

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 **Electronically Filed**
Nov 01 2017 10:01 a.m.

Elizabeth A. Brown
Clerk of the Supreme Court
THE WYNN PARTIES MOVED TO
REDACT AND SEAL PORTIONS OF
ANSWER TO WRIT PETITION AND
TO FILE THEIR APPENDIX UNDER
SEAL

I. INTRODUCTION

Pursuant to Part VII of the Supreme Court Rules Governing Sealing and Redacting Court Records, Real Parties in Interest (the “Wynn Parties”) hereby move this Court (1) to redact and file under seal portions of their Answer to Elaine P. Wynn’s Petition for Writ of Prohibition, and (2) to file their Appendix under seal. The Answer summarizes portions of deposition transcripts and other materials that have been designated Confidential or Highly Confidential pursuant to the Protective Order with Respect to Confidentiality entered by the District

Court on February 14, 2013 in accordance with Nevada Rule of Civil Procedure 26(c).

II. ANALYSIS

Part VII of the Supreme Court Rules provides that records submitted to this Court may be submitted in redacted or sealed form, subject to further order. The Court will keep the documents redacted or under seal if there is an appropriate basis under SRCR 3(4). That rule permits the sealing or redaction of the record when justified by compelling privacy or safety interests that outweigh the public interest in access to the court record. Furthermore, the public interest in privacy outweighs the public interest in open court records when the sealing or redaction furthers a protective order entered under NRCP 26(c). *See* SRCR 3(4)(b).

Here, after briefing from the parties, the District Court entered a Protective Order with Respect to Confidentiality under NRCP 26(c) (the “Protective Order”). (Ex. 1.) Pursuant to the Protective Order, the parties are permitted to designate materials that contain “information that constitutes, reflects, or discloses nonpublic information, trade secrets, know-how, or other financial, proprietary, commercially sensitive, confidential business, marketing, regulatory, or strategic information (regarding business plans or strategies, technical data, and nonpublic designs)” as Confidential. (*Id.* ¶¶ 2-3.) Additionally, the Protective Order includes designation of materials as Highly

Confidential if “the disclosure of which would create a substantial risk of competitive, business, or personal injury to the Producing Party.” (*Id.* ¶ 5.) And, information that is designated as Confidential or Highly Confidential may be filed with the Court and kept under seal and/or redacted upon motion of the filing party. (*Id.* ¶ 9.)

Petitioner Elaine P. Wynn and the Wynn Parties have designated certain materials as Confidential or Highly Confidential in accordance with the Protective Order. To present this issue to the Court, however, it is necessary to present the unredacted and unsealed versions of this material to the Court, and to redact or seal certain portions of the Answer and Appendix that quote or summarize material designated as Confidential or Highly Confidential in accordance with the Protective Order. Toward this end, the Court previously granted Petitioner’s Motion to Redact and Seal materials filed as part of this writ proceeding. *See* Order dated October 16, 2017 (on file).

Thus, to avoid running afoul of the Protective Order, the Wynn Parties seek an order allowing them (1) to redact and file under seal portions of their Answer that quote or summarize Confidential or Highly Confidential materials, and (2) to file their Appendix under seal as it contains excerpts from two deposition transcripts that are currently designated Highly Confidential under the terms of the Protective Order. A copy of the Wynn Parties’ Answer in redacted form is attached hereto as Exhibit 2.

III. CONCLUSION

Based upon the foregoing, the Wynn Parties respectfully request that this Court permit it to redact and file under seal portions of their Answer, and to file their Appendix under seal.

DATED this 31st day of October, 2017.

CAMPBELL & WILLIAMS

By /s/ J. Colby Williams
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Attorneys for Real Parties in Interest

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' Motion to Redact and Seal Portions of Answer to Writ Petition and to File Respondents' Appendix Under Seal** by United States Mail, postage prepaid:

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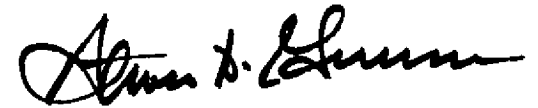
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AND VIA HAND DELIVERY TO:

HONORABLE ELIZABETH GONZALEZ
Department 11
Eighth Judicial District Court
200 Lewis Avenue
Las Vegas, Nevada 89155

By: /s/ **Lucinda Martinez**
An Employee of Campbell & Williams

EXHIBIT 1



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17 John A. Moran, Marc D. Schorr, Alvin V. Shoemaker,
Kimmarie Sinatra, D. Boone Wayson, and Allan Zeman

18 **DISTRICT COURT**

19 **CLARK COUNTY, NEVADA**

20 **WYNN RESORTS, LIMITED, a Nevada**
21 **Corporation,**

22 **Plaintiff,**

23 **vs.**

24 **KAZUO OKADA, an individual, ARUZE**
USA, INC., a Nevada corporation, and
25 **UNIVERSAL ENTERTAINMENT CORP.,**
a Japanese corporation,

26 **Defendants.**

27 **AND ALL RELATED CLAIMS**
28

Case No.: A-12-656710-B

Dept. No.: XI

**NOTICE OF ENTRY OF
WYNN PARTIES' PROTECTIVE
ORDER WITH RESPECT TO
CONFIDENTIALITY**

1 PLEASE TAKE NOTICE that the "Wynn Parties' Protective Order With Respect to
2 Confidentiality" was entered in the above-captioned matter on February 14, 2013, a true and
3 correct copy of which is attached hereto.

