

Case No. _____

In the Supreme Court of Nevada

ELAINE P. WYNN, an individual,

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

STEPHEN A. WYNN, WYNN RESORTS,
LIMITED, a Nevada Corporation, LINDA
CHEN, RUSSELL GOLDSMITH, RAY R. IRANI,
ROBERT J. MILLER, JOHN A. MORAN, MARC
D. SCHORR, ALVIN V. SHOEMAKER, KIM-
MARIE SINATRA, D. BOONE WAYSON, and
ALLAN ZEMAN,

Real Parties in Interest

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District Court No.
A-12-656710-B

PETITION FOR WRIT OF PROHIBITION
With Supporting Points and Authorities
(Redacted)

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PETITION FOR WRIT OF PROHIBITION

Petitioner Elaine P. Wynn seeks a writ of prohibition preventing the district court from enforcing its September 25, 2017 order granting the Wynn Parties' motion to overrule work product claims as to notes taken by Ms. Wynn in the context of her divorce proceedings against Mr. Wynn and compelling immediate production of the notes. The district court's ruling is contrary to the text of NRCP 26(b)(3), to established case law, and this Court's test for application of the work product doctrine.

Dated this 10th day of October 2017.

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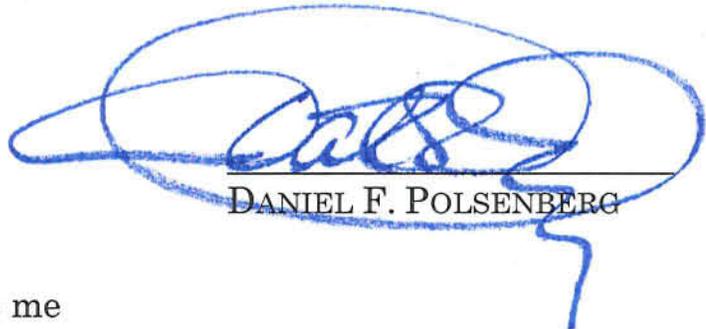
Attorneys for Elaine P. Wynn

VERIFICATION

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

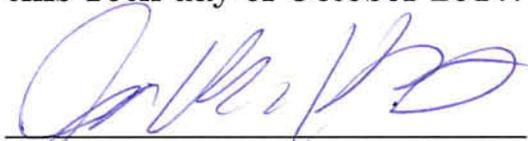
Under penalties of perjury, the undersigned declares that he is counsel for the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and that as to such matters he believes them to be true. This verification is made pursuant to NRS 15.010.

Dated this 10th day of October 2017.



DANIEL F. POLSENBERG

Subscribed and sworn to before me
this 10th day of October 2017.



Notary Public



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.

Petitioner 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 TRAUERIG, 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 10th day of October, 2017.

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ROUTING STATEMENT

The Nevada Supreme Court should retain this writ proceeding because it raises as a principal issue a question of statewide importance and of first impression: whether work-product protections are unavailable to documents prepared by a party rather than an attorney. See NRAP 17(a)(10). This Court's recent decision in *Wynn Resorts, Ltd. v. Eighth Judicial District Court*, 133 Nev., Adv. Op. 52, 399 P.3d 334, 347 (2017) has generated confusion in the lower courts as to the application of the work product doctrine. This Court's oversight is necessary to ensure the consistency of this Court's work-product jurisprudence.

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ISSUE PRESENTED

The district court denied work product protection and compelled disclosure of notes, notwithstanding these four characteristics:

1. The notes were prepared by a party in the midst of ongoing divorce litigation.

2. The notes involve allegations of personal misconduct and a multi-million dollar settlement payment by the party's soon-to-be-ex-husband.

3. The party prepared the notes [REDACTED]
[REDACTED]
[REDACTED].

4. The allegations of misconduct became an issue in the divorce because [REDACTED].

The issue presented is whether by compelling the disclosure of the notes because they were prepared by the party on her own, the district court erroneously restricted work product protection contrary to the text of NRCP 26(b)(3) and this Court's totality-of-the-circumstances test.

