IN THE SUPREME COURT OF THE STATE 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,

Respondent,

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, KIMMARIE SINATRA, D. BONNER WAYSON, and ALLAN ZEMAN,

Real Parties in Interest.

Case No. 74184

District Court No. A-15-719860

THE WYNN PARTIES' ANSWER TO ELAINE P. WYNN'S PETITION FOR WRIT OF PROHIBITION

(REDACTED)

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RULE 26.1 DISCLOSURE

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

Real Party in Interest Wynn Resorts, Limited is a publicly traded company headquartered in Las Vegas, Nevada. All other Real Parties in Interest are individuals. The Real Parties in Interest are referred to herein collectively as the "Wynn Parties."

The following attorneys and law firms have appeared for the Wynn Parties in the action below:

James J. Pisanelli, Todd L. Bice, Debra L. Spinelli, and Barry B. Langberg of Pisanelli Bice, PLLC;

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Donald J. Campbell, J. Colby Williams, Philip R. Erwin, and Samuel R. Mirkovich of Campbell & Williams; and

Melinda Haag and James N. Kramer of Orrick, Herrington & Sutcliffe.

DATED this 31st day of October, 2017.

CAMPBELL & WILLIAMS

By **/s/ *J. Colby Williams***
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I. INTRODUCTION

On February 28, 2017, Elaine P. Wynn ("Ms. Wynn") sat for a deposition in anticipation of an evidentiary hearing to examine alleged misconduct by Ms. Wynn and her then counsel, Quinn Emanuel Urquhart & Sullivan, LLP ("Quinn Emanuel"). Ms. Wynn was examined, in part, about [redacted] The sworn testimony Ms. Wynn provided during her deposition regarding the Notes—at a time when she was unaware the Wynn Parties would later seek production of these documents—differs significantly from the "facts" presented in her Petition for Writ of Prohibition ("Pet."), which are premised entirely on a litigation-tailored declaration prepared after the Wynn Parties moved to compel production of the Notes and to overrule Ms. Wynn's belated claim that they were entitled to protection under the work product doctrine.

Ms. Wynn, for example, was specifically asked during her deposition about [redacted] In her subsequent declaration,

however, Ms. Wynn represented that [redacted]

During her deposition in February 2017, Ms. Wynn testified that [redacted] When asked whether she had shared the substance of the Notes with her attorneys, Ms. Wynn never testified that [redacted] In her subsequent declaration, however, Ms. Wynn stated that [redacted]

During her deposition testimony in February 2017, Ms. Wynn repeatedly testified that [redacted] In her subsequent opposition to the motion to compel, however, Ms. Wynn said that [redacted]

During her deposition in February 2017, Ms. Wynn testified that [redacted], Ms. Wynn subsequently averred in her declaration that [redacted]

Aside from the factual inconsistencies between Ms. Wynn's deposition testimony and her subsequent declaration, the latter is also notable for what it fails

to say. As the party claiming work product protection, Ms. Wynn bears the burden of establishing that her Notes were prepared "in anticipation of litigation." That is, the Notes must have been prepared "*because of* the prospect of litigation" when evaluated under the "totality of the circumstances." *See Wynn Resorts, Limited. v. Eighth Judicial Dist. Ct.*, 133 Nev. Adv. Op. 52, 399 P.3d 334, 348 (2017) (emphasis added). Part of this burden, as explained by the case law cited in Ms. Wynn's own Writ Petition, requires Ms. Wynn to demonstrate that the Notes would not have been created in "essentially similar form irrespective of the litigation." *Wultz v. Bank of China, Ltd.*, 304 F.R.D. 384, 395-96 (S.D.N.Y. 2015). Where a party fails to address this issue, as Ms. Wynn failed to do in her declaration below, "this reason alone" is enough to find that a party has not met its burden of establishing work product protection. *Id.*

The District Court correctly determined that Ms. Wynn failed to meet her burden. This was not an abuse of discretion. Not only did the District Court find that Ms. Wynn prepared the Notes to "refresh her recollection" for various purposes—an act that waives work product protection under Nevada law if one uses the material to assist with testifying—but other testimony from Ms. Wynn in the record shows that she would have prepared the Notes in essentially the same form regardless of her divorce proceedings. This includes Ms. Wynn's testimony that [redacted]

[redacted] More recently, Ms. Wynn has again confirmed—in sworn deposition testimony and in direct contradiction to her carefully-worded declaration—that [redacted] (emphasis added).