4 DATED this 14th day of February, 2013.

5 PISANELLI BICE PLLC

6 By: 

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21 John A. Moran, Marc D. Schorr, Alvin V.
22 Shoemaker, Kimmarie Sinatra, D. Boone Wayson,
23 and Allan Zeman
24
25
26
27
28

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice PLLC, and that on this 14th day of February, 2013, I caused to be electronically served through the Court's filing system true and correct copies of the foregoing NOTICE OF ENTRY OF ORDER properly addressed to the following:

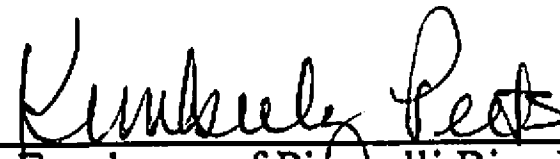
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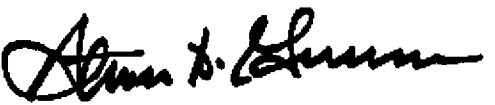
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Kimmarie Sinatra, D. Boone Wayson, and Allan Zeman

DISTRICT COURT

CLARK COUNTY, NEVADA

**WYNN RESORTS, LIMITED, a Nevada
Corporation,**

Plaintiff,

vs.

**KAZUO OKADA, an individual, ARUZE
USA, INC., a Nevada corporation, and
UNIVERSAL ENTERTAINMENT CORP.,
a Japanese corporation,**

Defendants.

AND ALL RELATED CLAIMS

Case No.: A-12-656710-B

Dept. No.: XI

**WYNN PARTIES' PROPOSED
PROTECTIVE ORDER WITH
RESPECT TO CONFIDENTIALITY**

PISANELLI BICE PLLC
3883 HOWARD HUGHES PARKWAY, SUITE 800
LAS VEGAS, NEVADA 89169

1 The Wynn Parties hereby propose that the handling of confidential material in these
2 proceedings shall be governed by the provisions set forth below:

3 1. **Applicability of this Protective Order:** Subject to Section 20 below, this
4 Protective Order does not and will not govern any trial proceedings in this action but will
5 otherwise be applicable to and govern the handling of documents, depositions, deposition
6 exhibits, interrogatory responses, responses to requests for admissions, responses to requests for
7 production of documents, and all other discovery obtained pursuant to Nevada Rules of Civil
8 Procedure or other legal process by or from, or produced on behalf of, a party or witness in
9 connection with this action (this information hereinafter shall be referred to as "Discovery
10 Material"). As used herein, "Producing Party" or "Disclosing Party" shall refer to the parties and
11 nonparties that give testimony or produce documents or other information in connection with this
12 action; "Receiving Party" shall refer to the parties in this action that receive such information, and
13 "Authorized Recipient" shall refer to any person or entity authorized by Sections 10 and 11 of this
14 Protective Order to obtain access to Confidential Information, Highly Confidential Information,
15 or the contents of such Discovery Material.

16 2. **Designation of Information:** Any Producing Party may designate Discovery
17 Material that is in its possession, custody, or control produced to a Receiving Party as
18 "Confidential" or "Highly Confidential" under the terms of this Protective Order if the Producing
19 Party in good faith reasonably believes that such Discovery Material contains nonpublic,
20 confidential information as defined in Sections 4 and 5 below.

21 3. **Exercise of Restraint and Care in Designating Material for Protection:** Each
22 Producing Party that designates information or items for protection under this Protective Order
23 must take care to limit any such designation to specific material that qualifies under the
24 appropriate standards. Indiscriminate designations are prohibited.

25 4. **Confidential Information:** For purposes of this Protective Order, "Confidential
26 Information" means any Protected Data (as defined below) or any information that constitutes,
27 reflects, or discloses nonpublic information, trade secrets, know-how, or other financial,
28 proprietary, commercially sensitive, confidential business, marketing, regulatory, or strategic

1 information (regarding business plans or strategies, technical data, and nonpublic designs), the
2 disclosure of which the Producing Party believes in good faith might reasonably result in
3 economic or competitive, or business injury to the Producing Party (or its affiliates, personnel, or
4 clients) and which is not publicly known and cannot be ascertained from an inspection of publicly
5 available sources, documents, material, or devices. Confidential Information shall also include
6 sensitive personal information that is not otherwise publicly available, such as home addresses;
7 social security numbers; dates of birth; employment personnel files; medical information; home
8 telephone records/numbers; employee disciplinary records; family court documents sealed by the
9 family court pursuant to NRS 125.110 or designated Confidential by agreement of the parties to
10 the family court proceedings at issue; wage statements or earnings statements; employee benefits
11 data; tax records; and other similar personal financial information. A party may also designate as
12 "CONFIDENTIAL" compilations of publicly available discovery materials, which would not be
13 known publicly in a compiled form.