MEMORANDUM OF POINTS AND AUTHORITIES

In the midst of Elaine P. Wynn's and Stephen A. Wynn's divorce litigation, [REDACTED] [REDACTED] Mr. Wynn had paid millions of dollars to settle a Wynn Resorts employee's allegations of personal misconduct by Mr. Wynn. [REDACTED], Ms. Wynn spoke to two individuals with knowledge of the incident to investigate the allegations and [REDACTED] [REDACTED]. Ms. Wynn took notes on those conversations and shared the substance of those notes with her divorce attorney. The [REDACTED] [REDACTED] became an issue in the divorce proceedings.

Under this Court's totality of the circumstances test, these notes were plainly prepared "because of" the then-pending divorce litigation. Recognizing that, the district court nonetheless ordered the notes' disclosure based on the court's view that notes prepared by a party "to refresh [her] memory for purposes of [her] litigation is not work product." This view contradicts the text of Rule 26 and established case law that documents prepared by a party with or without an attorney's

involvement are protected work product if, as here, the documents were prepared in anticipation of litigation. This Court should issue the writ to prevent the district court from enforcing its order compelling production of the notes.

BACKGROUND

A. Procedural History

This complex litigation involves multiple parties—including Ms. Wynn, Mr. Wynn, and Wynn Resorts, Limited—and encompasses numerous claims, crossclaims, and counterclaims. It began in February 2012 when Wynn Resorts sued to confirm the validity of its redemption of stock held by Aruze USA, Inc., a company controlled by former director Kazuo Okada and the Wynn Resorts’ largest individual shareholder at the time (the “Okada parties”). Ms. Wynn, a co-founder and significant shareholder of Wynn Resorts as well as a former employee and director of the company, was brought into the litigation as a defendant when the Okada parties asserted claims against her as a director. 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.

In September 2017, during discovery in this case, the Wynn Parties (Mr. Wynn, Wynn Resorts, Limited, and multiple counterdefendants) moved to overrule Ms. Wynn's work product claims and compel production of notes taken by Ms. Wynn in 2009 in connection with then-ongoing litigation involving Ms. Wynn's and Mr. Wynn's divorce. At the September 25, 2017 motions hearing, the district court granted the Wynn Parties' motion and compelled production of the notes. The district court stayed its order to allow Ms. Wynn to file this petition for a writ of prohibition.¹

B. Ms. Wynn Prepares Notes in Connection with Her Then-Pending Divorce Litigation

From March 2009 through January 2010, Ms. Wynn and Mr. Wynn were engaged in litigation regarding their divorce. (2 App. 369

¶ 2.) In April 2009, while that litigation was pending, [REDACTED]

[REDACTED]

[REDACTED] Mr. Wynn had paid millions of dollars to settle

¹ The district court has not yet entered an order on its ruling compelling production of Ms. Wynn's notes, but the court temporarily stayed its ruling to permit Ms. Wynn to seek relief from this Court. Ms. Wynn will supplement the appendix with the written Order when it is available.

allegations of personal misconduct by Mr. Wynn towards a Wynn Resorts employee. (See 1 App. 50 ¶ 52; 2 App. 369 ¶ 3.) Upon learning of the allegations of misconduct and the settlement, Ms. Wynn initiated conversations with two individuals who had knowledge of the incident. On April 23, 2009, Ms. Wynn spoke with current Wynn Resorts employee Doreen Whennen. And on April 23 and 25, 2009, Ms. Wynn also spoke with Arte Nathan, a former employee of the company. (2 App. 369 ¶¶ 4, 5.) Ms. Wynn took notes on those conversations. (*Id.* ¶ 4.) Ms. Wynn spoke with Ms. Whennen and Mr. Nathan as part of her investigation of Mr. Wynn's misconduct in connection with the divorce litigation, including [REDACTED] (unbeknownst to Ms. Wynn prior to that time) to pay the substantial settlement with the ex-employee. (*Id.* ¶¶ 3-5.) Ms. Wynn subsequently conveyed the information reflected in her notes to her attorney in the divorce litigation. (*Id.* ¶ 5.) Mr. Wynn's [REDACTED] [REDACTED] [REDACTED]. (*Id.* ¶ 3.)

