

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAWRENCE and HEIDI CANARELLI,
and FRANK MARTIN, Special
Administrator of the Estate of Edward C.
Lubbers, Former Trustees,

Petitioners,

vs.

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

Respondent,

and

SCOTT CANARELLI, Beneficiary of
The Scott Lyle Graves Canarelli
Irrevocable Trust dated February 24,
1998,

Real Party in Interest.

Case No. 78883

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**PETITIONERS' APPENDIX TO
PETITION FOR WRIT OF
PROHIBITION OR MANDAMUS**

(VOLUME 3 OF 5)

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CHRONOLOGICAL TABLE OF CONTENTS

TAB	DOCUMENT	DATE	PAGES
1 (Vol. 1)	Motion for Judgment on the Pleadings and/or Partial Summary Judgment on Petitioner’s First Prayer for Relief	April 25, 2018	1 - 87
2 (Vol. 1)	Petitioner’s Supplemental Petition	May 18, 2018	88 - 136
3 (Vol. 1)	Petitioner’s Motion for Determination of Privilege Designation of RESP013284-013288 and RESP078899-078900	July 13, 2018	137 - 206
4 (Vol. 2)	Respondents’ Opposition to Motion for Determination of Privilege Designation of RESP013284-013288 and RESP078899-078900 and Countermotion for Remediation of Improperly Disclosed Attorney-Client Privileged and Work Product Protected Materials	Aug. 10, 2018	207 - 320
5 (Vol. 2)	Petitioner’s Reply to Opposition to Motion for Determination of Privilege Designation of RESP013284-013288 and RESP078899-078900; and Opposition to Countermotion for Remediation of Improperly Disclosed Attorney-Client	Aug. 24, 2018	321 - 380

	Privileged and Work Product Protected Materials		
6 (Vol. 3)	Hearing Transcript dated August 29, 2018 (Excerpts)	Aug. 29, 2018	381 - 468
7 (Vol. 3)	Order on Respondents' Motion for Judgment on the Pleadings and/or Partial Summary Judgment on Petitioner's First Prayer for Relief	Sept. 21, 2018	469 - 472
8 (Vol. 3)	Stipulation and Order to Seal Documents Previously Filed with the Court	Sept. 26, 2018	473 – 476
9 (Vol. 3)	Discovery Commissioner's Report and Recommendations	Dec. 6, 2018	477 - 489
10 (Vol. 3)	Respondents' Objections, in Part, to Discovery Commissioner's Report and Recommendations on Motion for Determination of Privilege Designation	Dec. 17, 2018	490 - 614
11 (Vol. 4)	Petitioner's Objection to the Discovery Commissioner's Report and Recommendations on (1) the Motion for Determination of Privilege Designation, (2) the Supplemental Briefing on Appreciation Damages	Dec. 17, 2018	615 - 740

12 (Vol. 4)	Opposition to Respondents' Objections, in Part, to Discovery Commissioner's Report and Recommendations on Motion for Determination of Privilege Designation	Jan. 14, 2019	741 - 785
13 (Vol. 4)	Respondents' Opposition to Petitioner's Objection to the Discovery Commissioner's Report and Recommendations on (1) the Motion for Determination of Privilege Designation, (2) the Supplemental Briefing on Appreciation Damages	Jan. 14, 2019	786 - 839
14 (Vol. 5)	Respondents' Reply in Support of Objections, in Part, to Discovery Commissioner's Report and Recommendations on Motion for Determination of Privilege Designation	Mar. 21, 2019	840 - 861
15 (Vol. 5)	Reply in Support of Petitioner's Objection to the Discovery Commissioner's Report and Recommendations on (1) the Motion for Determination of Privilege Designation, (2) the Supplemental Briefing on Appreciation Damages	Mar. 21, 2019	862 - 950

16 (Vol. 5)	Hearing Transcript dated April 11, 2019 (excerpts)	Apr. 11, 2019	951 – 1031
17 (Vol. 5)	Order on the Parties' Objections to the Discovery Commissioner's Report and Recommendation on the Motion for Privilege Designation	May 31, 2019	1032 - 1037

CERTIFICATE OF SERVICE

I certify that I am an employee of Campbell & Williams and that I did, on the 3rd day of June, 2019, serve upon the following in this action a copy of the foregoing **Petitioners' Appendix to Petition for Writ of Prohibition or Mandamus (Volumes 1 - 5)** by United States Mail, postage prepaid:

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By: /s/ **John Y. Chong**
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6

1 **RTRAN**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 IN THE MATTER OF THE TRUST OF:) Case No. P-13-078912-T
7 THE SCOTT LYLE GRAVES CANARELLI)
8 IRREVOCABLE TRUST, DATED) DEPT. XXVI/Probate
9 FEBRUARY 24, 1998)
10)
11)
12)

13
14 BEFORE THE HONORABLE BONNIE BULLA,
15 DISCOVERY COMMISSIONER

16
17 WEDNESDAY, AUGUST 29, 2018

18
19 ***TRANSCRIPT OF PROCEEDINGS RE:***
20 **ALL PENDING MOTIONS AND ADDITIONAL BRIEFING**

21
22 **APPEARANCES:**

23 For the Petitioner: DANA ANN DWIGGINS, ESQ.
24 TESS E. JOHNSON, ESQ.
25 JEFFREY P. LUSZECK, ESQ.

For the Trustee/Respondent(s): JON COLBY WILLIAMS, ESQ.
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RECORDED BY: FRANCESCA HAAK, COURT RECORDER

1 going to have to bear with me through this, because --

2 MS. BRASTER: That's fine, Your Honor.

3 DISCOVERY COMMISSIONER: -- I want to start in a different
4 order.

5 I'm going to start for the Motion for Determination of Privilege
6 Designation. There are two groups of records at issue. The first group
7 is RESP013284 through RESP013288. And the second group of
8 documents is RESP7899 through RESP78900. There are so many
9 issues here. And I don't think that counsel thought through all of the
10 issues. And I can tell you this, because we've spent quite a bit of time
11 looking at it and thinking them through ourselves. I think that my first
12 question for everybody is who's the client in 2012, 2013? Who's the
13 client?

14 MS. DWIGGINS: I could answer that. I have an engagement
15 letter. It is Mr. Lubbers in his capacity as trustee. I assume you're
16 talking of the Lee Hernandez firm?

17 DISCOVERY COMMISSIONER: Do you think Mr. Lubbers is
18 the client?

19 MS. DWIGGINS: Yes, I do. In his capacity as a trustee.

20 DISCOVERY COMMISSIONER: I think it's possible Scott's
21 the client.

22 MS. DWIGGINS: Well, I think the fiduciary exception would
23 apply, which I reference in my brief, which is one of the reasons why I
24 don't think it's privileged.

25 DISCOVERY COMMISSIONER: Well --

1 MS. DWIGGINS: But it's definitely not him individually or him
2 in his capacity as an attorney.

3 DISCOVERY COMMISSIONER: But I think the question is
4 who's the client? And the fiduciary exception has not been determined
5 in Nevada yet. At least by the Nevada Supreme Court. We do however
6 have an exception under NRS 49.115, as to communications relevant to
7 a matter of common interest between their two or more clients that the
8 communication was made by any of them to a lawyer retained or
9 consulted in common when offered an inaction between any of the
10 clients.

11 Here's the conceptual problem that I have, is that in 2012, at
12 the end of 2012 or 2013, before the petition is filed, and petition primarily
13 is one of accounting initially, I don't think there's any question on that,
14 although I think Mr. Lubbers probably, being a lawyer, was sophisticated
15 enough to know that depending on how this played out, he could have
16 some exposure. I don't think there's any question as to the concern that
17 we may be headed into litigation.

18 The problem is the petition itself -- the petition itself is for an
19 accounting of which Scott and his trusts are the beneficiary as well as
20 the other siblings. But Mr. Lubbers is the trustee at that point. So the
21 actions that he is taking are for the benefit of the trust.

22 With respect to the exception, the trustee exception, again,
23 Nevada has not ruled on this, although there is a 2012 unpublished
24 decision which would suggest that there would be circumstances in
25 which the trustee could hire an attorney and the communication be the

1 attorney and the trustee would be privileged and then there are other
2 circumstances where it would not be.

3 And I think the question is for whose benefit is the trustee
4 acting?

5 So when I looked at the -- this very complex issue about these
6 documents, the first issue I really addressed was is there an exception to
7 the attorney/client privilege? And we have two areas of privilege. We
8 have attorney/client and work product. So taking the attorney/client first,
9 is there an exception possibly to that privilege? And I think under our
10 statute as it's written, as well as the unpublished decision, which is
11 *Marshall vs. Eighth Judicial District Court*, and the Westlaw cite is 2012
12 Westlaw 236635 --

13 MS. DWIGGINS: I'm sorry, could you say that -- 23 --

14 DISCOVERY COMMISSIONER: 236635. Now, it's
15 unpublished, it's an early decision, so technically it has no business
16 being cited. So you all didn't do anything wrong by not citing it. In fact,
17 you did it right. But having said that, it does give you some insight into
18 what the supreme court might do on this.

19 The supreme court cited a New York case that recognized the
20 trustee exception. So I think that one of the issues I had looking at this
21 was, early on, you know, what -- what was the purpose of the initial
22 petition for accounting, who was that going to benefit? It wasn't just the
23 trustee, it was the beneficiaries.

24 So there is an argument, I think, that the trustee exception
25 applies, at least in 2012, 2013. And the only reason I say that -- that --

1 give those timeframes is that's when the documents are created, I
2 believe.

3 MS. DWIGGINS: And that was the only relief requested was
4 for an accounting and just an appraisal pursuant to the agreement.

5 DISCOVERY COMMISSIONER: Right. And I don't think, you
6 know, I think if Mr. Lubbers were here, I think he would probably agree
7 with that, that that was for the benefit of the -- of the trust and yet I would
8 also think that he would probably say, Yeah, I was concerned that a
9 petition was filed. Because now I know I've got a potential issue with
10 this particular trust.

11 But you know what, when you're a trustee, you have to accept
12 that. There are challenges in being a trustee. And one of them is when
13 the beneficiary says, Hey, I want an accounting. That doesn't
14 automatically put the trustee and the beneficiary in an adversarial
15 relationship. I guess that is the best way to say it.