14 (a) Protected Data. The term "Protected Data" shall refer to any information
15 that a party believes in good faith to be subject to federal, state or foreign data protection laws or
16 other privacy obligations. Protected Data constitutes highly sensitive materials requiring special
17 protection. Examples of such laws include, but are not limited to, the Macau Personal Data
18 Protection Act ("MDPA"), Macao Special Administrative Region Law n.º 16/2001 ("Judicial
19 system for operating games of fortune in casinos"), and other state, federal, and/or foreign law(s)
20 that impose special protections.

21 5. **Highly Confidential Information:** For purposes of this Protective Order, Highly
22 Confidential Information is any Protected Data and/or Confidential Information as defined in
23 Section 4 above that also includes (a) extremely sensitive, highly confidential, nonpublic
24 information, consisting either of trade secrets or proprietary or other highly confidential business,
25 financial, regulatory, private, or strategic information (including information regarding business
26 plans, technical data, and nonpublic designs), the disclosure of which would create a substantial
27 risk of competitive, business, or personal injury to the Producing Party, and/or (b) nonpublic
28 documents or information reflecting the substance of conduct or communications that are the

1 subject of state, federal, or foreign government investigations. Certain Protected Data may
2 compel alternative or additional protections beyond those afforded Highly Confidential
3 Information, in which event the parties shall meet and confer in good faith, and, if unsuccessful,
4 the party seeking any greater protection shall move the Court for appropriate relief. A party may
5 re-designate material originally "CONFIDENTIAL" as "HIGHLY CONFIDENTIAL" by giving
6 notice of such a re-designation to all parties.

7 **6. Designating Confidential Information or Highly Confidential Information.** If
8 any party in this action determines in good faith that any information, documents, things, or
9 responses produced in the course of discovery in this action should be designated as Confidential
10 Information or Highly Confidential Information (the "Designating Party"), it shall advise any
11 party receiving such material of this fact, and all copies of such document, things, or responses, or
12 portions thereof deemed to be confidential shall be marked "CONFIDENTIAL" or "HIGHLY
13 CONFIDENTIAL" (whether produced in hard copy or electronic form) at the expense of the
14 designating party and treated as such by all parties. A Designating Party may inform another
15 party that a document is Confidential or Highly Confidential by providing the Bates number of
16 the document in writing. If Confidential or Highly Confidential Information is produced via an
17 electronic form on a computer readable medium (e.g., CD-ROM), other digital storage medium,
18 or via Internet transmission, the Producing Party or Designating Party shall affix in a prominent
19 place on the storage medium or container file on which the information is stored, and on any
20 container(s) for such medium, the legend "Includes CONFIDENTIAL INFORMATION" or
21 "Includes HIGHLY CONFIDENTIAL INFORMATION." Nothing in this section shall extend
22 confidentiality or the protections associated therewith to any information that does not otherwise
23 constitute "Confidential Information" or "Highly Confidential Information" as defined in Sections
24 4 and 5 herein.

25 **7. Redaction Allowed:** Any Producing Party may redact from the documents or
26 things it produces matter that the Producing Party claims is subject to the attorney-client privilege,
27 the work product doctrine, a legal prohibition against disclosure, or any other privilege from
28 disclosure. Any Producing Party also may redact information that is both personal and

1 nonresponsive, such as a social security number. A Producing Party may not withhold
2 nonprivileged, responsive information solely on the grounds that such information is contained in
3 a document that includes privileged information. The Producing Party shall mark each redaction
4 with a legend stating "REDACTED," and include an annotation indicating the specific reason for
5 the redaction (e.g., "REDACTED—Work Product"). All documents redacted based on attorney
6 client privilege or work product immunity shall be listed in an appropriate log in conformity with
7 Nevada law and Nevada Rule of Civil Procedure 26(b)(5). Where a document consists of more
8 than one page, the page on which information has been redacted shall so be marked. The
9 Producing Party shall preserve an unredacted version of such document. In addition to the
10 foregoing, the following shall apply to redactions of Protected Data:

11 (a) Any party may redact Protected Data that it claims, in good faith, requires
12 protections under the terms of this Protective Order.

13 (b) Protected Data shall be redacted from any public filing not filed under seal.

14 (c) The right to challenge and the process for challenging redactions shall be
15 the same as the right to challenge and the process from challenging the designation of
16 Confidential Information or Highly Confidential Information.

17 8. Use of Confidential Information or Highly Confidential Information. Except
18 as provided herein, Confidential Information and Highly Confidential Information designated or
19 marked shall be maintained in confidence, used solely for the purposes of this action, to the extent
20 not otherwise prohibited by an order of the Court, shall be disclosed to no one except those
21 persons identified herein in Sections 10 and 11, and shall be handled in such manner until such
22 designation is removed by the Designating Party or by order of the Court. Confidential or Highly
23 Confidential information produced by another party shall not be used by any Receiving Party for
24 any commercial, competitive or personal purpose. Nothing in this Protective Order shall govern
25 or restrict a Producing Party's use of its own Confidential or Highly Confidential Information in
26 any way.