During her February 2017 deposition by the Wynn Parties, Ms. Wynn testified regarding the notes she created in 2009. Ms. Wynn

testified [REDACTED]

[REDACTED] (See 2 App. 162:1-5.) She also

testified [REDACTED]

[REDACTED] (See *id.* at 2 App. 164:3-5.)²

C. The District Court's Order to Produce the Notes

At a motions hearing on September 25, 2017, the district court granted the Wynn Parties' motion to overrule Ms. Wynn's claim of work product protection for the notes and to compel their production. In a brief colloquy with Ms. Wynn's counsel, the court questioned "why on earth Ms. Wynn's notes would ever be work product when Ms. Wynn did them all on her own as part of her divorce to refresh her memory." (1 App. 104:10–13.) The court then declared: "Making notes yourself to

² During that deposition, Ms. Wynn also responded [REDACTED]

[REDACTED] (See 2 App. 170:8-15.) That testimony, however—which came toward the end of a lengthy deposition—was mistaken. Ms. Wynn did separately discuss the alleged misconduct by Mr. Wynn and his multi-million dollar settlement payment with Kimmarie Sinatra in 2009. (See 1 App. 50 ¶ 52; 2 App. 369 ¶ 6.) But the notes at issue here, although they relate to the same subject matter, do not document or describe any conversations Ms. Wynn had with Ms. Sinatra. (2 App. 369 ¶ 6.)

refresh your memory for purposes of your litigation is not work product.” (1 App. 105:2–3.)

Ms. Wynn’s counsel explained that the notes were not “just for [Ms. Wynn’s] own edification,” but rather were taken after information about the incident “came to her attorney in the course of her divorce proceedings with Mr. Wynn, and it concerned issues that were very much involved in that divorce proceeding, and she was doing the inquiry pursuant to the issues in that litigation,” and that she “share[d] the substance of what she learned with her attorneys for the purposes of that litigation.” (1 App. 104:18–105:10.) Ms. Wynn’s counsel further explained that work product is sometimes done “so that you can have some sort of recording of events so that you can use them in the litigation.” (*Id.* at 1 App. 105:13–16.)

The court nonetheless ordered the notes produced. (*Id.* at 1 App. 105:18–22.) Ms. Wynn now petitions for a writ of prohibition.

**WHY THE WRIT SHOULD ISSUE:
PROHIBITION IS APPROPRIATE IN THIS CASE**

Petitioner Ms. Wynn seeks to prevent improper disclosure of privileged notes under the district court’s erroneous application of Rule

26(b)(3) and this Court’s recent decision adopting the “because of litigation” test for the application of the work product doctrine.

This Court has recognized that “[w]rit relief is an available remedy, where, as here, petitioners have no plain, speedy and adequate remedy at law other than to petition this court. If improper discovery were allowed, the assertedly privileged information would irretrievably lose its confidential and privileged quality and petitioners would have no effective remedy, even by a later appeal.” *Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 350–51, 891 P.2d 1180, 1183–84 (1995); *see also L.V. Dev. Assocs. v. Eighth Judicial Dist. Court*, 130 Nev., Adv. Op. 37, 325 P.3d 1259, 1262 (2014) (“Further, we note that a writ of prohibition is an appropriate remedy to correct an order that compels disclosure of privileged information.”).

Here, if the district court’s order to produce the notes were allowed to go into effect, the notes would “irretrievably lose [their] confidential and privileged quality,” and Ms. Wynn “would have no effective remedy.” *See Wardleigh*, 111 Nev. at 350–51, 891 P.2d at 1183–84. Writ relief is imperative to prevent this harm.