16 But having said that, all of that, the documents that I reviewed
17 were Mr. Lubbers' documents. And Mr. Lubbers may be the client,
18 along with the beneficiary, potentially, if there's a -- an exception. But
19 the documents at least that I reviewed were his notes. And they came in
20 both handwritten notes and typewritten notes. And I don't think there's
21 any disagreement on that. They're -- they're his notes.

22 So Ms. Dwiggins raises an interesting issue, which is there's
23 no indication that they were actually sent to the lawyer, or were they
24 prepared contemporaneously with the phone call with the lawyer, were
25 they in preparation of the phone call with the lawyer to address the

1 petition? We don't know. I think they were probably contemporaneous
2 or at least perhaps prepared immediately following the call and some of
3 them may have been prepared in advance of the call to -- to set forth the
4 areas that Mr. Lubbers wanted to discuss with his initial lawyer, which I
5 believe was Mr. Lee?

6 MR. WILLIAMS: Correct.

7 DISCOVERY COMMISSIONER: Okay.

8 MS. DWIGGINS: Well, there's also no indication as to
9 whether or not, at least on the typed memo, all or any portion of it was
10 actually discussed during that call.

11 DISCOVERY COMMISSIONER: Well, and if the privilege is
12 intact, we'll never know, because it's going to be a privileged
13 conversation.

14 MR. WILLIAMS: Well, and Your Honor, that's my point. We
15 see throughout -- and I have a lot to say in response to what you've said.
16 But I'm listening to you, because it's important to get your views. But
17 one of the recurrent themes throughout this is that, well, Attorney Lee
18 didn't say this, Attorney Renwick didn't say that. You know, they didn't
19 say XYZ or ABC.

20 But, Your Honor, I don't have to disclose privileged
21 communications in order to uphold the underlying --

22 DISCOVERY COMMISSIONER: I -- I agree with you.

23 MR. WILLIAMS: -- protection of the documents. So I can't
24 have Mr. Lee come in and say, Ed Lubbers told me these five things.
25 Because then that would be a waiver. Or I couldn't take these notes to

1 Mr. Lee and say, Review these notes, tell me if you talked to Ed about
2 these, because then what would we hear? I refreshed his recollection or
3 I've made testimonial use of those notes.

4 So I can't -- I can only use the lawyers to give you general
5 descriptions of what was discussed.

6 DISCOVERY COMMISSIONER: Unless there's a trustee
7 exception, in which case the beneficiaries can talk with the lawyers. I
8 mean, that's -- that's one of the issues that nobody really talked about --
9 well, I know Ms. Dwiggins raised it. But I don't think it was really
10 addressed all that thoroughly, and this is just --

11 MS. DWIGGINS: Well, I --

12 DISCOVERY COMMISSIONER: -- Commissioner Bulla's
13 impression.

14 MR. WILLIAMS: Your Honor, most respectfully, the words
15 fiduciary exception to peers in their reply brief, but they -- and this is a
16 new -- this was never argued by the petitioner that they were entitled to
17 these notes because of fiduciary exception. So if I might, Your Honor, I
18 just --

19 DISCOVERY COMMISSIONER: Yeah, well --

20 MR. WILLIAMS: Get a few things out.

21 DISCOVERY COMMISSIONER: -- because this is one of the
22 issues that I think you do have to address.

23 MR. WILLIAMS: Well --

24 DISCOVERY COMMISSIONER: I mean, this is an issue
25 and -- and it's one if commissioner Bulla's going to make a ruling, she's

1 going to address. And -- and, frankly, if the decision is not met with your
2 approval, there are higher courts that you can address it with, which I am
3 happy to have some guidance on this.

4 MR. WILLIAMS: Sure.

5 DISCOVERY COMMISSIONER: But quite candidly, that is
6 one concern. But it is a very small concern in the big picture of what we
7 need to talk about today.

8 There is no question in my mind, moving on for the moment,
9 that Mr. Lubbers was acting as the lawyer. He was not. He was acting
10 as the trustee. I know that there is an issue on whether or not some of
11 the notes actually contained his opinions or thought processes. I'm not
12 saying they didn't, but he wasn't analyzing it from the perspective of
13 being a lawyer.

14 MR. WILLIAMS: But, Your Honor --

15 DISCOVERY COMMISSIONER: If anything, he was
16 analyzing it maybe from the perspective of being a client. Is he a lawyer
17 or was he a lawyer? Yes. He had both hats. But he was not acting --
18 he was not giving himself legal advice. Which is why he retained an
19 attorney.

20 MR. WILLIAMS: Correct, Your Honor. But the law is clear
21 that work product isn't only generated by attorneys or at the direction of
22 an attorney. Parties can generate work product.

23 DISCOVERY COMMISSIONER: I'm not talking about work
24 product right now.

25 MR. WILLIAMS: But you talked about mental impressions and

1 opinions, which is work product.

2 DISCOVERY COMMISSIONER: Right. I understand that.
3 But I just -- I -- you're right. But I want to try to get -- see, there's been
4 two privileges asserted, attorney/client. And yes, to the extent that --
5 that unless the trustee exception applies to the extent that Mr. Lubbers
6 had conversations with Mr. Lee as his attorney, unless the trustee
7 exception applies, then they would be privileged.

8 MS. DWIGGINS: Well, that's the key word, whether or not
9 those communications took place. And --

10 DISCOVERY COMMISSIONER: Well, clearly, Ms. Dwiggins,
11 communications took place. They produced --

12 MS. DWIGGINS: Well --

13 DISCOVERY COMMISSIONER: What was discussed, we will
14 not know. And the whole point of the privilege is that we will not know.
15 But that's not -- I don't really care about that. Okay? Because we don't
16 know what was discussed and that's not really the issue.

17 The bigger issue we have on the two sets of documents that
18 were "inadvertently produced" is, number one, was the clawback
19 provision timely utilized, and number two, if the documents do not fall
20 within the attorney/client privilege, and again, Mr. Lubbers and -- and
21 why I say this --

22 And -- I'm sorry, Mr. Williams, sometimes I get going and I
23 don't --

24 MR. WILLIAMS: It's okay.

25 DISCOVERY COMMISSIONER: -- I need to just kind of

1 maybe stop, but this was my thought process, is he's not acting as the
2 lawyer. These are not attorney/client documents he has created. Now,
3 he can create a document as the client and send it to the lawyer, but I
4 have no evidence that that happened here. And I think really if -- if these
5 documents are protected by anything, it's work product. That's what
6 they would be protected by.

7 MS. DWIGGINS: And they only asserted opinion work
8 product.

9 DISCOVERY COMMISSIONER: Right.

10 MR. WILLIAMS: Wait a second --

11 DISCOVERY COMMISSIONER: Okay. But -- but wait a
12 minute --

13 MR. WILLIAMS: I didn't --

14 DISCOVERY COMMISSIONER: And the opinion work
15 product --

16 MR. WILLIAMS: That doesn't make any sense.

17 DISCOVERY COMMISSIONER: -- there's fact work product
18 and opinion work product. If you want to know the difference --

19 MS. DWIGGINS: And, well, that's --

20 DISCOVERY COMMISSIONER: -- Magistrate Ling [phonetic]
21 did a pretty good job of talking about that, if you really want to know the
22 difference. I'm not sure it's all that critical here.

23 But again, for it to be opinion work product, he would have to
24 be the lawyer in the relationship. He's not, he's the trustee.

25 MR. WILLIAMS: Your Honor, I most respectfully disagree with

1 that.

2 DISCOVERY COMMISSIONER: I know you do. But --

3 MR. WILLIAMS: Most -- most respectfully. I mean, the -- the
4 case law is clear that parties can create work product. The lawyer does
5 not have to be involved. I've cited you --

6 DISCOVERY COMMISSIONER: Oh, no. No.

7 MR. WILLIAMS: Okay.

8 DISCOVERY COMMISSIONER: I agree with that.

9 MR. WILLIAMS: And so --

10 DISCOVERY COMMISSIONER: No, I'm getting back --

11 MR. WILLIAMS: So now you're talking about opinions?

12 DISCOVERY COMMISSIONER: Right. I --

13 MR. WILLIAMS: So -- and that's part of --

14 DISCOVERY COMMISSIONER: He's not -- he's --

15 MR. WILLIAMS: -- the work product analysis, Your Honor.
16 None of the cases that say that work product can be created by the
17 party --

18 DISCOVERY COMMISSIONER: I understand that --

19 MR. WILLIAMS: -- none of them say --

20 DISCOVERY COMMISSIONER: -- it can. I'm so sorry. I'm
21 just taking this one step at a time.

22 MR. WILLIAMS: Right.

23 DISCOVERY COMMISSIONER: I'm not protecting the work
24 product because he was the lawyer giving opinions. Okay. He's not the
25 lawyer. He's the client.

1 MR. WILLIAMS: Understood.

2 DISCOVERY COMMISSIONER: Can he create work

3 product? Yes.

4 MR. WILLIAMS: Okay.

5 DISCOVERY COMMISSIONER: He can.

6 MR. WILLIAMS: Understood.

7 DISCOVERY COMMISSIONER: I understand that.

8 MR. WILLIAMS: Okay.

9 DISCOVERY COMMISSIONER: I'm just taking this one level

10 at a time. The first level is, is it work product by a lawyer? No. He's the

11 trustee.

12 MR. WILLIAMS: Okay.

13 DISCOVERY COMMISSIONER: He wears two hats. He has

14 a lawyer hat, he has a trustee hat. Which hat is he wearing here? He's

15 wearing the trustee hat. So it's not work product by a lawyer.

16 Can it be work product by the client? Yes. Sure. Can it be

17 work product by a third party? Sure.

18 MR. WILLIAMS: Understood. That makes sense, Your

19 Honor.

20 DISCOVERY COMMISSIONER: I absolutely understand that.

21 I may not be articulating it very well, but I do understand it.

22 So now we're in the realm of work product by a client. Did he

23 have opinions contained within this information? And what I'd like to do

24 now, I've got to break this up into groups. I'm going to take Group 78899

25 through 78900 first.

1 MS. DWIGGINS: Your Honor, before you do, I guess I just
2 want to clarify. Because my understanding is opinion work product only
3 applies to opinions by an attorney.