27 9. Once the Court enters this Protective Order, a party shall have thirty (30) days to
28 designate as Confidential or Highly Confidential any documents previously produced in this

1 action, which it can do by stamping "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" on the
2 document, or informing the other parties of the Bates-numbers of the documents so designated.

3 10. **Use of Confidential Information and Highly Confidential Information in**
4 **Depositions.** Counsel for any party shall have the right to disclose Confidential or Highly
5 Confidential Information at depositions, provided that such disclosure is consistent with this
6 Protective Order, including Sections 10 and 11. Any counsel of record may request that all
7 persons not entitled under Sections 10 or 11 of this Protective Order to have access to
8 Confidential Information or Highly Confidential Information leave the deposition room during the
9 confidential portion of the deposition. Failure of such other persons to comply with a request to
10 leave the deposition shall constitute substantial justification for counsel to advise the witness that
11 the witness need not answer the question where the answer would disclose Confidential
12 Information or Highly Confidential Information. Additionally, at any deposition session, (1) upon
13 inquiry with regard to the content of any discovery material(s) designated or marked as
14 "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY;"
15 (2) whenever counsel for a party deems that the answer to a question may result in the disclosure
16 or revelation of Confidential or Highly Confidential Information; and/or (3) whenever counsel
17 for a party deems that the answer to any question has resulted in the disclosure or revelation of
18 Confidential or Highly Confidential Information, counsel to any party may designate portions of a
19 deposition transcript and/or video of any deposition (or any other testimony) as containing
20 Confidential or Highly Confidential Information in accordance with this Order by a statement on
21 the record during the deposition or by notifying all other parties in writing, within thirty (30)
22 calendar days of receiving the transcript or video that it contains Confidential or Highly
23 Confidential Information and designating the specific pages, lines, and/or counter numbers as
24 containing Confidential or Highly Confidential Information. If a designation is made via a
25 statement on the record during a deposition, counsel must follow up in writing within thirty (30)
26 calendar days of receiving the transcript or video, identifying the specific pages, lines, and/or
27 counter numbers containing the Confidential or Highly Confidential Information. If no
28 confidentiality designations are made within the thirty calendar (30) day period, the entire

1 transcript shall be considered nonconfidential. During the thirty (30) day period, the entire
2 transcript and video shall be treated as Confidential Information (or Highly Confidential
3 Information). All originals and copies of deposition transcripts that contain Confidential
4 Information or Highly Confidential Information shall be prominently marked "CONFIDENTIAL"
5 or "HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY" on the cover thereof and, if and
6 when filed with the Court, the portions of such transcript so designated shall be filed under seal.
7 Counsel must designate portions of a deposition transcript as "CONFIDENTIAL" or "HIGHLY
8 CONFIDENTIAL - ATTORNEYS' EYES ONLY" within thirty calendar (30) days of receiving
9 the transcript. Any DVD or other digital storage medium containing Confidential or Highly
10 Confidential deposition testimony shall be labeled in accordance with the provisions of
11 Section 6.

12 11. **Persons Authorized to Receive Confidential Information.** Confidential
13 Information produced pursuant to this Protective Order may be disclosed or made available only
14 to the Court, its employees, other court personnel, any discovery referee, mediator or other
15 official who may be appointed by the Court, and to the persons below:

16 (a) A party, or officers, directors, employees, and agents of a party deemed
17 necessary by counsel to aid in the prosecution, defense, or settlement of this action;

18 (b) Counsel for a party (including in house attorneys, outside attorneys
19 associated with a law firm(s) of record, and paralegal, clerical, and secretarial staff employed by
20 such counsel);

21 (c) Persons retained by a party to provide litigation support services
22 (photocopying, videotaping, translating, preparing exhibits or demonstrations, organizing, storing,
23 retrieving data in any form or medium, etc.);

24 (d) Consultants or expert witnesses (together with their support staff) retained
25 for the prosecution or defense of this litigation, provided that such an expert or consultant is
26 not a current employee of a direct competitor of a party named in this action, (fn)

27 (e) Court reporter(s) and videographers(s) employed in this action;

28 (f) Any authors or recipients of the Confidential Information;

(fn) A party may seek leave of court to provide information to a consultant employed by a competitor

1 (g) A witness at any deposition or other proceeding in this action, who shall
2 sign the Confidentiality Agreement attached as "Exhibit A" to this Protective Order before being
3 shown a confidential document; and

4 (h) Any other person as to whom the parties in writing agree or that the Court
5 in these proceedings so designates.