Finally, though the District Court did not need to reach the issue in light of its ruling, the Wynn Parties demonstrated a substantial need for the Notes even if they were determined to be protected work product. While Ms. Wynn now cites cases for the proposition that interview notes may qualify as opinion work product, she never contested below that the Notes are ordinary work product, if they are work product at all. Her most recent deposition [redacted]. Insofar as Ms. Wynn suggests the Wynn Parties may obtain the substantial equivalent of the Notes by deposing Ms. Whennen and Mr. Nathan, she is again mistaken. Mr. Nathan was deposed recently, and repeatedly testified that [redacted] As for Ms. Whennen, her deposition was cut short and is now the subject of a separate writ petition before this Court.[1]

II. COUNTER-STATEMENT OF THE ISSUE PRESENTED

1. Did the District Court clearly abuse its discretion when determining that Ms. Wynn's Notes were not protected under the

[1] *See Wynn Resorts, Limited v. Eighth Judicial Dist. Ct.*, Case No. 74063 (Sept. 26, 2017); *see also* Point V(D), *infra*.

work product doctrine codified in NRCP 26(b)(3) where the totality of the circumstances presented in Ms. Wynn's sworn deposition testimony—as opposed to her litigation-tailored declaration—demonstrates that the Notes were ***not*** prepared because of the prospect of litigation but, instead, would have been prepared in essentially the same form regardless of Ms. Wynn's then-pending divorce proceedings.

III. COUNTER-STATEMENT OF FACTS

A. Ms. Wynn's Crossclaims.

In June 2012, Ms. Wynn filed her original crossclaim in the underlying litigation seeking a judicial declaration that the January 2010 Stockholders Agreement between Mr. Wynn, Ms. Wynn and Aruze USA, Inc. ("Aruze") was no longer valid as a result of Wynn Resorts' redemption of Aruze's stock in the Company. In the ensuing five-plus years, Ms. Wynn—employing an ever-changing roster of attorneys from across the country—has filed increasingly caustic versions of her crossclaim in an effort to extricate herself from the Stockholders Agreement or to otherwise extract a settlement from her ex-husband.

In August 2015, Ms. Wynn filed the fourth version of her crossclaim, which added claims alleging that Mr. Wynn had breached the Stockholders Agreement as well as the implied covenant of good faith and fair dealing contained therein as a

result of Ms. Wynn's failure to be renominated to the Wynn Resorts Board of Directors in 2015. In March 2016, Ms. Wynn filed the fifth version of her crossclaim, this time adding intentional tort claims premised, in part, on a theory that Mr. Wynn and others had retaliated against Ms. Wynn because of her knowledge and "inquiries" about various incidents that had occurred at the Company throughout its 17-year history. Finally, Ms. Wynn filed the sixth version of her crossclaim in June 2017, which added Wynn Resorts and Kim Sinatra as additional defendants below, claiming they had breached fiduciary duties and/or tortiously interfered with the Stockholders Agreement. Ms. Wynn's Sixth Amended Counterclaim and Crossclaim ("6ACC") is her currently operative pleading. (1 App. 1-78.)