ARGUMENT

This Court recently explained that NRCP 26(b)(3), like its federal counterpart, “protects documents with ‘two characteristics: (1) they must be prepared in anticipation of litigation or for trial, and (2) they must be prepared by or for another party or by or for that other party’s representative.’” *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 133 Nev., Adv. Op. 52, 399 P.3d 334, 347 (2017). “Under the ‘because of test,” adopted by this Court, “documents are prepared in anticipation of litigation when ‘in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation.” *Id.* at 348. While the rule protects any document prepared by or for a party “because of” litigation, it does *not* protect “records prepared in the normal course of business since those are not prepared because of the prospect of litigation.” *Id.*

Ms. Wynn’s notes meet this Court’s test for work product protection. They were prepared “by” a party. Moreover, the totality of the circumstances here—Ms. Wynn’s notes document an investigation she undertook in communication with her attorney in the context of

litigation, she discussed the substance of her notes with her attorney, and the subject of her notes was directly litigated in her divorce proceedings—leaves no doubt that the notes were prepared “because of” litigation. Indeed, the district court acknowledged that the notes were made “for purposes of [Ms. Wynn’s] litigation.” (1 App. 105:2-3.)

The court appeared to rely on two points in overruling work-product protection: (1) Ms. Wynn made the notes “all on her own as part of her divorce,” and (2) Ms. Wynn made the notes “to refresh [her] memory for purposes of [her] litigation.” (1 App. 104:11-13, 105:2-3.) Neither of these points, however, overcomes the fact that the notes were made “because of” litigation. To the contrary, the district court’s observations *confirm* that the notes are far from “records prepared in the normal course of business,” *Wynn Resorts*, 399 P.3d at 348, but instead were made because of Ms. Wynn’s divorce proceedings. Under this Court’s precedent, that is determinative. The district court’s contrary ruling departs from the plain text of Rule 26(b)(3) and misapplies this Court’s recent decision adopting the “because of” test for determining whether documents “are prepared in anticipation of litigation,” Nev. R. Civ. P. 26(b)(3).

**A. Ms. Wynn’s Notes Were Prepared “Because of”
Her Then-Ongoing Divorce Litigation**

***1. Documents that a Party Prepares Because
of Litigation are Protected Work Product***

In *Wynn Resorts, Ltd. v. Eighth Judicial District Court*, this Court held that for purposes of the work product doctrine, a document is prepared in anticipation of litigation “when in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation.” 399 P.3d at 348 (internal quotation marks omitted). Under the “because of” standard, the court considers “the totality of the circumstances.” *Id.* The document is protected as work product if “it can fairly be said that the document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of that litigation.” *Id.*

***2. Ms. Wynn Prepared her Notes Because
of the Ongoing Divorce Litigation***

The totality of the circumstances here plainly establishes that Ms. Wynn’s notes of her conversations about allegations of misconduct and a multi-million dollar payment by her soon-to-be ex-husband were created because of Ms. Wynn’s divorce litigation. Litigation was not merely

anticipated but indeed had already commenced and was ongoing when the document was created; the document was created [REDACTED]; the document concerned the other party in that litigation and a payment with significant implications for that litigation; and Ms. Wynn shared the substance of the document with her attorney.

3. The Conversations Documented Happened in the Midst of the Divorce Litigation

The conversations documented in the notes took place in the midst of that litigation. (2 App. 369 ¶¶ 2-5.) They came about [REDACTED]. (Id. ¶ 3.)

a. THE NOTES CONCERN AN ISSUE IN THE DIVORCE LITIGATION

The notes concern allegations of serious personal misconduct towards a Wynn Resorts employee by Mr. Wynn, the other party in the ongoing divorce litigation. *Id.* And they involve a multi-million dollar settlement payment that, unbeknownst to Ms. Wynn, [REDACTED]. *Id.* Ms. Wynn testified [REDACTED]. (See 2 App. 162:1–5.) She also testified that she [REDACTED]