6 Any person to whom Confidential Information is disclosed pursuant to subparts (a)
7 through (g) hereinabove shall be advised that the Confidential Information is being disclosed
8 pursuant to an order of the Court, that the information may not be disclosed by such person to any
9 person not permitted to have access to the Confidential Information pursuant to this Protective
10 Order, and that any violation of this Protective Order may result in the imposition of such
11 sanctions as the Court deems proper. Any person to whom Confidential Information is disclosed
12 pursuant to subpart (c), (d), (g) or (h) of this section shall also be required to execute a copy of the
13 form Exhibit A. The persons shall agree in writing to be bound by the terms of this Protective
14 Order by executing a copy of Exhibit A (which shall be maintained by the counsel of record for
15 the party seeking to reveal the Confidential Information) in advance of being shown the
16 Confidential Information. No party (or its counsel) shall discourage any persons from signing a
17 copy of Exhibit A. If a person refuses to execute a copy of Exhibit A, the party seeking to reveal
18 the Confidential Information shall seek an order from the Court directing that the person be bound
19 by this Protective Order. In the event of the filing of such a motion, Confidential Information
20 may not be disclosed to such person until the Court resolves the issue. Proof of each written
21 agreement provided for under this Section shall be maintained by each of the parties while this
22 action is pending and disclosed to the other parties upon good cause shown and upon order of the
23 Court.

24 12. Persons Authorized to Receive Highly Confidential Information. "HIGHLY
25 CONFIDENTIAL – ATTORNEYS' EYES ONLY" documents and information may be used only
26 in connection with this case and may be disclosed only to the Court and the persons listed in
27 subsections (b) to (e) and (g) to (h) of Section 10 above, but shall not be disclosed to a party, or
28 an employee of a party, unless otherwise agreed or ordered. With respect to sub-section (f), the

1 parties will consider disclosure of Highly Confidential Information to an author or recipient
2 on a case by case basis. Any person to whom Highly Confidential Information is disclosed
3 pursuant to sub-sections (c), (d), (g) or (h) of Section 10 above shall also be required to execute a
4 copy of the form Exhibit A.

5 13. **Filing of Confidential Information or Highly Confidential Information With**
6 **Court.** Any party seeking to file or disclose materials designated as Confidential Information or
7 Highly Confidential Information with the Court in this Action must seek to file such Confidential
8 or Highly Confidential Information under seal pursuant to Rule 3 of the Nevada Rules for Sealing
9 and Redacting Court Records. The Designating Party will have the burden to provide the Court
10 with any information necessary to support the designation as Confidential Information.

11 14. **Notice to Nonparties.** Any party issuing a subpoena to a nonparty shall enclose a
12 copy of this Protective Order and advise the nonparty that it may designate any Discovery
13 Material it produces pursuant to the terms of this Protective Order, should the nonparty producing
14 party wish to do so. This Order shall be binding in favor of nonparty designating parties to the
15 maximum extent permitted by law. Any nonparty invoking the Protective Order shall comply
16 with, and be subject to, all applicable sections of the Protective Order.

17 15. **Knowledge of Unauthorized Use or Possession.** If a party receiving Confidential
18 Information or Highly Confidential Information learns of any possession, knowledge, use or
19 disclosure of any Confidential Information or Highly Confidential Information in violation of the
20 terms of this Protective Order, the Receiving Party shall immediately notify in writing the party
21 that produced the Confidential Information or Highly Confidential Information. The Receiving
22 Party shall promptly furnish the Producing Party the full details of such possession, knowledge,
23 use or disclosure. With respect to such unauthorized possession, knowledge, use or disclosure the
24 Receiving Party shall assist the Producing Party in remedying the disclosure (e.g., by retrieving
25 the Confidential Information from an unauthorized recipient) and/or preventing its recurrence.

26 16. **Copies, Summaries or Abstracts.** Any copies, summaries, abstracts or exact
27 duplications of Confidential Information or Highly Confidential Information shall be marked
28 "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY" and shall be

1 considered Confidential Information or Highly Confidential Information subject to the terms and
2 conditions of this Protective Order. Attorney-client communications and attorney work product
3 regarding Confidential Information or Highly Confidential Information shall not be subject to this
4 section, regardless of whether they summarize, abstract, paraphrase, or otherwise reflect
5 Confidential Information or Highly Confidential Information.

6 17. **Information Not Confidential.** The restrictions set forth in this Protective Order
7 shall not be construed to apply to any information or materials that:

8 (a) Were lawfully in the Receiving Party's possession prior to such
9 information being designated as Confidential or Highly Confidential Information in this action,
10 and that the Receiving Party is not otherwise obligated to treat as confidential;

11 (b) Were obtained without any benefit or use of Confidential or Highly
12 Confidential Information from a third party having the right to disclose such information to the
13 Receiving Party without restriction or obligation of confidentiality;

14 (c) Were independently developed after the time of disclosure by persons who
15 did not have access to the Producing Party's Confidential or Highly Confidential Information;

16 (d) Have been or become part of the public domain by publication or
17 otherwise and not due to any unauthorized act or omission on the part of a Receiving Party; or

18 (e) Under law, have been declared to be in the public domain.