B. Ms. Wynn's February 28, 2017 Deposition.

On February 28, 2017, the Wynn Parties deposed Ms. Wynn in connection with a March 2017 evidentiary hearing related to Ms. Wynn's and her counsel's improper acquisition and possession of Wynn Resorts' privileged documents. Ms. Wynn revealed during the deposition that [redacted] (2 App. 163-64) (Depo. Tr. of Elaine Wynn.) [redacted], (*see*

1 App. 44 (6ACC ¶ 19)), [redacted]. (2 App. 150; 152; 163-64; 170.)

Given the limited scope of Ms. Wynn's deposition related to the Quinn Emanuel disqualification proceedings, counsel for the Wynn Parties did not conduct an exhaustive examination of Ms. Wynn regarding the Notes. Additionally, the Wynn Parties did not believe any alleged 2005 incident between Mr. Wynn and a former Company employee was a proper subject of discovery given its lack of relevance to any of the legitimate claims or defenses at issue in the litigation. Notwithstanding the limited examination at the time, Ms. Wynn's testimony confirmed [redacted].

1. *Ms. Wynn testified that* [redacted].

Ms. Wynn testified that [redacted]. (2 App. 169.) [redacted]. *Id*. [redacted]. (2 App. 153.) Indeed, Ms. Wynn claimed she [redacted]. *Id.* [redacted] (2 App. 155; *see also* 2 App. 162 [redacted]

[redacted]

Ms. Wynn never testified that [redacted].

Ms. Wynn did agree [redacted] (2 App. 155.) After testifying that [redacted]

[redacted]

[redacted]

(2 App. 156) (emphasis added.) Ms. Wynn instead testified that [redacted] (2 App. 157.)

2. *Ms. Wynn never* [redacted].

Ms. Wynn further testified that [redacted] (2 App. 157-58.) But when given the opportunity to clarify [redacted]

[redacted]

(2 App. 158-59) (emphasis added.)[2]

[2] Ms. Wynn's [redacted] does not transform them into material protected under the work product doctrine. Documents that would have been created in essentially the same form absent the prospect of litigation do not later qualify for work product protection simply because they become useful in a subsequent lawsuit. *See United States v. Adlman,* 134 F.3d 1194, 1202 (2d Cir. 1998) (work product doctrine does not apply to "documents . . . that would have been created in essentially similar form irrespective of the litigation . . . [e]ven if such documents might also help in preparation for litigation[.]"); *E.I. Dupont De Nemours & Co. v. Kolon Indus*., 269 F.R.D. 600, 604 (E.D. Va. 2010) (work product doctrine "does not cover documents created in the ordinary course of business that later serve a litigation-related purpose.").

C. Post-Disqualification Proceedings.

Quinn Emanuel withdrew from representing Ms. Wynn in the middle of the disqualification proceedings, which were ultimately resolved with the entry of a Stipulation and Order for Entry of a Permanent Injunction on March 20, 2017. Thereafter, Ms. Wynn's new counsel re-noticed her motion for leave to file the 6ACC. The Court granted Ms. Wynn's leave motion at a hearing held on May 1, 2017, and entered an order to that effect on May 16, 2017.

On June 5, 2017—over the Wynn Parties' opposition—the Court granted Ms. Wynn's motion to compel production of documents related to so-called "retaliation" allegations contained in her 6ACC. Ms. Wynn's knowledge of the alleged 2005 incident between Mr. Wynn and a former employee is a purported basis for her retaliation theories. (1 App. at 42-43; 50; 68-74) (6ACC ¶¶ 8-9; 51-52; 140-170.) Given the Court's ruling and the corresponding expansion of discovery, Mr. Wynn Served his Third Set of Requests for Production of Documents to Elaine P. Wynn on June 9, 2017. The Requests specifically sought information related to [redacted] (2 App. 179-82; 186-89; 200-03) (Request Nos. 16, 17, 20, 21, 29 and 30.)

On August 7, 2017, Ms. Wynn served her Corrected Response to Stephen A. Wynn's Third Request for Production of Documents. (2 App. 175-268.) On the

same date, Ms. Wynn produced her Log of Privileged Documents and Index of Names. (2 App. 270-76.) The Privilege Log contains [redacted] (2 App. 274) (Entry Nos. 6 and 7.) [redacted] *See id.* [redacted] *Id.* No other information is provided on the Privilege Log. During the parties' meet and confer conference, Ms. Wynn's counsel claimed the Notes identified on the Privilege Log are protected because they were prepared in anticipation of litigation, to wit: Ms. Wynn's divorce proceedings. (2 App. 129) (Williams Decl. ¶¶ 11-12.)