4 DISCOVERY COMMISSIONER: Well, now, that is why -- I --

5 MS. DWIGGINS: Because there are mental impressions,
6 opinions, and -- hold on, let me get the other language -- by an attorney.
7 Let me find the language, sorry.

8 DISCOVERY COMMISSIONER: I uphold my case, if I can
9 find it.

10 MS. DWIGGINS: I don't know why I -- just give me a moment,
11 because I have way too many tags here.

12 DISCOVERY COMMISSIONER: It can be a representative --

13 MS. DWIGGINS: There -- mental impression, collusions,
14 opinions, or legal theories of an attorney --

15 DISCOVERY COMMISSIONER: It can be representative.

16 MS. DWIGGINS: -- or other representative of a party.

17 MR. WILLIAMS: Right.

18 DISCOVERY COMMISSIONER: Yeah. It can --

19 MS. DWIGGINS: Okay. Well, then that -- wouldn't that by
20 definition mean someone other than Lubbers? Not the client.

21 DISCOVERY COMMISSIONER: Oral representative
22 concerning litigation.

23 MS. DWIGGINS: To me that means someone other than
24 Lubbers.

25 DISCOVERY COMMISSIONER: Well, what if the client --

1 they're the lawyer, said to Mr. Lubbers, Put your analysis down on paper
2 for me.

3 MR. WILLIAMS: Right. Your Honor, I mean -- and again,
4 we're jumping around. And I -- I -- this is complicated stuff.

5 DISCOVERY COMMISSIONER: It is.

6 MR. WILLIAMS: And let me be the first to tell you I know we
7 put too much paper in front of you. But they raised a number of
8 arguments with respect to waiver and everything else I'm sure we'll talk
9 about that we had to address. So I apologize for the length of the
10 briefing.

11 But -- but it's absolutely our position that a party can create
12 opinion work product. We see here that the repeated refrain that --
13 with -- Mr. Lubbers was sitting in a deposition, I could ask him about all
14 this.

15 DISCOVERY COMMISSIONER: Okay.

16 MR. WILLIAMS: Most respectfully, if I were defending that
17 deposition and the questioner asked, Mr. Lubbers, tell us what you think
18 the strengths of your -- of your case are, tell us what you think the
19 weaknesses are, I would be objecting and instructing not to answer
20 based on his views.

21 Now, maybe I've practiced in a different realm for 25 years
22 and I've had that wrong. But I'm not aware of any court that require
23 Mr. Lubbers to answer that question if he were still here, or if that same
24 type of question was posed to Mr. Canarelli. Those are the mental
25 impressions of a client or the opinions of a client about the litigation.

1 And that's what, most respectfully, I submit are contained in the notes.

2 And that raises a concern for me. I don't know where we're
3 going to go here, but I just, before we do, want to put on the record I
4 don't think it's appropriate for a public hearing where the transcripts
5 arguably are going to be public, to be talking about the contents of the
6 notes that we contend are privileged or work product protected. I think
7 that just exacerbates --

8 DISCOVERY COMMISSIONER: I can't seal this hearing and I
9 won't. So if you want the hearing sealed, you'll have to ask the district
10 court judge to do that.

11 MR. WILLIAMS: Your Honor, most respectfully, I'm not asking
12 you to seal the hearing. What I'm asking everyone to do is as we go
13 through this, to exercise discretion, and when they talk about the notes,
14 in other words, for example, if we wanted to talk about the typewritten
15 notes, as they've been referred, the way I would handle it, Your Honor,
16 would be to say let's look at the first three lines, you know, without
17 reading them into the record. Because we're just --

18 DISCOVERY COMMISSIONER: It wasn't my plan to read
19 them into the record.

20 MR. WILLIAMS: And I didn't know that -- I didn't know where
21 the Court's going. I just wanted that to be on the record before any of us
22 went anywhere. I'm not saying the Court was going to, but I just wanted
23 to make that clear.

24 DISCOVERY COMMISSIONER: I appreciate that.

25 MS. DWIGGINS: Your Honor, I guess let's avoid the elephant

1 in the room. We obviously are all concerned about one portion. This all
2 boils down to one portion of that typed memo.

3 MR. WILLIAMS: Most respectfully it doesn't, Your Honor.
4 That's my point. Because --

5 DISCOVERY COMMISSIONER: Well, I don't know if I saw it
6 that way. Now, you all might see it that way, because you're litigating --

7 MR. WILLIAMS: I don't.

8 DISCOVERY COMMISSIONER: -- the cases. I looked at it. I
9 think the *Kotter* case that the supreme court recently came down with,
10 suggests that they want the in camera review done --

11 MS. DWIGGINS: Uh-huh.

12 DISCOVERY COMMISSIONER: -- to determine whether or
13 not it, you know, it is a document that -- that should be made privileged.
14 So that's what I did --

15 MR. WILLIAMS: Your Honor, absolutely.

16 DISCOVERY COMMISSIONER: -- even though
17 unfortunately, a lot of this documentation is already in the public record.

18 MR. WILLIAMS: Right.

19 DISCOVERY COMMISSIONER: And, you know, I feel like
20 we're jumping around and I really wanted to try to do this in a reasonable
21 order. So if you can just bear with me --

22 MR. WILLIAMS: I will.

23 DISCOVERY COMMISSIONER: -- let me try to at least give
24 you some direction of where I'm going. And then I'll let you argue your
25 position.

1 MR. WILLIAMS: Fair enough, Your Honor. Thank you.

2 DISCOVERY COMMISSIONER: Okay. So let me just start
3 quickly with the document range that I wanted to, 78899-78900. Let me
4 tell you what bothers me about this particular production is it didn't have
5 Bates labels on the production. This is the one, right? There were two
6 pages without Bates labels.

7 MR. WILLIAMS: You're talking about Exhibit 2 to the motion,
8 right?

9 MS. DWIGGINS: Is that the Nicolatus meeting?

10 MR. WILLIAMS: These are what Petitioners call the Nicolatus
11 notes. They have a date, I think I can say this without a problem,
12 of 12/19/2013.

13 MS. DWIGGINS: And these, just to put them in context, were
14 part of a --

15 DISCOVERY COMMISSIONER: Correct.

16 MS. DWIGGINS: -- 48-page document.

17 DISCOVERY COMMISSIONER: Right.

18 MS. DWIGGINS: You're right, they weren't Bate labeled. I
19 actually brought them to their attention.

20 DISCOVERY COMMISSIONER: When?

21 MS. DWIGGINS: May 3rd or -- no, I don't --

22 MR. WILLIAMS: Your Honor, I -- I can --

23 MS. DWIGGINS: I brought them to their attention, because, to
24 be quite candid, I thought they might have been Mr. Williams' notes.

25 DISCOVERY COMMISSIONER: Whose notes?

1 Mr. Williams'?

2 MS. DWIGGINS: Mr. Williams', which apparently they were.

3 DISCOVERY COMMISSIONER: They're his notes?

4 MS. DWIGGINS: Yes.

5 MR. WILLIAMS: These are Mr. Lubbers'.

6 MS. DWIGGINS: Yes, these are. But there was a
7 combination of 48 pages of one document.

8 DISCOVERY COMMISSIONER: Okay.

9 MS. DWIGGINS: On the first part of it, I believe they might
10 have been Mr. Williams'. So when I saw them, I brought them -- I
11 actually called them or sent an e-mail asking if they were available, if
12 they were near a computer that they could pull them up, so they're -- I
13 wasn't transmitting them and creating another copy. And as soon as
14 Mr. Williams pulled them up and they were on the phone, he said, Those
15 are my notes.

16 MR. WILLIAMS: Exactly.

17 MS. DWIGGINS: And we went --

18 DISCOVERY COMMISSIONER: Okay. So we clawed back
19 that part of the production, correct?

20 MS. DWIGGINS: Which was actually --

21 DISCOVERY COMMISSIONER: Everybody agreed to.

22 MS. DWIGGINS: -- all but it was, I think, what, 46 of the 48
23 pages? Because there was Hunter Williams notes at his office, and I
24 think somebody else's. I -- I agreed without a question that Mr. Williams'
25 notes --

1 DISCOVERY COMMISSIONER: Okay. So this part of the
2 production, though, was -- these two pages were actually part of that
3 production as well.

4 MS. DWIGGINS: Correct. And we --

5 DISCOVERY COMMISSIONER: Did you see those two
6 pages at that time? Did you bring to Mr. Williams' attention, hey, there's
7 two pages without Bates labels here?

8 MS. DWIGGINS: We went through the entire 48 pages
9 together on the phone and I -- I honestly --

10 DISCOVERY COMMISSIONER: Including --

11 MS. DWIGGINS: Yes.

12 DISCOVERY COMMISSIONER: -- 899 and 900?

13 MS. DWIGGINS: Yes. And I can't remember, and you can
14 refresh -- they were both on the phone -- whether or not they had to
15 double check as to whether or not those were Mr. Lubbers' handwriting
16 or whether they said they were. I know there was some writing on
17 something that they had to confirm.

18 MR. WILLIAMS: Right. Your Honor, this is -- and I'm glad
19 we're talking about these. This is, respectfully, the way that the process
20 should work. The example that you're talking about, these two notes --
21 these two pages of notes. Because Ms. Dwiggins is exactly right. On
22 June 14th, she called my office and asked if I could get by a computer
23 because she believed that there may have been documents
24 inadvertently produced that contained attorney/client privilege -- or either
25 work product or attorney/client privilege, whatever -- notes.

1 And so I got on the phone with Mr. Erwin and Ms. Dwiggins,
2 and I don't know if Ms. Johnson was on the phone --

3 DISCOVERY COMMISSIONER: But what raised her
4 suspicion weren't these two pages, they were pages around it.

5 MR. WILLIAMS: Correct.

6 DISCOVERY COMMISSIONER: I'm not faulting her for not
7 calling you on these two pages.

8 MR. WILLIAMS: I'm not either. I'm not either.

9 DISCOVERY COMMISSIONER: Okay.

10 MR. WILLIAMS: No, no. I'm --

11 DISCOVERY COMMISSIONER: I'm faulting you all for
12 producing them --

13 MR. WILLIAMS: No, no, no. Your Honor --

14 DISCOVERY COMMISSIONER: -- if you really thought it was
15 privilege.

16 MR. WILLIAMS: I'm not -- I'm not faulting Ms. Dwiggins for
17 these two pages of notes either. In fact, I -- that's why I say in the
18 papers this I how it was supposed to work. She under the ESI protocol,
19 but more importantly, Rule 4.4(b), she saw something that looked
20 potentially protected. She called me. She gave me notice that it looked
21 like there's something that was inadvertently produced and then we
22 worked, Your Honor, most respectfully, let me just walk through it.
23 There were 48 pages, give or take, in this packet. We went through
24 them. We then clawed them back under the ESI protocol. She had --
25 she agreed with certain items that were clawed back, she disagreed with

1 others. We had further discussions about them in exchange for further
2 letters.