19 18. **Challenges to Designations.** Any party may object to the designation of
20 Confidential Information or Highly Confidential Information on the ground that such information
21 does not constitute Confidential Information or Highly Confidential Information by serving
22 written notice upon counsel for the Producing Party within sixty (60) calendar days of the date
23 the item(s) was designated, specifying the item(s) in question and the grounds for the objection.
24 If a party objects to the designation of any materials as Confidential Information or Highly
25 Confidential Information, the party challenging the designation shall arrange for an EDCR 2.34
26 conference to be held within ten (10) calendar days of service of a written objection to the
27 designation to attempt to informally resolve the dispute. If the parties cannot resolve the matter,
28 the party challenging the designation may file a motion with the Court to resolve the dispute.

1 Such motions must be filed within ten (10) calendar days of the EDCR 2.34 conference. This
2 Protective Order will not affect the burden of proof on any such motion, or impose any burdens
3 upon any party that would not exist had the Protective Order not been entered; as a general
4 matter, the burden shall be on the person making the designation to establish the propriety of the
5 designation. Any contested information shall continue to be treated as confidential and subject to
6 this Protective Order until such time as such motion has been ruled upon.

7 19. **Use in Court.** If any Confidential Information or Highly Confidential Information
8 is used in any pretrial Court proceeding in this action, it shall not necessarily lose its confidential
9 status through such use, and the party using such information shall take all reasonable steps
10 consistent with the Nevada Supreme Court Rules Governing Sealing and Redacting Court
11 Records to maintain its confidentiality during such use.

12 20. **No Waiver.** This Protective Order is entered solely for the purpose of facilitating
13 the exchange of documents and information among the parties to this action without involving the
14 Court unnecessarily in the process. Nothing in this Protective Order, nor the production of any
15 information or document under the terms of this Protective Order, nor any proceedings pursuant
16 to this Protective Order shall be deemed to be a waiver of any rights or objections to challenge the
17 authenticity or admissibility of any document, testimony or other evidence at trial. Additionally,
18 this Protective Order will not prejudice the right of any party or nonparty to oppose production of
19 any information on the ground of attorney-client privilege; work product doctrine or any other
20 privilege or protection provided under the law.

21 21. **Reservation of Rights.** The parties each reserve the right to seek or oppose
22 additional or different protection for particular information, documents, materials, items or things.
23 This Stipulation shall neither enlarge nor affect the proper scope of discovery in this Action. In
24 addition, this Stipulation shall not limit or circumscribe in any manner any rights the Parties (or
25 their respective counsel) may have under common law or pursuant to any state, federal, or foreign
26 statute or regulation, and/or ethical rule.

27 22. **Inadvertent Failure to Designate.** The inadvertent failure to designate
28 information produced in discovery as Confidential or Highly Confidential shall not be deemed, by

1 itself, to be a waiver of the right to so designate such discovery materials as Confidential
2 Information or Highly Confidential Information. Within a reasonable time of learning of any
3 such inadvertent failure, the Producing Party shall notify all Receiving Parties of such inadvertent
4 failure and take such other steps as necessary to correct such failure after becoming aware of it.
5 Disclosure of such discovery materials to any other person prior to later designation of the
6 discovery materials in accordance with this section shall not violate the terms of this Protective
7 Order. However, immediately upon being notified of an inadvertent failure to designate, all
8 parties shall treat such information as though properly designated, and shall take any actions
9 necessary to prevent any future unauthorized disclosure, use, or possession.

10 23. **No Waiver of Privilege:** Disclosure (including production) of information after
11 the parties' entry of this Protective Order that a party or nonparty later claims was inadvertent and
12 should not have been disclosed because of a privilege, including, but not limited to, the
13 attorney-client privilege or work product doctrine ("Privileged Information"), shall not constitute
14 a waiver of, or estoppel as to, any claim of attorney-client privilege, attorney work product, or
15 other ground for withholding production as to which the Disclosing or Producing Party would be
16 entitled in this action.

17 24. **Effect of disclosure of Privileged Information:** The Receiving Party hereby
18 agrees to promptly return, sequester, or destroy any Privileged Information disclosed or produced
19 by Disclosing or Producing Party upon request by Disclosing or Producing Party regardless of
20 whether the Receiving Party disputes the designation of Privileged Information. The Receiving
21 Party may sequester (rather than return or destroy) such Privileged Information only if it contends
22 that the information itself is not privileged or otherwise protected and it challenges the privilege
23 designation, in which case it may only sequester the information until the claim of privilege or
24 other protection is resolved. If any party disputes the privilege claim ("Objecting Party"), that
25 Objecting Party shall object in writing by notifying the Producing Party of the dispute and the
26 basis therefore. The parties thereafter shall meet and confer in good faith regarding the disputed
27 claim within seven (7) court days after service of the written objection. In the event that the
28 parties do not resolve their dispute, the Objecting Party may bring a motion for a determination of

1 whether a privilege applies within ten (10) court days of the meet and confer session, but may
2 only contest the asserted privileges on ground other than the inadvertent production of such
3 document(s). In making such a motion, the Objecting Party shall not disclose the content of the
4 document(s) at issue, but may refer to the information contained on the privilege log. Nothing
5 herein shall relieve counsel from abiding by applicable ethical rules regarding inadvertent
6 disclosure and discovery of inadvertently disclosed privileged or otherwise protected material.
7 The failure of any party to provide notice or instructions under this Paragraph shall not constitute
8 a waiver of, or estoppel as to, any claim of attorney-client privilege, attorney work product, or
9 other ground for withholding production as to which the Disclosing or Producing Party would be
10 entitled in this action.