D. The Motion to Compel.

On September 7, 2017, the Wynn Parties filed a motion to overrule Ms. Wynn's work product claims and to compel production of the Notes. (2 App. 124-353.) In response to the motion, Ms. Wynn submitted a short declaration wherein she stated—*for the first time*—that [redacted] (2 App. 369) (Elaine Wynn Decl. ¶¶ 3; 5.) Ms. Wynn also stated that, contrary to her repeated deposition testimony, [redacted]

[redacted] (2 App. 369) (Elaine Wynn Decl. ¶¶ 6); *see also* (2 App. 357-58) (Opp'n, characterizing Ms. Wynn's prior testimony [redacted])[3] Notably, Ms. Wynn's declaration is silent on the issue of whether she would have prepared the Notes in essentially the same form regardless of whether she was involved in divorce proceedings at the time.

The District Court held a hearing on the motion on September 18, 2017. After having the opportunity to contrast Ms. Wynn's earlier deposition testimony regarding the purposes for which she created the Notes with the explanation presented in Ms. Wynn's subsequently-prepared declaration, the District Court determined the Notes were not protected work product, granted the motion, and ordered the Notes to be produced. (1 App. 104-05.) This writ proceeding followed.

E. Ms. Wynn's October 26, 2017 Deposition.

During the pendency of the instant writ proceeding, the Wynn Parties had the opportunity to depose Ms. Wynn again on October 26, 2017. Whereas Ms. Wynn's February 28 deposition was limited to the sanctions-related evidentiary hearing, the October 26 deposition focused on her substantive claims. The Wynn

[3] Ms. Wynn also averred in her declaration that [redacted] (2 App. 369) (Elaine Wynn Decl. ¶ 4). This differs from her earlier deposition testimony in which she stated [redacted] (2 App. 171-72.)

Parties again questioned Ms. Wynn [redacted]

See Wynn Parties' Appendix ("Wynn App.") at 21-22; 36-37 (emphasis added).[4]

[4] At the time this Answer was due, a certified copy of Ms. Wynn's deposition transcript from October 26, 2017 was unavailable. Thus, the Wynn Parties have included a "rough" version of the transcript as part of their Appendix. Once the certified copy of the transcript becomes available, the Wynn Parties will supplement the record accordingly.

IV. STANDARD OF REVIEW

A writ of prohibition is an extraordinary remedy. *See Mineral County v. State Dep't of Conserv.*, 117 Nev. 235, 243, 20 P.3d 800, 805-06 (2001). As the Petitioner, Ms. Wynn bears the burden to demonstrate that this Court's "intervention by way of extraordinary relief is warranted." *Club Vista Fin. Servs. v. Dist. Ct.*, 128 Nev. Adv. Op. 21, 276 P.3d 246, 249 (2012). Discovery matters, such as the work product ruling below, "are within the district court's sound discretion, and [this Court] will not disturb a district court's ruling regarding discovery unless the court has clearly abused its discretion." *Id.*

V. REASONS THE WRIT SHOULD NOT ISSUE

The Court should not issue a writ of prohibition because the District Court correctly ruled that Ms. Wynn's Notes fail to qualify for work product protection under NRCP 26(b)(3). Despite the existence of a litigation-tailored declaration below, Ms. Wynn's deposition testimony, provided both before and after her declaration, confirms that [redacted] To the contrary, Ms. Wynn has conceded that [redacted] The Notes, in other words, would have been prepared in essentially the same form regardless of any pending or future litigation. As such, Ms. Wynn has not satisfied, and cannot

satisfy, her burden of establishing that the work product doctrine applies to the Notes.