[REDACTED]

[REDACTED] (See *id.* at 2 App. 164:3-5.) She further explained in her affidavit that she prepared the notes [REDACTED]

[REDACTED]

[REDACTED] (2 App. 369 ¶ 5.)

b. MS. WYNN SHARED THE SUBSTANCE
OF THE NOTES WITH HER ATTORNEY

Moreover, Ms. Wynn shared the substance of those notes with her attorney in connection with the divorce litigation. (*Id.* ¶ 5.) [REDACTED]

[REDACTED]

[REDACTED]. (*Id.* ¶ 3.)³

³ The district court's ruling that a different set of materials is not protected by the work product doctrine is the subject of a separate petition for a writ of prohibition filed by the Wynn Parties and currently pending before this Court. *Wynn Resorts, Limited, v. The Eighth Judicial District Court of the State of Nevada, In and For the County of Clark; and the Honorable Elizabeth Gonzalez, District Judge, Dept. XI*, Case No. 74063 (Sept. 26, 2017). At issue in that separate petition is [REDACTED]. On August 25, 2017, the district court ruled that the report was not prepared "because of" litigation. As Ms. Wynn argued in the district court, although the Wynn Parties provided affidavits from other Wynn Resorts officers indicating [REDACTED], the Wynn Parties provided nothing to show that [REDACTED]

1. Notes Made “By” a Party Because of Ongoing Litigation Constitute Work Product Even if They are Not Made at the Direction of an Attorney

By its terms, Rule 26(b)(3) provides for work product protection for materials created “by ... another party.” The advisory committee notes to the amendment adopting this language explain that the rule applies “not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf.” Fed. R. Civ. P. 26 advisory committee notes to 1970 amendment; see also Nev. R. Civ. P. 26 comments (noting that the Nevada rule was “[r]evised in 1971 in accordance with the federal amendments, effective July 1, 1970”).

As cases recognize, “materials produced by or for a party in anticipation of litigation may constitute work product despite the fact that the materials were not created at the direction of an attorney.” *Moore v. Plains All Am. GP, LLC*, No. 14-4666, 2015 WL 5545306, at *4-5 (E.D. Pa. Sept. 18, 2015); *id.* (“[T]he plain language of the Federal Rules of Civil Procedure anticipate that materials created ‘by or for another party or its representative’ may be protected by the work

product doctrine, so long as they were created in anticipation of litigation.”); *see also* *Wultz v. Bank of China Ltd.*, 304 F.R.D. 384, 393–94 (S.D.N.Y. 2015) (“Finally, all cases of which the Court is aware that have specifically addressed this question afford protection to materials gathered by non-attorneys even where there was no involvement by an attorney.”). A requirement that “the document for which protection is sought must be either made or required by an attorney to be protected ... would be contrary to the text of Rule 26(b)(3) and the stated intent of its drafters.” *Goff v. Harrah’s Operating Co.*, 240 F.R.D. 659, 661 (D. Nev. 2007).

In *Wultz v. Bank of China, Ltd.*, the New York federal district court discussed the “because of” test adopted by this Court and cited *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998), on which this Court relied. The district court explained that “[n]otwithstanding the common description of the doctrine as the ‘attorney’ work product doctrine, as a doctrine ‘intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy,’ ... and as applying to ‘materials prepared by or at the behest of counsel,’ ... it is not in fact necessary that the material be prepared by or at the

direction of an attorney.” 304 F.R.D. at 393-94. Indeed, “it is well-established that the [work product] doctrine protects writings made by a party, even without any involvement by counsel.” *Szulik v. State St. Bank & Tr. Co.*, No. 12-10018-NMG, 2014 WL 3942934, at *3 (D. Mass. Aug. 11, 2014) (citations omitted).

Here, the district court erred in rejecting work product protection merely because the notes were prepared by Ms. Wynn “all on her own.”

