Case No. 74063

In the Supreme Court of Nevada

WYNN RESORTS, LIMITED,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark; and THE HONORABLE ELIZABETH GONZALEZ, District Judge,

Respondents,

and

ELAINE P. WYNN,

Real Party in Interest.

District Court
No. A656710

MOTION TO REDACT AND SEAL PORTIONS OF ANSWER AND TO FILE UNDER SEAL PORTIONS OF APPENDIX

Volume 2 of the appendix to real party in interest Elaine P. Wynn's answer contains documents that were sealed or submitted with a motion to seal in the district court. Ms. Wynn therefore moves to seal this volume to "further[] . . . a protective order entered under NRCP 26(c)." SRCR 3(4)(b). Ms. Wynn also moves to redact the discussion of these documents in her answer, as proposed in Exhibit 1, and to file the unredacted answer under seal.

Dated this 30th day of October, 2017.

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CERTIFICATE OF SERVICE

I certify that on October 30, 2017, I served the foregoing "Motion to Redact and Seal Portions of Answer and to File Under Seal Portions of Appendix" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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I further certify that a copy of this document will be served by mail, postage prepaid, at Las Vegas, Nevada, addressed as follows:

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EIGHTH JUDICIAL DISTRICT COURT
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/s/ Jessie M. Helm
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EXHIBIT 1

EXHIBIT 1

Case No. 74063

In the Supreme Court of Nevada

WYNN RESORTS, LIMITED, Petitioner, *vs.* THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark; and THE HONORABLE ELIZABETH GONZALEZ, District Judge, Respondents, and ELAINE P. WYNN, Real Party in Interest.	District Court No. A656710

ELAINE P. WYNN'S ANSWER
With Supporting Points and Authorities
(Redacted)

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Petitioner ELAINE P. WYNN is an individual and has been represented in this litigation by William R. Urga and David J. Malley of JOLLEY URGA WOODBURY HOLTHUS & ROSE; Mark E. Ferrario and Tami D. Cowden of GREENBERG TRAURIG, LLP; James M. Cole and Scott D. Stein of SIDLEY AUSTIN LLP; Daniel F. Polsenberg, Joel D. Henriod and Abraham G. Smith of LEWIS ROCA ROTHGERBER CHRISTIE LLP; and John B. Quinn, Michael T. Zeller, Susan R. Estrich, Michael L. Fazio and Ian S. Shelton of QUINN EMANUEL URQUHART & SULLIVAN, LLP.

Dated this 30th day of October, 2017.

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CASES

INTRODUCTION

The petition asks this Court to address one question: whether "the District Court erroneously read the 'because of' in anticipation of litigation test adopted in *Wynn Resorts, Limited v. Eighth Jud. Dist. Ct.*, 133 Nev. Adv. Op. 52[, 399 P.3d 334] (2017), as excluding any documents that serve a dual purpose." Pet. 3. That question is not presented here. The district court did not rule that the [redacted] served a dual purpose, and it did not deny work product protection on that basis. To the contrary, the district court found as a factual matter that [redacted] were not prepared "because of" anticipation of litigation.

Wynn Resorts fails to meet its burden to show otherwise. Ms. Whennen testified [redacted]. Her testimony reflects [redacted]. Indeed, according to her testimo-

ny, [redacted].

Unable to point to any evidence whatsoever that Ms. Whennen [redacted], Wynn Resorts suggests that [redacted] must have been taken in anticipation of litigation because of [redacted]. The law does not support any such conclusion. The mere fact that a document reflects [redacted] does not lead ineluctably to the conclusion that it would not exist if not for the prospect of litigation. Wynn Resorts also takes liberties with the record to obfuscate the timeline, in an apparent attempt to link [redacted]. As the disingenuousness of Wynn Resorts' argument reflects, Wynn Resorts has not met its burden to establish that [redacted] because of the prospect of litigation. The district court correctly recognized that [redacted] are simply a human resources-type report that does not qualify for work product protection.