3 So of the universe of 48 documents in the packet, we got the
4 dispute down to these two pages with respect to her contention that
5 they're not protected and my contention that there is. It's exactly the
6 way that it should have worked with the other set of notes.

7 But -- but talking about these, I'm not faulting her at all.

8 DISCOVERY COMMISSIONER: But how could you fault her
9 for the other set of notes? What about those would have stood out to
10 her to call you?

11 MR. WILLIAMS: The typed notes?

12 DISCOVERY COMMISSIONER: Yeah.

13 MS. DWIGGINS: Your Honor had already ruled the --

14 DISCOVERY COMMISSIONER: I mean, there is a --

15 MS. DWIGGINS: -- fiduciary exception applied.

16 DISCOVERY COMMISSIONER: Huge production.

17 MS. DWIGGINS: They had clawed back documents twice
18 prior to that time. One of them was with -- 100 pages. I would assume
19 after the second clawback, or even in connection with the second
20 clawback, they did a thorough review. And as this court already had
21 applied the fiduciary exception, I had no reason to believe they were
22 privileged. He was our trustee at the time.

23 DISCOVERY COMMISSIONER: Which court applied that the
24 fiduciary exception?

25 MS. DWIGGINS: It was in the context of Mr. Gerety, sorry.

1 But we had already -- you.

2 MR. WILLIAMS: Your Honor, again --

3 DISCOVERY COMMISSIONER: Me?

4 MR. WILLIAMS: -- I just want to --

5 MS. DWIGGINS: Yeah. In connection with --

6 DISCOVERY COMMISSIONER: I don't remember looking at
7 it before, so that's a problem.

8 MS. DWIGGINS: It was in connection with Lubbers' retention
9 of Gerety and I was seeking his communications with Gerety.

10 DISCOVERY COMMISSIONER: Right.

11 MR. WILLIAMS: Your Honor, nowhere in the moving papers
12 or in the reply papers has Petitioner ever argued -- ever -- that the notes
13 are subject to production because they're encompassed within a
14 fiduciary exception to the attorney/client privilege. That's never been
15 argued. The fact that you raised it, Petitioner's now trying to capitalize
16 on it as if that was --

17 MS. DWIGGINS: It is in my reply brief.

18 MR. WILLIAMS: -- was in --

19 DISCOVERY COMMISSIONER: So it is --

20 MR. WILLIAMS: -- their mind with respect --

21 DISCOVERY COMMISSIONER: -- imperative on the lawyers
22 to raise to the Court law, the legal issues, whether --

23 MR. WILLIAMS: Right. And had --

24 DISCOVERY COMMISSIONER: -- they may or may not be --

25 MR. WILLIAMS: Had that --

1 DISCOVERY COMMISSIONER: And this is a critical issue in
2 this case.

3 MR. WILLIAMS: Had that been raised in the motion, Your
4 Honor, I would have addressed it in the opposition, but it wasn't. And if
5 they're going to point to somewhere in the reply where it's mentioned --
6 because it is mentioned, but not in this context --

7 DISCOVERY COMMISSIONER: The commissioner is now
8 raising it as an issue. Do you want to have time to supplement on it?
9 Because I do think it's an issue in this case that may end up going all the
10 way up.

11 MR. WILLIAMS: I -- I --

12 DISCOVERY COMMISSIONER: Because it is critical to the
13 analysis and the determination of whether -- you know, we've got so
14 many issues with these documents. That is one. That is --

15 MR. WILLIAMS: Right.

16 DISCOVERY COMMISSIONER: -- the start. But there are
17 more issues. Let me tell you what I'm concerned about with 889
18 and 900.

19 MR. WILLIAMS: Okay.

20 DISCOVERY COMMISSIONER: These are -- appear to me,
21 without giving too much information out, I'm not reading them into the
22 record, but that they do document a telephone call. I think we can say
23 that.

24 MS. DWIGGINS: I think that was -- every December -- I'm
25 sorry, the Nicolatus notes that we --

1 DISCOVERY COMMISSIONER: That -- okay.

2 MS. DWIGGINS: -- refer to those.

3 DISCOVERY COMMISSIONER: So let's talk about it.

4 Nicolatus.

5 MS. DWIGGINS: That was the meeting.

6 DISCOVERY COMMISSIONER: The fact that he participated,

7 as I understand it in the phone call, can we say that?

8 MS. DWIGGINS: It was --

9 MR. WILLIAMS: It's a meeting.

10 MS. DWIGGINS: It was a meeting.

11 MR. WILLIAMS: It's a meeting, Your Honor.

12 DISCOVERY COMMISSIONER: A meeting? Yeah. I -- I

13 think that waives any type of attorney/client privilege and --

14 MR. WILLIAMS: I'm --

15 DISCOVERY COMMISSIONER: -- okay. I think it waives it.

16 Because there should have been no expectation with an independent

17 appraiser present that you were going to be able to protect that

18 conversation.

19 Now, the work product issue of -- okay. So let's go one at a

20 time.

21 MR. WILLIAMS: Right.

22 MS. DWIGGINS: Well, Mr. --

23 DISCOVERY COMMISSIONER: Attorney/client, no. Work

24 product. Then we get back to the same situation that we kind of left off a

25 few minutes ago, which is the difference, I guess, between fact and

1 opinion. I think there is an argument that both are present, but the
2 opinions that he is giving is not as a lawyer. It is as the trustee.

3 Now, work product. Can you waive it? If you disclose it, is it
4 waived?

5 MR. WILLIAMS: Only if it's to your adversary. Not if it's to a
6 third party.

7 DISCOVERY COMMISSIONER: Right. That's the *Kotter*
8 case.

9 MR. WILLIAMS: Correct.

10 DISCOVERY COMMISSIONER: That's the new case where
11 they explain you can waive attorney/client, but not work product.

12 But work product is what? What kind of privilege is work
13 product? I feel like I'm running a Jeopardy! game. What kind of
14 privilege is work product? Absolute?

15 MS. DWIGGINS: No.

16 DISCOVERY COMMISSIONER: Qualified? Qualified
17 privilege. So what's the test?

18 MR. WILLIAMS: Well, the distinction is --

19 MS. DWIGGINS: Substantial need under ordinary and
20 extraordinary under --

21 DISCOVERY COMMISSIONER: Circumstance.

22 MS. DWIGGINS: -- under opinion.

23 MR. WILLIAMS: Your Honor, my understanding is if work
24 product applies, it applies. Okay. Rule 26(b)(3). Now, if it's ordinary
25 work product or fact work product, as it's been referred to, then you can

1 get it with substantial need.

2 DISCOVERY COMMISSIONER: Do you think our statute's
3 delineated?

4 MR. WILLIAMS: 26 -- NRCP 26(b)(3).

5 DISCOVERY COMMISSIONER: Well, let's take a look.

6 MR. WILLIAMS: Let's do it.

7 DISCOVERY COMMISSIONER: There -- it talks about it in
8 context of both expert and nonexpert. So I think we have to look at the
9 nonexpert one.

10 MR. WILLIAMS: Right. That's the first one, I think, Your
11 Honor.

12 DISCOVERY COMMISSIONER: Uh-huh.

13 MR. WILLIAMS: The way it's numbered is a little complicated
14 to find sometimes.

15 DISCOVERY COMMISSIONER: It always is complicated, I
16 know.

17 So I think we're looking at 26(a) -- I'm sorry, 26(b)(3)?

18 MR. WILLIAMS: Right.

19 DISCOVERY COMMISSIONER: Trial preparation? And --
20 trying to think of how much of this I can actually stand to read into the
21 record.

22 Subject to the provisions of Subdivision (b)(4) of the rule, a
23 party may obtain discovery of documents and tangible things
24 otherwise discoverable under Subdivision (b)(1) of this rule and
25 prepared in anticipation of litigation or for trial by or for another party

1 or by or for that other party's representative, including the other
2 party's attorney, consultant, surety indemnity, insurer, or agent.
3 Only upon a showing that the party seeking discovery has
4 substantial need of the materials in the preparation of the party's
5 case and that the party is unable without undue hardship to obtain
6 the substantial equivalent of the materials by other means. Okay.
7 So before April --

8 MR. WILLIAMS: Now, Your Honor -- but keep -- but keep
9 reading the next sentence, because that's the distinction between what
10 you just read, it relates to ordinary work product and then --

11 DISCOVERY COMMISSIONER: In ordering discovery of
12 such materials when required showing has been made, the Court
13 shall protect against the disclosure of the mental impressions,
14 conclusions, opinions, or legal theory of an attorney or other
15 representative of a party concerning the litigation.

16 MR. WILLIAMS: Correct.

17 DISCOVERY COMMISSIONER: But it doesn't say a party.
18 And I -- maybe that's what we need the briefing on.

19 MS. DWIGGINS: Well, and I think the whole preface before
20 that, Your Honor, is it be in anticipation of litigation, which I don't believe
21 it was. And, I mean, that's part of my argument I -- I want to walk
22 through as far as whether or not there was anticipation of litigation
23 against Lubbers.

24 DISCOVERY COMMISSIONER: Well, I agree that that is an
25 issue, because as I started this discussion, started the discussion by

1 talking about the trustee exception. Because the initial petition was only
2 for accounting.

3 MR. WILLIAMS: Right, Your Honor. But whether litigation is
4 adversarial for purposes of anticipating it under the work product
5 doctrine, is not tied to whether a claim is asserted against the other
6 party. They haven't cited you one case for that.