2. *Notes Made in Anticipation of Litigation are Protected Work Product where Their Purpose is to Preserve Investigation and Analysis in Connection with the Litigation*

The view that material prepared to “to refresh your memory for purposes of your litigation is not work product” is equally erroneous. Rule 26(b)(3) contains no such limitation. It protects “documents and tangible things ... prepared in anticipation of litigation.” Nev. R. Civ. P. 26(b)(3). The district court’s own statement recognized that the notes were prepared to preserve Ms. Wynn’s witness interviews “*for purposes of [Ms. Wynn’s] litigation.*” (1 App. 105:2–3 (emphasis added).) And Ms. Wynn relayed the substance of the notes to her attorney.

Numerous courts have recognized that such preservation material qualifies as work product. *See, e.g., Baker v. Gen. Motors Corp.*, 209

F.3d 1051, 1054 (8th Cir. 2000) (notes reflecting witness interview are work product); *Wultz*, 304 F.R.D. at 393-94 (work product includes materials that “result from the conduct of investigative or analytical tasks to aid counsel in preparing for litigation”). Such analytical summaries plainly fall within the protection of “a zone of privacy in which ... [to] prepare and develop legal theories and strategy with an eye toward litigation.” *Ruotolo v. City of New York*, No. 03 Civ. 5045 SHSDF, 2005 WL 823015, at *2 (S.D.N.Y. Apr. 7, 2005) (internal quotation marks omitted; alteration in original); *see also id.* (handwritten notes “made to record plaintiff’s analysis of the events surrounding an alleged pattern of retaliation against him by defendants as those events occurred” were protected work product). In *Szulik v. State Street Bank & Trust Co.*, for example, the Massachusetts federal district court held the work product doctrine protects a chronology compiled by the plaintiff “to prepare for his deposition.” 2014 WL 3942934, at *2-3. Similarly here, Ms. Wynn spoke to the former and current employees as part of her inquiry into matters directly at issue in her ongoing divorce litigation; that she took notes of those conversations to ensure accuracy and to be as thorough as possible

supports, rather than undermines the conclusion that the notes were prepared in anticipation of litigation.

Ms. Wynn's notes, prepared in the midst of her divorce litigation as part of her inquiry into a settlement [REDACTED], qualify as materials prepared by a party in anticipation of litigation.

The district court's erroneous reasoning resulted in limitations contrary to the text and intent of Rule 26(b)(3) and this Court's totality of the circumstances test.⁴

⁴ In the district court, the Wynn Parties raised two additional arguments to overcome the work product doctrine: that Ms. Wynn should be judicially estopped from claiming that materials prepared for her divorce litigation are protected from disclosure in this separate business litigation and that the Wynn Parties had shown a substantial need for the notes to overcome the work product protection. The district court did not reach either of these arguments, and in any event they are both meritless. For their judicial estoppel argument, the Wynn Parties relied on a single, somewhat unclear statement by counsel at oral argument that, according to the Wynn parties, took the position that work product in one litigation is not protected in a subsequent case. But the court did not "adop[t] [that] position or accep[t] it as true", *In re Frei Irrevocable Tr. Dated Oct. 29, 1996*, 133 Nev. 8, 390 P.3d 646, 652 (2017), as required for application of the extraordinary remedy of judicial estoppel. As to the necessary showing to obtain disclosure of protected materials, the Wynn Parties can obtain similar information through sworn testimony and therefore cannot show a substantial need to discover the document itself. *In re W. States Wholesale Nat. Gas Antitrust Litig.*, No. 1566, 2016 WL 2593916, at *3 (D. Nev. May 5, 2016).

CONCLUSION

Ms. Wynn's notes prepared because of her divorce proceedings against Mr. Wynn are protected work product. This Court should issue a writ of prohibition to prevent the district court from enforcing its September 25, 2017 order overruling work product claims and compelling immediate production of the notes.

Dated this 10th day of October 2017.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point, double-spaced Century Schoolbook font.

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3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that

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