Wynn Resorts also attempts to shift the focus away from its failure to provide record support for its position to a legal question. It attempts to transform the district court's clear factual ruling that [redacted] were not prepared "because of" litigation into a ruling concerning "dual purpose" documents—even though the court never said a word about "dual purpose" in connection with [redacted]. Wynn Resorts' entire argument hinges on importing into the district court's ruling a *later* statement the district court made in subsequently addressing an entirely *different* set of materials that are not at issue here. This is simply a distortion of the district court's actual ruling that [redacted] were not prepared because of the prospect of litigation.

Wynn Resorts has not met its burden to establish the applicability of the work product doctrine, and the district court did not abuse its discretion. This Court should deny writ relief.

BACKGROUND

Procedural History

Wynn Resorts' assertion of the work product doctrine arises in the context of a complex litigation involving multiple parties—including Ms.

Wynn, Mr. Wynn, and Wynn Resorts, Limited—and encompassing numerous claims, crossclaims, and counterclaims. In February 2012, Wynn Resorts sued to confirm the validity of its redemption of stock held by Aruze USA, Inc. Aruze and its former director then asserted claims, inter alia, against Ms. Wynn as a director of Wynn Resorts. Ms. Wynn subsequently asserted her own claims to challenge, among other things, the validity and enforceability of a stockholders agreement between herself, Mr. Wynn, and Aruze. One of Ms. Wynn's allegations is that Mr. Wynn, Wynn Resorts General Counsel Kimmarie Sinatra, and Wynn Resorts ousted her from the board of directors in 2015 in retaliation for, among other things, Ms. Wynn's inquiries into their handling of allegations of [redacted]. (1 EPW App. 40–41, 42, 50 ¶¶ 2–3, 8, 52.

In the course of discovery, Ms. Wynn deposed Doreen Whennen, a former employee of Wynn Resorts. At the July 2017 deposition, Ms. Whennen testified [redacted]

[redacted]. (App. Vol. II, 415–17, 423–24, 452 (Whennen Dep. 61:16–63:13, 69:25–70:12, 98:9–18).)

Following the disclosure that [redacted]. (App. Vol. II, 457–58 (Whennen Dep. 103:21–104:13).) Ms. Wynn then [redacted] from Ms. Whennen. (App. Vol. II, 335 (Decl. of M. Ferrario ¶ 6).) Though not required to do so, Ms. Wynn [redacted], so that Wynn Resorts could assess any privilege issues. *Id.* ¶ 7. Ms. Wynn also proposed a briefing schedule to allow Wynn Resorts to assert any privilege claim and [redacted] to the court. *Id.* Wynn Resorts agreed to that proposal. (App. Vol. II, 336 (*Id.* ¶ 8); App. Vol. II, 352 (Ex. A to Decl. of M. Ferrario).)

Instead of following the agreed-upon schedule, Wynn Resorts [redacted]. (App. Vol. II, 215–332.) Wynn Resorts based its motion solely on the contention that [redacted], men-

tioning the possibility of work product protection in a footnote. (App. Vol. II, 223–26, 221 n.3.) At a hearing on August 14, 2017, however, in response to an assertion of privilege by Wynn Resorts, the district court ordered supplemental briefing on the work product issue. 1 EPW App. 102:18–103:4.

After the parties submitted supplemental briefs, the district court ruled that "[t]he Human Resources typed [sic] report that was taken by Ms. Whennen is not one that in and of itself would fit the because of test under the Nevada Supreme Court's most recent pronouncement of the work product privilege in a case called Wynn Resorts versus Okada, 133 Nev. 52. For that reason the notes do not fall within the attorney work product exception." (App. Vol. I, 123 (Aug. 25, 2017 Tr. 23:8–13).) Wynn Resorts then filed its petition for a writ of prohibition with this Court.