7 DISCOVERY COMMISSIONER: Well, that's why it's
8 anticipation.

9 MR. WILLIAMS: It's anticipation, right. Now --

10 DISCOVERY COMMISSIONER: Okay. So I buy your
11 position on this. Okay?

12 MR. WILLIAMS: Okay.

13 DISCOVERY COMMISSIONER: I'm going to buy your
14 position that Mr. Lubbers was concerned and felt that there would be the
15 need of potential litigation. Here's my problem.

16 MR. WILLIAMS: Okay.

17 DISCOVERY COMMISSIONER: And independent of how you
18 might characterize these notes, upon my in camera review, I felt that
19 there was mostly factual information there, and discussion of that
20 information, and while before April, we might have had a different
21 remedy by taking Mr. Lubbers' deposition, that is no longer an option,
22 sadly enough.

23 So the only thing we have to go on terms of what his -- if you
24 consider it to be his work product or opinion, is his notes. And then on
25 top of that, I have this issue of waiting six months to claw them back,

1 and there is an issue in Federal Court and there are a couple of cases
2 that talk about once you get these documentation in the public eye, or
3 in -- or attached to some sort of a dispositive type motion, which
4 arguably they are, that motion's pending in front of the judge, then they
5 become presumptively public.

6 MR. WILLIAMS: No, Your Honor. I think -- I understand what
7 you're talking about. If I were to file a dispositive motion, a Motion for
8 Summary Judgment, for example, and --

9 DISCOVERY COMMISSIONER: But you're not in that
10 situation.

11 MR. WILLIAMS: No, I'm not.

12 DISCOVERY COMMISSIONER: You're with petitions and --
13 and --

14 MR. WILLIAMS: Exactly.

15 DISCOVERY COMMISSIONER: -- and I understand that.

16 MR. WILLIAMS: And I didn't do it. They filed it as part of their
17 petition seeking to expand their claims. I didn't attach them as part of
18 my motion to have that dismissed.

19 DISCOVERY COMMISSIONER: But it's -- see, the problem is
20 it's any -- it's any side bringing it. And the --

21 MR. WILLIAMS: No.

22 DISCOVERY COMMISSIONER: -- petition is -- I -- I disagree
23 with you.

24 MR. WILLIAMS: Okay.

25 DISCOVERY COMMISSIONER: -- because the problem is

1 that the documents were out there. That's why you have to claw back
2 quickly and you have to have procedures in place. Once you do a huge
3 document production, you go back through. Once they had a telephone
4 call with you and some of the documents in this range were privileged,
5 did you look again? Did you assert a privilege? It wasn't until they
6 actually filed the petition with the attachment of the documents that the
7 red flag went up. I think that might be too late. Six months later from the
8 initial production.

9 MS. DWIGGINS: And they waited --

10 DISCOVERY COMMISSIONER: Don't shake your head at
11 me.

12 MR. WILLIAMS: I'm -- I don't know if you're talking to me. I
13 was --

14 DISCOVERY COMMISSIONER: No, I'm not.

15 MR. WILLIAMS: I was -- okay. Your Honor, so --

16 DISCOVERY COMMISSIONER: Be respectful to the Court,
17 please.

18 MR. WILLIAMS: Just for chronological purposes, the -- the
19 notes that we were just talking about .the two pages of handwritten
20 notes where Ms. Dwiggins called me in June, that occurs after the filing
21 of the petition, dealing with the typewritten notes. That occurs on
22 May 18th.

23 DISCOVERY COMMISSIONER: Which is even more
24 problematic, because you didn't move to object to them.

25 MR. WILLIAMS: No, no. Your Honor -

1 MS. DWIGGINS: They waited --
2 MR. WILLIAMS: Okay.
3 MS. DWIGGINS: -- three --
4 DISCOVERY COMMISSIONER: She's attached them --
5 MS. DWIGGINS: They --
6 DISCOVERY COMMISSIONER: -- to the petition --
7 MR. WILLIAMS: Right.
8 DISCOVERY COMMISSIONER: Is there any movement
9 afoot?
10 MR. WILLIAMS: Yes. Yes.
11 MS. DWIGGINS: They wait almost three weeks before they
12 send us a letter.
13 MR. WILLIAMS: Ms. Dwiggins -- most respectfully, Your
14 Honor, if I could just --
15 DISCOVERY COMMISSIONER: Okay. You don't need to
16 keep saying most respectfully, I understand you're being respectful.
17 MR. WILLIAMS: No. I'm saying I just would like to be able to,
18 if I'm talking, not be interrupted by counsel.
19 So they filed it on May 18th. We have an ESI protocol that
20 governs, at least ostensibly, the way we're supposed to handle these.
21 We agreed to it, Your Honor. And that's attached as an exhibit to the
22 papers.
23 DISCOVERY COMMISSIONER: Exhibit 3.
24 MR. WILLIAMS: We sent written notice less than three weeks
25 later, one week -- we were made aware of it as attached as an exhibit,

1 we sent a notice clawing it back. They then said, We disagree with you,
2 we don't think it's -- and we're not going to take any of the public
3 references to the document out of our pleading. Okay.

4 Now, the ESI protocol says even if you disagree with us, you
5 don't debate the matter in the letters. You agree to either destroy it or if
6 you're going to contest it, you sequester it. They didn't agree to do that
7 in the first letter. We then wrote back again and said, here is a more
8 detailed explanation from our position. In addition, there's an ESI
9 protocol, there's Rule 4.4(b) and there's merits incentives, all of which
10 compel you to follow a certain process here.

11 DISCOVERY COMMISSIONER: But that process does not
12 apply to the inadvertent production. It's two separate paragraphs. And
13 on the inadvertent production on the last line, it says:

14 A producing party may not request a return of the document
15 pursuant to this section if the document contains any discoverable
16 information .

17 MR. WILLIAMS: Wait a sec. Your Honor, that's not -- that's
18 the wrong section. Most -- again, that's -- the ESI protocol provision that
19 we're talking about is 21.

20 DISCOVERY COMMISSIONER: But then you have 22.

21 MR. WILLIAMS: But that --

22 DISCOVERY COMMISSIONER: Who drafted this document?

23 MR. WILLIAMS: But 22 deals with nonresponsive information.
24 That's like if I produced -- if I produced Ed Lubbers' vacation schedule to
25 go somewhere, and it -- because it's not responsive to any requests,

1 then I can seek to claw that back. That's what 22 addresses. It has --
2 most -- again, it doesn't have anything to do with this issue. We're
3 talking only about 21. It's only 21.

4 MS. DWIGGINS: Irrespective, Your Honor, the first part of 21
5 says:

6 You agree to promptly return, sequester, or destroy.

7 It's already public record at that point in time.

8 MR. WILLIAMS: But that's not --

9 MS. DWIGGINS: They wait three weeks --

10 DISCOVERY COMMISSIONER: Yeah.

11 MS. DWIGGINS: -- to even write us the letter, and they make
12 no effort to seal it, extract it from the record, or anything.

13 MR. WILLIAMS: Your Honor, the irony of this? We were just
14 in front of Judge Sturman where she was moving to sanction us for
15 conduct that went on in bankruptcy court where she contended lawyers
16 for the respondents or affiliates of the respondents publicly filed
17 documents in violation of a confidentiality agreement that she never
18 moved to seal or did any -- she just -- damage done.

19 MS. DWIGGINS: Well, hold --

20 MR. WILLIAMS: And now we're here saying --

21 MS. DWIGGINS: Hold on.

22 MR. WILLIAMS: Now we're here saying that we were
23 obligated to move to seal these? We have followed a protocol, Your
24 Honor. We followed a protocol.

25 MS. DWIGGINS: Your Honor, that was a --

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MR. WILLIAMS: They then --

MS. DWIGGINS: -- different situation.

MR. WILLIAMS: They then -- they then --

DISCOVERY COMMISSIONER: Don't interrupt, please.

MR. WILLIAMS: -- done it, we put them on notice of it, and they've continued to make them public. Your Honor, that's not my fault that they're making them public. I'm -- I'm following the process to get the relief that we're entitled to.

DISCOVERY COMMISSIONER: But on a clawback provision in general, I don't think either the judge or I signed off on this. I can tell you right now I would not have signed off on it.

MR. WILLIAMS: I agree with you it's not a court order.

DISCOVERY COMMISSIONER: I would not have signed off on it. But I can tell you this. There -- to have the benefit of a clawback provision to get the benefit of it, you have to act promptly. You have to have procedures in place to ensure that you are constantly reviewing your materials and you're clawing back inadvertent productions. Because they don't know whether it's inadvertent or not.

Now, there was a clue apparently on -- on handwritten notes that -- that Ms. Dwiggin was concerned about. And she called you. And the protocol worked, no question about it.

MR. WILLIAMS: Right.

DISCOVERY COMMISSIONER: But I'm not sure it was a clear on the other documents and I'm certainly not sure it was clear on 899 -- 899 through 900.

1 And let me ask you this question. Do those documents really
2 matter? I'm not --

3 MR. WILLIAMS: Your Honor --

4 DISCOVERY COMMISSIONER: -- talking about the other set.
5 I'm talking about this set.

6 MR. WILLIAMS: Which set?

7 DISCOVERY COMMISSIONER: That's -- 899 through 900.
8 Does it really matter that those documents are part of a public record?
9 Really?

10 MR. WILLIAMS: Nicolatus's?

11 DISCOVERY COMMISSIONER: Yeah.

12 MR. WILLIAMS: Those aren't the ones that are part of the
13 public record. It's Exhibit 1, Your Honor. It's the typewritten notes.