Assuming, *arguendo*, the Notes somehow qualify for work product protection, the Wynn Parties have nonetheless demonstrated a substantial need for them. The Notes, at best, are ordinary work product the Wynn Parties cannot obtain elsewhere without undue hardship. Though the District Court did not reach the issue, this Court is free to affirm the ruling on that basis. *See Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987) ("[T]his court will affirm the order of the district court if it reached the correct result, albeit for the wrong reasons.").

A. Standards Governing the Work Product Doctrine.

The work-product doctrine is codified in NRCP 26(b)(3) and protects from discovery documents and tangible things prepared by a party or its representative in anticipation of litigation. *See Wardleigh v. Second Jud. Dist. Ct.,* 111 Nev. 345, 357, 891 P.2d 1180, 1188 (1995). "At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *Wynn Resorts, Limited v. Eighth Jud. Dist. Ct.*, 133 Nev. Adv. Op. 52, 399 P.3d 334, 347 (2017) (quoting *United States v. Nobles*, 422 U.S. 225, 238 (1975)). As one federal court has noted, "[t]he primary purpose of the rule is to prevent exploitation of another party's efforts in preparing

for the litigation." *Diamond State Ins. Co. v. Rebel Oil Company, Inc.*, 157 F.R.D. 691, 699 (D. Nev. 1994).

The party asserting the work-product doctrine bears the burden of establishing the doctrine's application to each document it seeks to withhold. *Id.; see also American National Bank v. Client Solutions,* 2002 WL 1058776, at *1 (N.D. Ill. March 22, 2002) ("The party asserting the work product doctrine must prove all of its elements on a document-by-document basis."). As part of this burden, the party "must show that material it seeks to protect (1) was prepared in anticipation of litigation and (2) was prepared by or for a party, or by his representative." *Wultz v. Bank of China, Ltd.*, 304 F.R.D. 384, 393 (S.D.N.Y. 2015) (quotation omitted); *accord Wynn Resorts*, 399 P.3d at 347 (quoting *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)*, 357 F.3d 900, 907 (9th Cir. 2004)).

B. The District Court Correctly Ruled that the Work Product Doctrine Does Not Protect the Notes Because They Were Not Prepared in Anticipation of Litigation.

Only documents that were prepared in anticipation of litigation qualify for protection under the work product doctrine. *See* NRCP 26(b)(3). This Court recently adopted the "because of" standard to determine whether materials were prepared in anticipation of litigation. *See Wynn Resorts*, 399 P.3d at 347-48. Under this test, "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 (emphasis in original) (quotations omitted). Documents prepared in the ordinary course of business or those "that would have been created in essentially similar form irrespective of the litigation" are not subject to work product protection. *Id.* (that is, "'but for the prospect of litigation,' the document would not exist.").

Whether the "because of" test is met depends on the "totality of the circumstances." In particular, "the court should 'look[ ] to the context of the communication and content of the document to determine whether a request for legal advice is *in fact* fairly implied, taking into account the facts surrounding the creation of the document and the nature of the document.'" *Id*. (quoting *In re CV Therapeutics, Inc. Sec. Litig.*, 2006 WL 1699536, at *4 (N.D. Cal. June 16, 2006) (emphasis in original)). The Court should likewise consider "whether a communication explicitly sought advice and comment." *Id.* Ms. Wynn's Notes satisfy none of these criteria.

Ms. Wynn created the Notes in April 2009—*four* years after the alleged incident in question (May 2005), more than *three* years before she filed her original crossclaim in this action (June 2012), and nearly *seven* years before she filed her Fifth Amended Crossclaim (March 2016) in which she raised allegations about the alleged former employee incident for the first time. Ms. Wynn

testified—twice—that [redacted] By definition, then, no "request for legal advice [can] *in fact* be fairly implied" in the documents. *Wynn Resorts,* 399 P.3d at 348. Nor, given Ms. Wynn's testimony, can the Notes be said to "explicitly [seek] advice and comment" considering that [redacted] *Id.*; *see also* (2 App. 153.)