Factual Background

[redacted]. (App. Vol. II, 414–15, 453 (Whennen Dep. 60:2–61:9, 99:1–4).) [redacted]

[redacted]

(App. Vol. III, 542–43 (Ex. D, WYNN00044007–08); App. Vol. II, 420 (Whennen Dep. 66:1–6).)

[redacted]. (App. Vol. II, 415–417 (Whennen Dep. 61:16–63:19).) [redacted]. (App. Vol. II, 416 (Whennen Dep. 62:1–8).) [redacted]. (App. Vol. II, 420 (Whennen Dep. 66:1–6).)

[redacted]

[redacted]. (App. Vol. II, 424 (Whennen Dep. 70:1–4, 11–12) ([redacted]); *see also* App. Vol. II, 452 (Whennen Dep. 98:9–18).)

[redacted]. (App. Vol. II, 425, 439 (Whennen Dep. 71:6–13, 85:22–86:6).) [redacted]. (App. Vol. II, 425 (Whennen Dep. 71:18–21).) [redacted]. (App. Vol. II, 425, 426 (Whennen Dep. 71:24–72:1, 72:11–18).) [redacted]. (App. Vol. II, 426 (Whennen Dep. 72:19–73:4).) [redacted]. (App. Vol. III, 503 (Schorr Decl. ¶ 9); App. Vol. III, 524 (Schreck Decl. ¶ 3).)

[redacted]. (App. Vol. II, 427, 429 (Whennen Dep. 73:14–20, 75:7–11).) [redacted]. (App. Vol. II, 427, 429 (Whennen Dep. 73:5–13, 75:20–25).) [redacted]. (App. Vol. II, 430, 433 (Whennen Dep. 76:6–15; 79:3–4).) [redacted]. (App. Vol. II, 430–31, 434 (Whennen Dep. 76:23–77:2; 80:4–9).) [redacted]. (App. Vol. II, 430–31 (Whennen Dep. 76:6–77:2).) [redacted] (App. Vol. II, 434 (Whennen Dep. 80:4–9).) [redacted]. (App. Vol. II, 424 (Whennen Dep. 70:13–20).) [redacted], (App. Vol. II, 433–34 (Whennen Dep. 79:21–80:3)), [redacted]

[redacted] (App. Vol. II, 434–35 (Whennen Dep. 80:17–81:15)). [redacted]. (App. Vol. II, 435 (Whennen Dep. 81:7–24).) [redacted] (App. Vol. II, 436 (Whennen Dep. 82:1–7).)

[redacted] (App. Vol. II, 436 (Whennen Dep. 82:5–7).) [redacted]. (App. Vol. II, 424 (Whennen Dep. 70:13–20).)

ARGUMENT

I.

[redacted] "BECAUSE OF" THE PROSPECT OF LITIGATION

As this Court has recently explained, to qualify for protection under the work product doctrine, materials must have been prepared "because of" the prospect of litigation. *Wynn Resorts, Ltd.*, 133 Nev. Adv. Op. 52, 399 P.3d at 348. In evaluating whether materials meet the "because of" test, the court considers the totality of the circumstances. *Id.* The work product doctrine "withholds protection from documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation." *Id.*

Under this Court's test, then, to obtain protection of [redacted] under the work product doctrine, Wynn Resorts must show that [redacted] were "created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of that litigation[.]" *Id.* The district court did not abuse its discretion in finding that Wynn Resorts has not meet this burden here. *See Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 634 (D. Nev. 2013) (the party claiming the work product protection bears the burden of demon-

strating its applicability); *United States v. Richey*, 632 F.3d 559, 567–68 (9th Cir. 2011) (party claiming work product protection must establish that the materials "would have [been] prepared … differently in the absence of prospective litigation"); *Wultz v. Bank of China Ltd.*, 304 F.R.D. 384, 395 (S.D.N.Y. 2015) (recognizing defendant's "burden of showing that the documents would not have been created in essentially similar form irrespective of litigation"). As the district court correctly ruled, [redacted] do not "fit the because of test" set forth by this Court in *Wynn Resorts*. (App. Vol. I, 123 (Aug. 25, 2017 Tr. 8–13).)