14 DISCOVERY COMMISSIONER: Okay. I'm talking about
15 Exhibit 2 right now.

16 MR. WILLIAMS: Right. That's not part of --

17 DISCOVERY COMMISSIONER: I broke them into --

18 MR. WILLIAMS: -- the public record.

19 DISCOVERY COMMISSIONER: -- two different groups.

20 MR. WILLIAMS: That's not part of the public record. That's
21 not my complaint. In my complaint on those is not --

22 DISCOVERY COMMISSIONER: Okay.

23 MR. WILLIAMS: -- that they're attorney/client privileged,
24 either. It was only work product.

25 MS. DWIGGINS: No, they part of it. They're -- they're --

1 MR. WILLIAMS: Exhibit 2?

2 DISCOVERY COMMISSIONER: I'm -- I'm raising the white
3 flag right now.

4 MR. WILLIAMS: Exhibit 2 was -- was submitted to you in
5 camera. As an exhibit. My complaint with Exhibit 1 is that they were
6 likewise submitted to you in camera as an exhibit, but those --

7 DISCOVERY COMMISSIONER: So do I need to address --

8 MR. WILLIAMS: -- are the ones that are also --

9 DISCOVERY COMMISSIONER: -- Exhibit 2 at all?

10 MR. WILLIAMS: -- publicly quoted. Your Honor, Exhibit 2 in
11 my view is less important than Exhibit 1, and in particular, the typewritten
12 notes. Now --

13 DISCOVERY COMMISSIONER: Can you guys move to claw
14 this back?

15 MR. WILLIAMS: Yes. Yeah.

16 DISCOVERY COMMISSIONER: Exhibit 2?

17 MR. WILLIAMS: Yes. Absolutely. That's how we got here is
18 that -- was that negotiation process --

19 DISCOVERY COMMISSIONER: I thought --

20 MR. WILLIAMS: -- I told you about that was 48 pages and we
21 ended up only having a dispute over two.

22 DISCOVERY COMMISSIONER: Okay. So Exhibit 2 is not
23 yet part of a public record?

24 MR. WILLIAMS: Exhibit 2 is not part of a public record.

25 DISCOVERY COMMISSIONER: Okay.

1 MR. WILLIAMS: It's been submitted to you in camera.

2 DISCOVERY COMMISSIONER: All right. So would you
3 agree with me that if there's any privilege that protects it, it's the work
4 product privilege?

5 MR. WILLIAMS: I would absolutely agree with you on that.

6 DISCOVERY COMMISSIONER: And would you agree with
7 me that -- I just don't see any opinion in here, unless I'm not able to read
8 the writing.

9 MR. WILLIAMS: Your Honor, I --

10 DISCOVERY COMMISSIONER: I think this is all pretty much
11 factual information based on a discussion and Mr. Nicolatus is present.

12 MR. WILLIAMS: Right.

13 MS. DWIGGINS: So was Mr. Solomon and my client.

14 MR. WILLIAMS: Right. And --

15 DISCOVERY COMMISSIONER: Yeah.

16 MR. WILLIAMS: -- and Your Honor, that's -- that's why I never
17 for once argued that it was attorney/client. Anything discussed in that
18 room wasn't going to be protected because there were third parties --

19 DISCOVERY COMMISSIONER: Right.

20 MR. WILLIAMS: -- the opposing party. But -- but to -- a
21 lawyer or a party taking notes in a meeting, even if the other parties --
22 Your Honor, take a deposition as an example. If I'm at a deposition, of
23 course, the other party's at the deposition. If my client's taking notes
24 during the deposition, they don't become subject of waiver just because
25 the other party was in the room. They can still be work product.

1 DISCOVERY COMMISSIONER: Okay.

2 MR. WILLIAMS: That's my point.

3 DISCOVERY COMMISSIONER: All right. So let's say that
4 Exhibit 2 is work product.

5 MR. WILLIAMS: Okay.

6 DISCOVERY COMMISSIONER: All right. Which I don't
7 disagree with your analysis there. But then we have to look at it. And
8 this is Mr. Lubbers' work product. There's no other way to get this
9 information. There's no other way to find out what he wrote down or
10 what he thought was important from that meeting other than these notes.
11 There is no other way to do it.

12 MR. WILLIAMS: Right. Well, Your Honor, but what
13 Mr. Lubbers decided to take down as being important in that meeting are
14 Mr. Lubbers' mental impressions or his opinions as to what was
15 important to take down, as to what went on in the meeting, this deals
16 with substantial need. And with respect to what went on in the meeting,
17 they can get that from either -- depose Nicolatus. Depose -- I mean,
18 most respectfully, Scott was there. Mr. Solomon was there. Bob Evans
19 was there. There are other people there who can be deposed that can
20 tell what happened in that meeting if they -- if that's important to them.
21 But they were there.

22 I don't think that's what's critically important here, Your Honor,
23 insofar as from their perspective or to be perfectly with the Court, from
24 mine. I have an obligation to protect what I believe are protected
25 records.

1 I think the more important issue here is the set of documents
2 at Exhibit 1, and in particular -- of those, the typewritten notes. Because
3 the typewritten notes are the ones that have been made public. It's the
4 typewritten notes that have been repeatedly made public in different
5 briefing after being on notice of what our position is.

6 So on those two pages that you -- you've started with, Your
7 Honor, I don't think there's much -- I don't think we're talking past each
8 other on those. I understand the Court's position and I hope you
9 understand mine.

10 MS. DWIGGINS: If I just may briefly --

11 DISCOVERY COMMISSIONER: I do.

12 MS. DWIGGINS: -- I don't agree with what he decided down
13 constitutes his mental impression. If that's the case, there would be no
14 concept of ordinary work product. Work product is everything somebody
15 wrote down and it's -- you accept that as a mental impression. It doesn't
16 matter who you are then if you wrote down. And when would ordinary
17 work product ever come into play then?

18 MR. WILLIAMS: Interviewing a witness and the witness telling
19 you these are the facts that happened and the lawyer takes down,
20 These are the facts that happened. That's ordinary work product, Your
21 Honor.

22 MS. DWIGGINS: I -- you could argue --

23 MR. WILLIAMS: That's the quintessentialist handbook.

24 MS. DWIGGINS: -- it's mental impression as well as that
25 that's what you consider it important to write down of what the witness

1 told you, unless you're doing a transcription of the entire interview.

2 There's no distinction there.

3 DISCOVERY COMMISSIONER: What safeguards were in
4 place when you produced these documents to make sure once you did a
5 production there wasn't an inadvertent disclosure, what did you do?

6 MR. WILLIAMS: I would start with the ESI protocol, Your
7 Honor, which --

8 DISCOVERY COMMISSIONER: That puts the burden on the
9 other side. What would you do?

10 MR. WILLIAMS: Well, it -- it -- but there's an important feature
11 of that and -- and this was a negotiated document signed by both
12 parties, agreed to by both parties. And what it said is, is that you can't
13 argue waiver based on the inadvertent production, which is what we're
14 talking about now is the fact -- in today's world, and I don't need to tell
15 the Court this, you live it day in and day out, I mean, discovery has
16 changed completely from the time I started practicing as a young lawyer.
17 Inadvertent productions are going to happen. There is no question
18 about that. And that's why we put in the protocol that if there ends up
19 being an inadvertent production, you can't argue that is the basis for
20 waiver or why you get the document. So I would start with that, Your
21 Honor.

22 MS. DWIGGINS: And I have not argued that.

23 MR. WILLIAMS: Right. But -- but the commissioner is
24 focused on it. And that's -- that's why I'm addressing it.

25 So with respect to the production --

1 DISCOVERY COMMISSIONER: I'm focused on more than
2 one thing.

3 MR. WILLIAMS: Oh, I --

4 DISCOVERY COMMISSIONER: Which might be my problem
5 at this point.

6 MR. WILLIAMS: All I'm talking about is what we're talking
7 about right now, Your Honor. I get that you have a number of things
8 you're concerned about.

9 But with respect to the additional safeguards, Your Honor,
10 the -- the initial productions were handled by Dickinson Wright, and you
11 can see from the history they were reviewing documents and they were
12 clawing documents back. They -- they just didn't get to these. I'm not,
13 you know -- that's -- that's not suggestive of any kind of fault. It's just
14 you know what's gone on in this case during the spring. We've been in
15 front of you a million times dealing with discovery issues and we've
16 gotten those as of today close to being worked out for the most part.

17 But there's been a lot going on. And so the fact that they
18 didn't come across this seven-page set of documents and get them
19 clawed back yet until they were publicly filed as an exhibit or attached as
20 an exhibit and publicly referenced in a document and then we moved on
21 it, Your Honor, I don't think that that suggests any kind of negligence or
22 lack of diligence on our part.

23 MS. DWIGGINS: Your Honor, I would disagree with that.
24 Because I attached as Exhibits 4 and 5 to our reply a letter dated
25 February 16th by Mr. Schwarz where they clawed back documents, and

1 another one on the 19th where they clawed back a large number of
2 documents, as you can see.

3 But the first one is Document 13471, which is within a couple
4 hundred pages of this. I would think once you do the first one, you
5 would do a thorough review of everything you've produced to that date
6 to see if there was anything else inadvertently disclosed, which I assume
7 is what led to the second clawback.

8 DISCOVERY COMMISSIONER: I'm just trying to understand,
9 Respondent's counsel, what did you all do to ensure -- did you just rely
10 on the ESI protocol, well, they'll let us know? But how would they --

11 MR. WILLIAMS: No.

12 DISCOVERY COMMISSIONER: -- know that? Because it's
13 identified as, you know, you've produced it, but how would they know
14 what it is? See, that's why I would -- I --

15 MR. WILLIAMS: So --

16 DISCOVERY COMMISSIONER: -- I would not have liked, I
17 don't really love this protocol.

18 MR. WILLIAMS: But -- but, Your Honor, it's not just --

19 DISCOVERY COMMISSIONER: I know you negotiated it.

20 MR. WILLIAMS: Yeah. But it's not just the protocol. If you
21 look at Rule 4.4(b), which deals with what happens when you get an
22 inadvertent disclosure --

23 DISCOVERY COMMISSIONER: All you have to do is notify.

24 MR. WILLIAMS: Right.

25 DISCOVERY COMMISSIONER: You don't have a clawback

1 provision.

2 MR. WILLIAMS: Correct. There was never a notification
3 here, Your Honor. I'm not talking about clawback, I'm talking about --

4 DISCOVERY COMMISSIONER: Well, how would they know?

5 MR. WILLIAMS: When --

6 DISCOVERY COMMISSIONER: Because you've not put a --
7 you've produced them.

8 MR. WILLIAMS: I -- I get that, Your Honor. But when I -- if I'm
9 a lawyer and I review this document, especially a lawyer as experienced
10 as Ms. Dwiggins, and I see some of the things in this document, Your
11 Honor, talking about what he perceives to be strengths and weaknesses
12 of his case?