Where the documents themselves lack any indicia of being created in anticipation of litigation, the work product doctrine will not apply. *See Burton v. R.J. Reynolds Tobacco Co.*, 170 F.R.D. 481, 490 (D. Kan. 1997) (denying work product protection where the materials were "devoid of any reference to any specific litigation, to the defense of litigation in general, or to legal issues."). That is exactly the case here.

Ms. Wynn participated in various conversations more than eight years ago about an alleged incident that occurred more than twelve years ago. The Wynn Parties questioned Ms. Wynn at her February 28 deposition about the Notes, [redacted], and Ms. Wynn [redacted] She instead testified that [redacted]

[redacted]

The Wynn Parties again questioned Ms. Wynn about the Notes at her October 26 deposition, and Ms. Wynn again confirmed that [redacted]. The totality of the circumstances, hence, unequivocally demonstrates that Ms. Wynn did not create the Notes because of any anticipated litigation as she would have prepared them in essentially the same form regardless of her ongoing divorce proceedings or, for that matter, any other litigation on the horizon. The Court should affirm the District Court's order overruling Ms. Wynn's assertion of attorney work product protection.

C. Ms. Wynn's Subsequently-Prepared Litigation Declaration Does Not Satisfy Her Burden of Proving that the Notes Would Not Have Been Prepared in Essentially the Same Form Irrespective of Her Divorce Proceedings.

Ms. Wynn devotes much of her Writ Petition to arguing that work product protection can attach to materials prepared by a party even if no attorney was involved. *See* Pet. at 15-17. The Wynn Parties have no quarrel with this general proposition. Regardless, the facts that [redacted]

[redacted] are all relevant considerations when determining whether the totality of the circumstances support a finding that the materials were prepared because of the prospect of litigation. *See* Point V(B), *supra*. Ms. Wynn, moreover, was obviously concerned enough about her prior deposition testimony that she sought to re-frame it with a new declaration in hopes of satisfying the criteria for work product protection.

Ms. Wynn's declaration fails, however, to satisfy her burden for at least three reasons. First, courts are skeptical of subsequently-prepared litigation affidavits that, as is the case here, rely on conclusory assertions or conflict with a witness's testimony. Second, Ms. Wynn's declaration never addresses whether she would have prepared the Notes in essentially the same manner regardless of her divorce proceedings. Finally, Ms. Wynn's most recent deposition testimony, once again, conflicts with her declaration and confirms the Notes were prepared for non-litigation purposes.

1. *Ms. Wynn's conclusory and conflicting declaration.*

"The burden of showing a document is entitled to work-product protection may not be "'discharged by mere conclusory or *ipse dixit* assertions.'" *In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig.*, 293 F.R.D. 568, 574 (S.D.N.Y. 2013) (quotation omitted). In the analogous context of attorney-client privilege, courts routinely disregard after-the-fact declarations that rely on

conclusory assertions or conflict with the witness's testimony. *See, e.g., United States v. Adlman*, 68 F.3d 1495, 1500 (2d Cir. 1995) (attorney client privilege did not protect communications where proponent relied upon "litigation affidavits prepared by interested persons four years after the fact and lacking any support in contemporaneous documentation.").[5] Given the multiple conflicts the Wynn Parties have identified between Ms. Wynn's February 28 deposition testimony and her subsequent declaration, *see* Points I; III(B)-(D), *supra*, the Court should attach no weight to the latter when determining whether the Notes are protected by the work product doctrine.