A. Wynn Resorts Has Produced No Evidence that [redacted] Because of the Prospect of Litigation

The district court was right to find that Wynn Resorts has failed to carry its burden to establish that [redacted] because of litigation. It is undisputed that [redacted]. And Wynn Resorts can cite no testimony from Ms. Whennen that [redacted]. Instead, Wynn Resorts speculates—without citing any record support—that Ms. Whennen must have [redacted]

[redacted] Pet. 17.

Contrary to Wynn Resorts' speculation, the record shows that Ms. Whennen [redacted]—an ordinary business purpose that is not covered by the work product doctrine. [redacted]. (App. Vol. II, 439 (Whennen Dep. 85:10–15).) [redacted]. (App. Vol. II, 439 (Whennen Dep. 85:16–21).)

[redacted] (App. Vol. II, 439–40 (Whennen Dep. 85:22–86:6).) [redacted]

[redacted]. (App. Vol. III, 542–43 (Ex. D, WYNN00044007–08).)[1] [redacted] and cannot support any conclusion, [redacted], that [redacted] "would not exist" but for the prospect of litigation.[2] *Wynn Resorts*, 133 Nev. Adv. Op. 52, 399 P.3d at 348.

Instead of submitting evidence that Ms. Whennen [redacted], Wynn Resorts implies that [redacted] Pet. 17. But the mere fact that [redacted] does not transform them into privileged work product created in anticipation of litigation. Multiple courts considering

[1] Wynn Resorts appears to acknowledge that [redacted]. *See* Pet. 7 n.4.

[2] Wynn Resorts asserts, in two places, that Ms. Whennen [redacted] Pet. 1, 12–13. In neither place does Wynn Resorts supply a citation to this supposed testimony—and Ms. Whennen's deposition reflects no such statement.

the application of the work product doctrine to [redacted] have held that internal investigations are not covered by the work product protection—at least prior to the point in time at which the purpose of the investigation shifts from fact gathering to mounting a legal defense, and even then, only if the document would not exist in substantially similar form but for the litigation. *See Prince v. Madison Square Garden, L.P.*, 240 F.R.D. 126, 128 (S.D.N.Y. 2007) (compelling the production of documents created in connection with sexual harassment investigation before purpose of investigation "shifted from an internal investigation in response to [plaintiff's] claims to an investigation for the purpose of mounting a legal defense against any such claims"); *Long v. Anderson Univ.*, 204 F.R.D. 129, 137 (S.D. Ind. 2001) (notes created in connection with investigation of sexual harassment pursuant to university's harassment policy were created in the normal course of business and were not work product, even though counsel had threatened litigation if harassment complaints were not resolved); *see also Wultz*, 304 F.R.D. at 395 (holding that documents relating to internal investigation of terrorism funding allegations were not work product absent proof that documents from investi-

gation "would not have been created in essentially similar form irrespective of the litigation"). Thus, the mere fact that [redacted] *because of* litigation.

Consistent with this case law, this Court has rejected the argument that "occurrence reports" qualify as "work product" documents prepared in anticipation of litigation. *Columbia/HCA Healthcare Corp. v. Eighth Jud. Dist. Ct.*, 113 Nev. 521, 527–28, 936 P.2d 844, 848 (1997) (cited with approval in *Wynn Resorts*, 133 Nev. Adv. Op. 52 at 25, 399 P.3d at 348). Despite the fact that the reports documented events that could clearly give rise to litigation, the Court rejected the contention that they were protected work product because the "occurrence reports" were prepared in the ordinary course of business for the purpose of documenting unusual events. *Id.* Here, Ms. Whennen [redacted]. (App. Vol. II, 420 (Whennen Dep. 66:1–6).) Thus, [redacted]

[redacted]. Under the logic of *Columbia*, no work product protection can arise in that situation.