13 DISCOVERY COMMISSIONER: Okay. I -- I am not --

14 MR. WILLIAMS: That's not --

15 DISCOVERY COMMISSIONER: I am not on the group yet.
16 I'm going to deal with this one --

17 MR. WILLIAMS: Okay. Oh, we're still --

18 DISCOVERY COMMISSIONER: -- first.

19 MR. WILLIAMS: -- talking about Exhibit 2?

20 DISCOVERY COMMISSIONER: Yes.

21 MR. WILLIAMS: Oh, Your Honor, again, I --

22 DISCOVERY COMMISSIONER: Okay. I'm going to require --

23 MR. WILLIAMS: -- I don't know how much --

24 DISCOVERY COMMISSIONER: -- that to retain its
25 nonprivileged but confidential designation, I don't see any alleged

1 opinions in that document that would concern me. Otherwise, also it -- it
2 appears to be more factual in nature. And although there are other
3 options to interview other witnesses, you could never take the deposition
4 of Mr. Lubbers and therefore there's no other way to get to his notes of
5 what he thought or what he documented from that meeting. So I'm
6 going to let it retain its nonprivileged designation.

7 MR. WILLIAMS: Okay, Your Honor.

8 DISCOVERY COMMISSIONER: And then we'll move on to
9 where you are concerned about.

10 MR. WILLIAMS: All right. And so I understand --

11 DISCOVERY COMMISSIONER: Which is third --

12 MR. WILLIAMS: -- the scope of the Court's ruling, you're
13 finding that there's substantial need to obtain -- that -- that it's work
14 product protected --

15 DISCOVERY COMMISSIONER: Right.

16 MR. WILLIAMS: -- but that there's a substantial need to
17 obtain it.

18 DISCOVERY COMMISSIONER: Because --

19 MR. WILLIAMS: Because Mr. Lubbers is not longer with us.

20 DISCOVERY COMMISSIONER: Right.

21 MR. WILLIAMS: Okay. And that it -- it maintains the -- I don't
22 know that that one was marked confidential, because that one was the
23 one that produced as a NATA file.

24 DISCOVERY COMMISSIONER: That's right.

25 MR. WILLIAMS: So, but --

1 DISCOVERY COMMISSIONER: What is it --

2 MS. DWIGGINS: It wasn't NATA.

3 DISCOVERY COMMISSIONER: -- is it -- should it be marked
4 confidential?

5 MS. DWIGGINS: It was a PDF.

6 DISCOVERY COMMISSIONER: Should it be parked
7 confidential, Mr. Schwarz? Mr. --

8 MR. WILLIAMS: I -- I think it should be, Your Honor.

9 DISCOVERY COMMISSIONER: Is that what the intent would
10 have been to mark it confidential?

11 MS. DWIGGINS: The -- the confidentiality agreement was
12 designed to protect financial information. Not every single document
13 disclosed in this case.

14 DISCOVERY COMMISSIONER: But -- but you've used that
15 designation on these documents.

16 MR. WILLIAMS: Right.

17 MS. DWIGGINS: They used it on everything. But --

18 MR. WILLIAMS: Your Honor, the -- the confidentiality
19 agreement it's Exhibit 11 to our opposition, is not limited only to financial
20 information.

21 DISCOVERY COMMISSIONER: Okay. All right. Well, we'll
22 extend the confidentiality label to those documents.

23 MR. WILLIAMS: Okay.

24 DISCOVERY COMMISSIONER: Moving right along. The
25 next set is 13284 through 13288. And these I think are the issue, I

1 mean, I think the -- the clear issue here is not so much with page 284,
2 which I think falls in line with the other group of documents, 286, I think
3 those are clearly similar to what I just allowed to remain unprivileged or
4 produced, but maintained as confidential. Do you have any dispute on --
5 on those two pages? It's 13284 and 13286 is what I'm looking anything.

6 MS. DWIGGINS: I think 7 and 8 are also part of the same
7 thing. Because you have keep in mind there were three different
8 petitions filed relating to three different trusts.

9 MR. WILLIAMS: All right. So why would -- why would they
10 even be getting his notes related to trusts other than what's at issue in
11 this action?

12 DISCOVERY COMMISSIONER: I would agree
13 that 13284, 13286, and 13287 appears to be factual information related
14 to the trust. Would someone on the respondent's side please tell me if
15 I'm incorrect on that.

16 MR. WILLIAMS: Well, so a couple of points, Your Honor. On
17 those three that you just mentioned, I -- I think on the first one --

18 DISCOVERY COMMISSIONER: Yes.

19 MR. WILLIAMS: -- I think that that reflects Mr. Lubbers' notes
20 that he took during the call with the lawyers. It's got the same date and
21 there are some notations that suggest that. That's the document that to
22 me reflects a discussion about the petition.

23 DISCOVERY COMMISSIONER: Right.

24 MR. WILLIAMS: Okay. So I would -- my position on this
25 document, and I'll -- I'll address all of them just to go in order.

1 DISCOVERY COMMISSIONER: Okay.

2 MR. WILLIAMS: I'll address all of them. I think this one is
3 both attorney/client privileged and work product would be my position.
4 We're -- we're skipping 85 for right now.

5 DISCOVERY COMMISSIONER: Correct.

6 MR. WILLIAMS: The typed notes.

7 The next two documents, Your Honor, 13286 at the top is
8 titled Secondary Trust. Ms. Dwiggins is correct. Three petitions were
9 filed at the same time regarding three different trusts. This is related to a
10 trust that is not at issue in this proceeding, the secondary trust.

11 Same with the next page, that's dealing with an asset
12 protection trust. So these two pages aren't even related to this case. I
13 don't think that they should be produced for that reason first, I guess
14 would be the easiest. But next is I think that they would also be work
15 product protected and/or attorney/client privileged to the extent that
16 Mr. Lubbers was talking with his lawyers about these and making the
17 notes after the initial petitions have been filed.

18 DISCOVERY COMMISSIONER: We don't know. That's the
19 problem, we don't know.

20 MR. WILLIAMS: That's -- it -- it is -- and, Your Honor --

21 DISCOVERY COMMISSIONER: The first page I would say is
22 more likely, but page 286 and 287 we don't know.

23 MR. WILLIAMS: Right. And -- but I will --

24 MS. DWIGGINS: I believe and I would say there's probably
25 no dispute that these four handwritten pages were taken at the same

1 time during the call.

2 DISCOVERY COMMISSIONER: Okay.

3 MS. DWIGGINS: But -- but I don't see how you could
4 separate them out. When you look at the context of the call was at
5 most 24 minutes, I think it's important for this Court to look at the scope
6 of what was discussed as reflected in his handwritten notes.

7 DISCOVERY COMMISSIONER: We have to have objective
8 parameters in place on this. I cannot start second-guessing what was
9 discussed, who was present, what was said. I can honestly barely read
10 Mr. Lubbers' notes. So I can tell what they relate to somewhat, but to
11 me the notes on the pages that I just talked to you about --

12 MR. WILLIAMS: Uh-huh.

13 DISCOVERY COMMISSIONER: -- deal with maybe if you
14 want to say kind of a summary of the petition and some client contact
15 information or attorney contact information. And the trust. Now, if the
16 secondary trust and the protection trust are not at issue, I don't know
17 why we can't claw back those two pages of notes. Which are 286
18 and 287.

19 MS. DWIGGINS: Again, Your Honor, my only concern is that
20 in light of the fact that this was all discussed presumably during this call
21 that again was 24 minutes at the most, I think it's important as to a
22 reasonable inference or whether or not this other stuff was discussed.

23 Your Honor understands how complicated --

24 DISCOVERY COMMISSIONER: How is that even going to
25 get into evidence?

1 MR. WILLIAMS: Well --

2 MS. DWIGGINS: I -- well, what I'm saying -- okay. They have
3 the heavy burden of proving privilege. And the fact of the matter is we
4 don't know. Because Mr. Lubbers is not here.

5 DISCOVERY COMMISSIONER: Right. He's not.

6 MS. DWIGGINS: For all we know is he took these down after
7 the call.

8 DISCOVERY COMMISSIONER: Well, I'm not going to
9 speculate as to whether they were created during or after the call. My
10 question on 286 and 287 is these appear to be summaries of petitions or
11 trusts dealing with -- or dealing with trusts that are not related to this
12 case, apparently. Is that true? Is that's true, I'm letting them claw that
13 back.

14 MS. DWIGGINS: That's fine, Your Honor.

15 DISCOVERY COMMISSIONER: Those two documents get --
16 get to be clawed back.

17 MR. WILLIAMS: It is true, Your Honor.

18 DISCOVERY COMMISSIONER: Right. So let me say it one
19 more time. You can claw back 286 and 287 in the series.

20 With respect to page 288 and 284, my -- my problem is that I
21 don't really know -- I'm assuming that 284 was contemporaneous with
22 the call. That would make sense to me. On 288, those are -- are notes
23 jotted down, they're facts about the trust. I am not going to put a
24 privilege on that 288. To me that is just dealing with the petition and
25 facts of the petition and he's documenting it.

1 MR. WILLIAMS: Right, Your Honor. But --

2 DISCOVERY COMMISSIONER: I'll put a confidentiality
3 stamp on it, but I'm not going to claw it back as being privileged.

4 MR. WILLIAMS: Well, there's already a confidentiality stamp
5 on it, Your Honor. But these -- Petitioner's not -- if these notes are being
6 created either during or after a phone call with a lawyer -- so I'm setting
7 aside the fiduciary exception issue.

8 DISCOVERY COMMISSIONER: There are not opinion --
9 there's not opinion here. It's facts.

10 MR. WILLIAMS: But that's -- but -- but that would be -- I'm
11 not -- that's work product, Your Honor. Attorney/client. If I have --

12 DISCOVERY COMMISSIONER: Then I'll -- then I'll apply the
13 trustee exception and we'll let it go up to the supreme court. Because to
14 me this is dealing with the petition on the irrevocable trust. He's making
15 notes on that. I do not see any reason to cloak this in attorney/client
16 privilege. It deals with the petition. It's factual information. I think that's
17 the documenting about the petition, although I don't know for certain. I
18 don't exactly know when he wrote this information, but even if it was
19 contemporaneous with the call, I think number one, it deals with the
20 petition and the -- and that was for an accounting. There was not an
21 adversarial problem at that point in time, even if they're -- one could
22 argue in anticipation of litigation, that is not what this document talks
23 about. That's number one.