2. *Ms. Wynn's declaration never addresses whether the Notes would have been prepared in essentially the same form regardless of her divorce proceedings.*

In *Wultz v. Bank of China, Ltd.*, a case heavily relied upon by Ms. Wynn (*see* Pet. at 16-18), the court explained that the burden of establishing work product protection requires the proponent to show that the material "would not have been prepared 'in essentially similar form irrespective of the litigation.'" 304 F.R.D at 395. The court stated the question as follows: "had [Defendant] been presented with the identical facts [ ] in circumstances in which it did not foresee litigation,

[5] *See also In re Grand Jury Proceedings*, 2001 WL 1167497, at *7-8 (S.D.N.Y. Oct. 3, 2001) (disregarding investigator's "after-the-fact affidavits drafted by counsel" where his "declaration and hearing testimony differed substantially from his grand jury testimony."); *Solomon v. Scientific American, Inc.*, 125 F.R.D. 34, 36 n.2 (S.D.N.Y 1988) (attaching no weight to "affidavits obviously drafted by counsel after [the] dispute arose.").

would it have generated essentially the same documents sought by plaintiffs on this motion?" *Id.* Notwithstanding that the defendant bank argued it "would have undertaken no investigation at all" but for receipt of the plaintiffs' demand letter, the *Wultz* court found the bank had "provided virtually no evidence on the question of what [it] 'would have' done had it learned of the [ ] allegations under circumstances where the knowledge was not coupled with the threat of litigation." *Id.* at 395-96. As such, it concluded "***[f]or this reason alone***, [defendant] has not met its burden of showing that the materials are protectable as work product." *Id.* at 396 (emphasis added).

The same is true here. Ms. Wynn's declaration is silent as to whether she would have prepared the Notes in essentially the same form had she learned about the underlying events that triggered their creation outside the context of her divorce proceedings. Absent such a showing, Ms. Wynn cannot benefit from work product protection. *See Schulman v. Saloon Beverage, Inc.*, 2014 WL 3353254, at *11 (D. Vt. July 9, 2014) (conclusory affidavit on the issue of whether insurance adjuster's report would have been prepared in essentially similar form was insufficient to meet burden of establishing work product protection).

3. *Ms. Wynn's October 26 deposition testimony confirms the Notes were not prepared because of the prospect of litigation.*

If the discrepancies between Ms. Wynn's February 28 deposition testimony and her subsequent declaration were not enough to undermine her work product claim altogether, her recent deposition testimony on October 26 ends the matter. That is because the entire foundation of Ms. Wynn's Writ Petition—*i.e.*, that Ms. Wynn prepared the Notes "because of her then-ongoing divorce litigation" (*see* Pet. at 11-13)—has proven to be a fiction.

When questioned regarding the Notes under oath in the deposition setting, where a party's counsel cannot control the narrative, Ms. Wynn expressly disavowed what this Court has characterized as the "*sine qua non*" for work product protection—that "'but for the prospect of [ ] litigation,' the document would not exist." *Wynn Resorts*, 399 P.3d at 348. Specifically, Ms. Wynn conceded that [redacted] (Wynn App. 21-22; 36-37.) Stated differently, Ms. Wynn would have prepared the Notes in essentially similar form regardless of any then-pending or prospective litigation. The work product doctrine, accordingly, cannot apply in these circumstances.

D. The Wynn Parties Have Demonstrated a Substantial Need for the Notes.

Assuming, *arguendo*, this Court finds the Notes are protected work product, it should still deny Ms. Wynn's Writ Petition. The Wynn Parties established below that the Notes, if they are work product at all, are "ordinary" work product. (2 App. 140-144.) They further demonstrated a substantial need for the Notes because they cannot obtain the substantial equivalent thereof without undue hardship. *See id.* Though the District Court did not reach the issue, this Court may nonetheless affirm the ruling on that basis. *See Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987) ("[T]his court will affirm the order of the district court if it reached the correct result, albeit for the wrong reasons.").