Wynn Resorts also purports to rely on statements by [redacted]. Pet. 7–8, 13, 17; (App. Vol. III, 503–04 (Schorr Decl.), 524–25 (Schreck Decl.).) That [redacted]. If it were otherwise, any document prepared by an employee would be deemed to have been prepared because of the prospect of litigation so long as any other employee in the corporation anticipated litigation. This is plainly not the law. *E.g.*, *Columbia,* 113 Nev. at 527–28, 936 P.2d at 848 (reports by hospital personnel not work product even though other personnel had been contacted by the hospital counsel about a potential claim).[3]

[3] Mr. Schorr's declaration further states [redacted] (App. Vol. III, 504 (Schorr Decl. ¶ 11).) That purported basis is nonsensical at best given that when [redacted]

Ms. Whennen, by contrast, [redacted]. Instead, she testified that [redacted]. (App. Vol. II, 424, 452 (Whennen Dep. 70:1–4, 98:9–18).)

Moreover, Wynn Resorts [redacted]. (App. Vol. II, 424 (Whennen Dep. 70:13–20).) Ms. Whennen's testimony reflects that she [redacted]. (App. Vol. II, 435–36 (Whennen Dep. 81:25–82:7).) [redacted].

[redacted]. (App. Vol. II, 436 (Whennen Dep. 82:1–7).) [redacted]. If Wynn Resorts' speculation were true—[redacted] Pet. 17—[redacted].

Wynn Resorts thus utterly fails to meet its burden to establish that [redacted] "because of anticipated litigation" and would not have created them "in substantially similar form but for the prospect of that litigation[.]" *Wynn Resorts*, 133 Nev. Adv. Op. 52 at 25, 399 P.3d at 348.

B. Wynn Resorts' Argument Is Inconsistent With the Record

Absent any evidence that Ms. Whennen [redacted] for any purpose related to litigation, let alone "because of" the prospect of

litigation, Wynn Resorts instead takes liberties with the record in an effort to obfuscate the timing and the role of counsel.

With regard to the timing of Ms. Whennen's [redacted] Wynn Resorts states: [redacted]. (App. Vol. [sic] III, 504.)" Pet. 8 (emphasis added). Wynn Resorts further asserts that [redacted] Pet. 17. In other words, Wynn Resorts apparently means to imply that Ms. Whennen was [redacted]. But the record does not support Wynn Resorts' characterization of the timeline.

First, the only citation Wynn Resorts provides for its asserted timing of [redacted]—App. Vol. III, 504—says nothing whatsoever about [redacted]. That citation is to the second page of Mr. Schorr's declaration in which he states that [redacted]

[redacted]. It says absolutely nothing about [redacted], let alone that [redacted].

And Ms. Whennen's testimony—which, unlike Mr. Schorr's declaration, [redacted]—is to the contrary. Ms. Whennen testified that [redacted]. (App. Vol. II, 416, 424–29 (Whennen Dep. 62:9–20, 70:24–75:23).) Ms. Whennen testified that [redacted].

Specifically, as Ms. Whennen was testifying about [redacted], counsel for Ms. Wynn asked:

Q: [redacted]
?
A: [redacted].

(App. Vol. II, 424 (Whennen Dep. 70:1–4) (emphasis added).) Ms. Whennen re-confirmed [redacted]
[redacted]:

Q.: [redacted]
?
A. [redacted].
Q. [redacted]
?
A. [redacted].

(App. Vol. II, 452 (Whennen Dep. 98:9–18) (emphasis added).) And Ms. Whennen made the point even more clearly when [redacted]. When counsel misspoke and indicated that [redacted]
[redacted]:

[redacted]

[redacted].