11 **25. Inadvertent Production of Non-Discoverable Documents.** If a Producing Party
12 inadvertently produces a document that contains no discoverable information, the Producing Party
13 may request in writing that the Receiving Party return the document, and the Receiving Party will
14 return the document. A Producing Party may not request the return of a document pursuant to
15 this section if the document contains any discoverable information. If a Producing Party
16 inadvertently fails to redact personal information (e.g., a social security number), the Producing
17 Party may provide the Receiving Party a substitute version of the document that redacts the
18 personal information, and the Receiving Party shall return the original, unredacted document to
19 the Producing Party.

20 **26. Return of Information.** Within thirty (30) calendar days after the final
21 disposition of this action, all Confidential Material and/or Highly Confidential Material produced
22 by an opposing party or nonparty (including, without limitation, any copies, extracts or
23 summaries thereof) as part of discovery in this action shall be destroyed by the parties to whom
24 the Confidential Material and/or Highly Confidential Material was produced, and each counsel
25 shall, by declaration delivered to all counsel for the Producing Party, affirm that all such
26 Confidential Material and/or Highly Confidential Material (including, without limitation, any
27 copies, extracts or summaries thereof) has been destroyed; provided, however, that each counsel
28 shall be entitled to retain pleadings, motions and memoranda in support thereof, declarations or

1 affidavits, deposition transcripts and videotapes, or documents reflecting attorney work product or
2 consultant or expert work product, even if such material contains or refers to Confidential
3 Material and/or Highly Confidential Material, but only to the extent necessary to preserve a
4 litigation file with respect to this action.

5 27. **Attorney's Fees.** Nothing in this Protective Order is intended to either expand or
6 limit a prevailing party's right under the Nevada Rules of Civil Procedure or other applicable state
7 or federal law to pursue costs and attorney's fees incurred related to confidentiality designations
8 or the abuse of the process described herein.

9 28. **Injunctive Relief and Sanctions Available for Unauthorized Disclosure or Use**
10 **of Confidential Information or Highly Confidential Information.** The Parties and/or
11 nonparties shall not utilize any Confidential Information and/or Highly Confidential Information
12 for their own personal and/or business advantage or gain, aside from purpose(s) solely related to
13 the instant litigation. The Parties and nonparties acknowledge and agree that unauthorized use
14 and/or disclosure of Confidential Information and/or Highly Confidential Information beyond this
15 litigation shall subject the offending party or nonparty to sanctions contemplated in
16 NRCP 37(b)(2)(A)-(D), up to and including entry of judgment against the offending party in
17 circumstances involving willful disobedience with this order. Further, the Parties and/or
18 nonparties receiving or being given access to Confidential Information and/or Highly Confidential
19 Information acknowledge that monetary remedies would be inadequate to protect each party in
20 the case of unauthorized disclosure or use of Confidential Information or Highly Confidential
21 Information that the Receiving Party only received through discovery in this action and that
22 injunctive relief would be necessary and appropriate to protect each party's rights in the event
23 there is any such unauthorized disclosure or use of Confidential Information or Highly
24 Confidential Information. The availability of injunctive relief to protect against the unauthorized
25 disclosure or use of Confidential Information or Highly Confidential Information shall not be
26 exclusive.

27 29. **Other Actions and Proceedings.** If a Receiving Party (a) is subpoenaed in
28 another action, investigation, or proceeding, (b) is served with a demand in another action,

1 investigation, or proceeding, or (c) is served with any legal process by one not a party to this
2 Protective Order, seeking materials which were produced or designated as Confidential or Highly
3 Confidential pursuant to this Protective Order, the Receiving Party shall give prompt actual
4 written notice by electronic transmission to counsel of record for such Producing Party within
5 five (5) business days of receipt of such subpoena, demand or legal process, or such shorter notice
6 as may be required to provide other parties with the opportunity to object to the immediate
7 production of the requested discovery materials to the extent permitted by law. The burden of
8 opposing enforcement of the subpoena shall fall upon the party or nonparty who produced or
9 designated the Discovery Material as Confidential or Highly Confidential Information. Unless
10 the party or nonparty who produced or designated the Confidential or Highly Confidential
11 Information obtains an order directing that the subpoena not be complied with, and serves such
12 order upon the Receiving Party prior to production pursuant to the subpoena, the Receiving Party
13 shall be permitted to produce documents responsive to the subpoena on the subpoena response
14 date. Compliance by the Receiving Party with any order directing production pursuant to a
15 subpoena of any Confidential or Highly Confidential Information shall not constitute a violation
16 of this Protective Order. Nothing in this Protective Order shall be construed as authorizing a
17 party to disobey a lawful subpoena issued in another action.

18 30. Execution in Counterparts. This Protective Order may be signed in counterparts,
19 and a fax or "PDF" signature shall have the same force and effect as an original ink signature.