Ms. Wynn seems to present two arguments in response to this issue, neither of which is persuasive. First, she cites a smattering of cases standing for the proposition that "preservation material" like interview notes can qualify for work product protection. *See* Pet. at 17-19. Though the cases are cited as a rebuttal to the District Court's finding that Ms. Wynn prepared the Notes as an aid to "refresh her recollection," Ms. Wynn also appears to argue impliedly that her Notes contain an "analytical" element that makes them more akin to opinion work product, which enjoys stronger protection than ordinary work product. *See id.* Such a contention is, of course, directly at odds with the evidence in this case as Ms. Wynn has repeatedly testified that [redacted]. (2 App. 155; 162) (Wynn

App. 36-37); *see also In re Matter of American River Transp. Co.*, 2017 WL 1429856, at *3 (E.D. Mo. April 20, 2017) ("ordinary work product 'includes raw factual information.'") (quotation omitted).[6]

Ms. Wynn's second argument is that the Wynn Parties may obtain the substantial equivalent of the Notes by deposing Doreen Whennen and Arte Nathan. *See* Pet. at 19, n.4. This, too, is wrong. Ms. Whennen's deposition ended early and is now the subject of a separate writ petition before this Court. Specifically, counsel for the Wynn Parties ended the deposition to address concerns Ms. Whennen may have revealed Wynn Resorts' privileged and protected information to Ms. Wynn and/or her attorneys. The Wynn Parties promptly sought relief from

[6] Ms. Wynn's citation to *Szulik v. State Street Bank & Trust Co.*, 2014 WL 3942934 (D. Mass. Aug. 11 2014) is misleading insofar as it suggests a party can maintain protection over work product materials despite using them to refresh one's recollection prior to testifying. *See* Pet. at 18 (stating "the work product doctrine protects a chronology compiled by the plaintiff 'to prepare for his deposition.'"). In *Szulik*, the defendant sought production of a chronology one of the plaintiffs had prepared to assist with his deposition in an *earlier* piece of litigation. 2014 WL 3942934, at *2-3. Though the court found the chronology was protected work product because it was prepared to assist with discovery in the *earlier* litigation, it expressly noted "that a different situation may exist if [plaintiff] uses the document to prepare for a deposition in *this* case." *Id.* at *3, n.3 (citing Fed. R. Evid. 612(b)) (emphasis added). The court's observation is consistent with Nevada law. *See Las Vegas Development Assoc. v. Eighth Judicial Dist. Ct.*, 130 Nev. Adv. Op. 37, 325 P.3d 1259, 1265 (2014) (concluding "that when a witness uses a privileged document to refresh his or her recollection prior to giving testimony at a deposition, an adverse party is entitled to have the writing produced at the deposition pursuant to NRS 50.125.").

the District Court, which was denied, and are now challenging that ruling by way of the writ petition filed in Case No. 74063.

As for Mr. Nathan, he was deposed recently, and repeatedly testified that [redacted]. (Wynn App. 7-11.) Courts have found substantial need in similar circumstances. *See, e.g., Hooke v. Foss Maritime Co.*, 2014 WL 1457582, at *6-7 (N.D. Cal. April 10, 2014) (finding substantial need where witnesses did not recall any details of the incident or the contents of the incident report); *Fisher v. Kohl's Dep't Store, Inc.*, 2012 WL 2377200, at *6 (E.D. Cal. June 22, 2012) (same); *Phillips v. Dallas Carriers Corp.*, 133 F.R.D. 475, 480-81 (M.D.N.C. 1990) (finding substantial need where passage of time resulted in defendant's inability to recall aspects of collision, and plaintiff could not obtain substantial equivalent of the witness's statement which was a "nearly contemporaneous account of the events put in issue in this litigation."). This Court should do likewise.

VI. CONCLUSION

For the reasons set forth herein, the Wynn Parties respectfully request that Ms. Wynn's Writ Petition be denied in its entirety.

DATED this 31st day of October, 2017.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this reply 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 font, double spaced, Times New Roman.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 6325 words.

I hereby certify that I have read this reply, 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, 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 the accompanying reply does not conform with the requirements of the

Nevada Rules of Appellate Procedure.

DATED this 31st day of October, 2017.

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CERTIFICATE OF SERVICE

I certify that I am an employee of Campbell & Williams and that I did, on the 31st day of October, 2017, serve upon the following in this action a copy of the foregoing **Wynn Parties' Answer to Elaine P. Wynn's Petition for Writ of Prohibition** by United States Mail, postage prepaid:

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