(App. Vol. II, 438 (Whennen Dep. 84:11–16).) The available record, therefore, does not support the Wynn Parties' characterization of the timeline and content of [redacted].[4]

Wynn Resorts also attempts to obfuscate the record concerning [redacted]. Apparently recognizing that their position that [redacted]. With careful drafting, Wynn Resorts states, for example, that [redacted]. (App.

[4] Notably, Wynn Resorts' characterization of [redacted] as having been prepared [redacted] (App. Vol. I, 106 (Aug. 25, 2017 Tr. 6:23–24).)

Vol. III, 524.)." Pet. 8. Wynn Resorts elsewhere writes that [redacted] Pet. 17 (emphasis added).

In fact, however, [redacted]. (App. Vol. III, 503 (Schorr Decl. ¶ 9) ([redacted]); App. Vol. III, 524 (Schreck Decl. ¶ 3) ([redacted]).) And in his deposition testimony, Mr. Wynn confirmed that [redacted]. 2 EPW App. 137:9–19.[5] That belief is well founded: Mr. Wynn confirmed [redacted]. 2 EPW App. 138:18–22.[6]

[5] Although the district court did not have the benefit of Mr. Wynn's deposition testimony at the time the court ruled on Wynn Resorts' assertion of work-product protection, that recent testimony—[redacted].

[6] Wynn Resorts also takes liberties with the record regarding the timing of [redacted]. The Petition says (without citation) that [redacted] Pet. 8. In fact, Mr. Schorr's declaration [redacted]

In any event, even if Wynn Resorts could back up its characterization of the timeline and the nature of [redacted] with record evidence, it has still failed to meet its burden to establish that [redacted] satisfy this Court's "because of" test for work product protection. To the contrary, whether Ms. Whennen [redacted], Wynn Resorts has produced no evidence that [redacted]. As detailed above, Ms. Whennen [redacted]

[redacted]. (*See* App. III, 504.) The Petition also says that [redacted]. Pet. 8. But [redacted]. (App. Vol. III, 524)

[redacted]. In other words, Wynn Resorts offers nothing to establish that [redacted] "were created in anticipation of litigation and would not have been created in substantially similar form but for the prospect of that litigation." *Wynn Resorts*, 133 Nev. Adv. Op. 52, 399 P.3d at 348. The district court's ruling that [redacted] do not fit this Court's "because of" test is thus well within its discretion.

II.

THE DISTRICT COURT DID NOT REJECT WORK PRODUCT PROTECTION FOR "DUAL PURPOSE" MATERIALS

Unable to point to evidence to contradict the district court's findings that [redacted] "because of" anticipated litigation, Wynn Resorts attempts to shift the focus. According to Wynn Resorts, the district court rejected Wynn Resorts' work product argument not because of its factual findings, but because the court "erroneously read the 'because of' in anticipation of litigation test adopted in *Wynn Resorts, Limited v. Eighth Jud. Dist. Ct.*, 133 Nev. Adv. Op. 52 (2017) as excluding any documents that serve a dual purpose." Pet. 3. That is incorrect—the district court's ruling had nothing to do with any "dual purpose" analysis.

The district court's ruling that [redacted] were not created because of litigation nowhere mentions any "dual purpose." (*See* App. Vol. I, 123 (Aug. 25, 2017 Tr. 23:8–13).) Instead, Wynn Resorts tries to bootstrap the denial of work product protection for [redacted] onto a statement the district court made in a later argument concerning an entirely different set of materials produced under entirely different factual circumstances. (*See* App. Vol. I, 159 (Aug. 25, 2017 Tr. 59:9–12).)[7] That subsequent ruling, however, is not before this Court. The ruling that actually is before this Court is simply that [redacted] human resources-type report does not "in and of itself . . . fit the because of test under the Nevada Supreme Court's most recent pronouncement of the work product privilege." (App. Vol. I, 123 (Aug. 25, 2017 Tr. 23:8–23).)