20 31. Order Survives Termination. This Protective Order shall survive the termination
21 of this action, and the Court shall retain jurisdiction to resolve any dispute concerning the use of
22 information disclosed hereunder.

23 DATED this 7th day of February 2013.

24 PISANELLI BICE PLLC

25 By: /s/ James J. Pisanelli
James J. Pisanelli, Esq., Bar # 4027
26 Todd L. Bice, Esq., Bar # 4534
Debra L. Spinelli, Bar # 9695
27 3883 Howard Hughes Parkway, Suite 800
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DATED this 7th day of February, 2013.

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DATED this 7th of day of February, 2013.

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Attorneys for Elaine P. Wynn

ORDER

IT IS SO ORDERED.

DATED: February 13, 2013

Elizabeth Gonzalez
THE HONORABLE ELIZABETH GONZALEZ
DISTRICT COURT JUDGE

EXHIBIT A

CONFIDENTIALITY AGREEMENT

I, _____ do hereby acknowledge and agree, under penalty of perjury, as follows:

1. I have read the Stipulated Confidentiality Agreement and Protective Order ("the Protective Order") entered in *Wynn Resorts, Limited v. Kazuo Okada, et al.*, Eighth Judicial District Court Case No. A-12-656710-B on _____, _____, and I fully understand its contents.

2. I hereby agree and consent to be bound by the terms of the Protective Order and to comply with it in all respects, and to that end, I hereby knowingly and voluntarily submit and subject myself to the personal jurisdiction of the Eighth Judicial District Court of Nevada so that the said court shall have the power and authority to enforce the Protective Order and to impose appropriate sanctions upon me for knowingly violating the Protective Order, including punishment for contempt of court for a knowing violation of the Protective Order.

3. I understand that by signing this instrument, I will be eligible to receive "Confidential Information" and/or "Highly Confidential Information" under the terms and conditions of the Protective Order. I further understand and agree that I must treat any "Confidential Information" and/or "Highly Confidential Information" in accordance with the terms and conditions of the Protective Order, and that, if I should knowingly make a disclosure of any such information in a manner unauthorized by the Protective Order, I will have violated a court order, will be in contempt of court, and will be subject to punishment by the court for such conduct.

DATED: _____

(Signature)

(Printed Name)

(Address)

EXHIBIT 2

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-12-656710

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

(REDACTED)

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D. Boone Wayson, and Allan Zeman*

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;

Paul K. Rowe and Bradley R. Wilson of Wachtell, Lipton, Rosen & Katz;

Robert L. Shapiro of Glaser, Weil, Fink, Howard, Avchen & Shapiro, LLP;

Mitchell J. Langberg of Brownstein Hyatt Farber & Schreck;

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

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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]

[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]

[REDACTED]

During her deposition in February 2017, Ms. Wynn testified that [REDACTED]

[REDACTED]

When asked whether she had shared the substance of the Notes with her attorneys,

Ms. Wynn never testified that [REDACTED]

[REDACTED] In her subsequent declaration, however, Ms. Wynn stated that [REDACTED]

[REDACTED]

During her deposition testimony in February 2017, Ms. Wynn repeatedly testified that [REDACTED]

[REDACTED] In her

subsequent opposition to the motion to compel, however, Ms. Wynn said that [REDACTED]

[REDACTED]

During her deposition in February 2017, Ms. Wynn testified that [REDACTED]

[REDACTED]

[REDACTED], Ms.

Wynn subsequently averred in her declaration that [REDACTED]

[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]

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]

[REDACTED]

[REDACTED] (2 App. 163-64) (Depo. Tr. of Elaine Wynn.) [REDACTED]

[REDACTED]

[REDACTED], (see

1 App. 44 (6ACC ¶ 19)), [REDACTED]

[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]

[REDACTED]. (2 App. 153.) Indeed, Ms. Wynn claimed she [REDACTED]

[REDACTED]. *Id.* [REDACTED]

[REDACTED] (2 App. 155; *see also*

2 App. 162 [REDACTED]

[REDACTED]

Ms. Wynn never testified that [REDACTED]

[REDACTED].

Ms. Wynn did agree [REDACTED]

[REDACTED] (2 App. 155.)

After testifying that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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

[REDACTED]

[REDACTED] (2 App. 157.)

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

Ms. Wynn further testified that [REDACTED]

[REDACTED]

[REDACTED] (2 App. 157-58.) But when given the opportunity to clarify

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[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] [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]

[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]

[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]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[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]

[REDACTED] To the contrary, Ms. Wynn has conceded that [REDACTED]

[REDACTED]

[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]

[REDACTED]

[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]

[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]

[REDACTED]

[REDACTED] She instead testified that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Wynn Parties again questioned Ms. Wynn about the Notes at her October 26 deposition, and Ms. Wynn again confirmed that [REDACTED]

[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]

[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]

[REDACTED]

[REDACTED]

[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]

[REDACTED]

[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.

CAMPBELL & WILLIAMS

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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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AND VIA HAND DELIVERY TO:

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By: /s/ **Lucinda Martinez**
An Employee of Campbell & Williams