Nothing in this phrasing constitutes a rejection of dual purpose documents. To the contrary, the district court explained that the human resources-type report "*in and of itself*" does not fit the "because of"

[7] Although it has no relevance to this petition, it is notable that even in the context of that unrelated ruling, the district court recognized that this Court's *Wynn Resorts* decision "adopted the because of test, which is applying the totality of the circumstances analysis." (App. Vol. I, 159 (Aug. 25, 2017 Tr. 59:11–12.)

test. *Id.* (emphasis added). That ruling is plainly correct. Where, as here, a human resources-type report is unaccompanied by evidence that it was in fact created because of the prospect of litigation, it does not qualify for work product protection. *Wynn Resorts*, 133 Nev. Adv. Op. 52, 399 P.3d at 348.

Wynn Resorts relies on several cases to support the proposition that a "dual purpose" document can qualify as work product under the "because of" test. *See* Pet. 15–16. None of these cases holds that a human resources-type report created under circumstances like those here is protected by the work product doctrine. *See United States v. Adlman*, 134 F.3d 1194, 1195, 1202 (2d Cir. 1998) (a "study prepared for an attorney *assessing the likely result of an expected litigation*" was "created because of the prospect of litigation" and "does not lose protection under [the 'because of'] formulation merely because it is created in order to assist with a business decision") (emphasis added) (cited at Pet. 15); *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)*, 357 F.3d 900, 908 (9th Cir. 2004) (granting work product protection to documents prepared by investigator *hired by the attorney because of "impending litigation"* where the "threat" of litigation "animated every document [the

investigator] prepared") (emphasis added) (cited at Pet. 16); *In re Woolworth Corp. Sec. Class Action Litig.*, No. 94 CIV. 2217 (RO), 1996 WL 306576, at *1, 3 (S.D.N.Y. June 7, 1996) (granting work product protection over "internal notes and memoranda" created by a law firm and the accountants hired by the law firm "in the process of investigating Woolworth's alleged accounting irregularities, overstatements, and understatements" where "*[a]ll participants knew* when [the law firm] became involved that *litigation—civil, and possibly criminal—as well as regulatory action were virtually certainties*") (emphases added) (cited at Pet. 16); *see also Mega Mfg., Inc. v. Eighth Jud. Dist. Ct.*, No. 62396, 2014 WL 2527226, at *2 (Nev. May 30, 2014) (accident investigation report is not work product where "any legal discussion that may have occurred did not inspire creation of the report") (cited at Pet 15).[8]

The district court's ruling that the human resources-type report in and of itself does not fit the "because of" test is also consistent with Ms.

[8] Wynn Resorts also cites *In re CV Therapeutics, Inc. Securities Litigation*, No. C-03-3709 SI(EMC), 2006 WL 1699536, at *2 (N.D. Cal. June 16, 2006), as clarified on reconsideration, No. C-03-3709 SI (EMC), 2006 WL 2585038 (N.D. Cal. Aug. 30, 2006), but that case does not help Wynn Resorts here. The federal district court for the Northern District of California (not the Ninth Circuit as misstated in the petition, Pet. 16), primarily addressed the attorney-client privilege and did not separately analyze the documents under the work product doctrine.

Wynn's arguments before the district court [redacted]. Ms. Wynn did not purport to advocate for a rejection of work product protection for dual purpose records. Instead, she demonstrated that [redacted] were not prepared because of litigation at all. (App. Vol. II, 346–47 (Opp. 14–15); App. Vol. III, 530–35 (Supp. Opp. 5–10).) Moreover, as demonstrated in detail above, the district court's ruling is consistent with the record evidence presented by Wynn Resorts, which in no way supports a conclusion that [redacted].

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of prohibition or in the alternative mandamus.

Dated this 30th day of October, 2017.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

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1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

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3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 30th day of October, 2017.

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