24 Number two, if it's work product, it's factual. It's not opinion.
25 And he's not a lawyer giving any opinion as it relates to this document.

1 So I don't see a reason to put a privilege stamp on it.

2 MR. WILLIAMS: Okay.

3 DISCOVERY COMMISSIONER: That's with 288. I'm a little
4 more troubled by 284, because it does seem to be a documentation of
5 the call itself. I don't think there's anything in here that's particularly
6 exciting, to be candid with you.

7 MR. WILLIAMS: Right. Your Honor, of course, the privilege
8 doesn't turn on -- on whether something -- whether the notes --

9 DISCOVERY COMMISSIONER: Are exciting or not, I know
10 that.

11 MR. WILLIAMS: Right. You don't -- you don't look at the
12 content. But I want to go back to something that the Court said,
13 because I think it's important. And this has to do with this notion that the
14 initial petition wasn't adversarial. Okay. And that it was only seeking an
15 accounting. Your Honor --

16 DISCOVERY COMMISSIONER: But that's for the benefit of
17 the beneficiary.

18 MR. WILLIAMS: But let's see what's being said. Okay.
19 Mr. Lubbers goes to see lawyers because things are being said about
20 him. In addition to having an obligation to account, I get that, okay?
21 But, Your Honor, let's look at what is being said in the petition. Now,
22 can --

23 DISCOVERY COMMISSIONER: I -- I agree with you. Okay?
24 I do agree with you. But the document here that I'm looking at --

25 MR. WILLIAMS: Uh-huh.

1 DISCOVERY COMMISSIONER: -- doesn't specifically tell me
2 it was made contemporaneous with the call, it doesn't have a date on it.
3 All it does is document, I think, parts of the petition that deal with the
4 accounting on the trust. I think. That's what it looks like to me. There is
5 nothing privileged or even if it is privileged as work product for the --
6 the -- I'm just simply suggesting right now that there's no other way to
7 get to it. Mr. Lubbers is -- is not with us any longer. And the type of
8 work product that we would be concerned about protecting, this is not.
9 And you're telling me it could all be contemporaneous and -- and even
10 Ms. Dwiggins says maybe it was all done at the same time. I don't know
11 that to be the case.

12 And if it would be attorney/client as it deals with the
13 accounting part of this case, that's for the beneficiary. So really it's for
14 the benefit of the beneficiary. And one could reasonably argue under
15 case law that we have not adopted yet in Nevada, but one could
16 reasonably argue that this falls into the trustee exception.

17 MR. WILLIAMS: Okay. Your Honor, so a couple of points
18 there. With respect to Mr. Lubbers not being here, we all wish he was
19 here and we all wish we could have him provide direct evidence in the
20 form of them or an affidavit or what have you with respect to these
21 notes. We don't have that.

22 But I don't have -- my burden doesn't require me to have direct
23 evidence of this, Your Honor. I can establish the existence of the
24 privilege through circumstantial evidence. And it's not just these notes.
25 The lawyers, Lee and Renwick, provided declarations to the extent that

1 they could generally describing the subject matter of the items discussed
2 with Mr. Lubbers. And it -- this is an important point. Not just on
3 October 14th, 2013. If you look at their dealing records that they
4 provided, they continued to have discussions with Mr. Lubbers about
5 these types of topics.

6 So, Your Honor, the threshold argument is that there -- they
7 would be privileged. If Mr. Lubbers was taking notes during those calls
8 or even if he record -- even if he hung up the phone and said, Let me
9 write down what the lawyers told me, that would still be privileged, is my
10 position.

11 And then with respect to work product, you've analyzed it and
12 found that they only reflect facts. I understand that. But I would
13 respectfully submit that they haven't shown a substantial need to get
14 these notes if they're just ordinary work product.

15 DISCOVERY COMMISSIONER: Well, the substantial --

16 MR. WILLIAMS: Because I --

17 DISCOVERY COMMISSIONER: -- need is Mr. Lubbers isn't
18 here.

19 MR. WILLIAMS: I understand.

20 DISCOVERY COMMISSIONER: And he's the only one that
21 could have documented what he did document.

22 MR. WILLIAMS: But -- but substantial need never justifies the
23 disclosure of attorney/client privilege communications is all I'm saying.

24 DISCOVERY COMMISSIONER: But it can be waived.

25 MR. WILLIAMS: Well --

1 DISCOVERY COMMISSIONER: And -- and then the issue,
2 then we get back to full circle on the inadvertent disclosure and what
3 efforts were made to ensure that the documents were not, in fact,
4 produced. I understand you have an ESI protocol, but you also have
5 responsibility with a clawback provision to make sure you're timely
6 reviewing to make sure that things have not been rushed, you know,
7 within 30 days. I -- I don't know all the different provisions they have in
8 Federal Court. And -- and by the way, if you haven't looked, we've --
9 we've somewhat proposed adopting the Federal Court standards on this.
10 So, you know, this is important. These are really important issues.

11 MR. WILLIAMS: Your Honor, I could not agree more.

12 DISCOVERY COMMISSIONER: But again, I -- I do not
13 believe -- I -- I struggle to know when Document 13288 was created.
14 Maybe it was created contemporaneously with the call. There's no date
15 on the document. All I have is a page. It seems to be notes about the
16 trust. I think if it's attorney/client, I think this is the perfect document for
17 the trustee exception to apply, because it's talking about an accounting.
18 Not other litigation.

19 And number two, if it's work product, there's no other way to
20 get to the information.

21 Then that leaves me only with page 13284 and 13285. 13284
22 does appear to be a note contemporaneous with the date of the
23 telephone call, the fact that the lawyer is referenced. I think that there
24 may -- the argument that would extend the trustee exception to this note
25 exists, because it's in 2013 before the actual petition that was filed

1 against Mr. Lubbers individually was filed.

2 But I also agree that if we look at the work product aspect of it,
3 certainly someone in Mr. Lubbers' position could have anticipated
4 litigation. And I -- I do understand that.

5 But I think we've got two different privileges going on. So if we
6 say yes, anticipating litigation under work product, we still have this
7 concept of is there any way to get to this information other than these
8 notes. I don't see any opinion information there that would give me
9 concern. I see the fact of certain things being documented. And a
10 question mark that really is not that persuasive to me as a reason to
11 protect this, because it's factual in nature, not opinion.

12 So --

13 MR. WILLIAMS: That's related to the work product analysis,
14 right, Your Honor?

15 DISCOVERY COMMISSIONER: Right. Correct. Under the
16 attorney/client. Again, let me just make it very clear, I can't tell the
17 document 132888 would be protected by attorney/client. And that would
18 be true of 13287 as well, but it doesn't really matter, because I think
19 those two trust documents we're taking out, because they're not related.
20 So 13288 I can't tell when that was done. I can't tell if that's part of
21 attorney/client communication. I think it's better analyzed as work
22 product and there's no other way to get it, so I'm going to allow 13288,
23 because it's Mr. Lubbers' notes.

24 13284 I think it probably is attorney/client. I'm going to go
25 ahead and apply the trustee exception here utilizing Subsection 5

1 of 49.115. And again, I'm looking at the year, 2013, the petition that was
2 in place, and it deals, again, with accounting of that trust, which I think is
3 ultimately for the benefit of the beneficiary. And I think in this particular
4 situation, the beneficiary, Scott Canarelli and Ed Lubbers stand in the
5 same position.

6 MS. DWIGGINS: And your --

7 DISCOVERY COMMISSIONER: On this particular document.

8 MS. DWIGGINS: And, Your Honor, we had also raised the
9 concept of waiver that the information was provided to America West
10 Development, Inc., and third parties.

11 DISCOVERY COMMISSIONER: I'm going to talk about that
12 in a minute, because that's the *Kotter* case.

13 MS. DWIGGINS: But before we go onto the tight [phonetic]
14 memo, if -- if I could briefly -- because I know you're holding work
15 product as to some of those documents that we just went over, but I
16 don't believe the anticipation of litigation applies as it relates --

17 DISCOVERY COMMISSIONER: And I disagree with you.

18 MS. DWIGGINS: -- to Lubbers. And if I could explain that to
19 Your Honor, and why I believe that, I think it's pretty clear that it does to
20 relate to Lubbers. It relates maybe to the Canarellis or it does relate to
21 the Canarellis, but they're not one and the same.

22 And if I may, I have a chart for you. It won't take very long to
23 go over. But I've divided the timeline and everything they've raised
24 between the Canarellis and the Lubbers side. And what all our
25 allegations have been all along, even before the petition, is May in 2012,

1 the family trustees who are the Canarellis, not Ed, became hostile and
2 stopped making distributions. Scott had hired our firm in 2012 of June in
3 connection with the Canarellis' decision to stop withhold -- or withholding
4 distributions.

5 In November 2012, Scott did authorize us to file a petition and
6 we communicated that by way of letter. But it was as a result of the
7 Canarellis' decision as family trustee, because Ed was not family trustee
8 at this time, remember.

9 MR. WILLIAMS: But didn't -- didn't he work with the
10 Canarellis? I mean --

11 MS. DWIGGINS: Okay. Well, what hat is he wearing?

12 DISCOVERY COMMISSIONER: Well --

13 MS. DWIGGINS: There's no threat in litigation against him.
14 He's not even a trustee that could potentially be liable.

15 DISCOVERY COMMISSIONER: We have been going for
16 almost an hour and a half. I need to give my staff and myself a break. I
17 think we all need a break. And --

18 MS. DWIGGINS: I'm fine. But I would like the opportunity to
19 go through this really quickly, because I think it's very important,
20 especially in the context --

21 DISCOVERY COMMISSIONER: Okay. Ms. Dwiggins --

22 MS. DWIGGINS: -- of the --

23 DISCOVERY COMMISSIONER: -- I will give you that
24 opportunity. Just let my staff have a break, please. And myself. Okay?
25 And we'll be back. We promise. We'll be back.

1 Thank you.

2 MR. WILLIAMS: Thank you, Your Honor.

3 [Court recessed at 3:21 p.m., until 3:32 p.m.]

4 DISCOVERY COMMISSIONER: All right. So we're back on
5 the record.

6 Ms. Dwiggins.

7 MS. DWIGGINS: Thank you, Your Honor.

8 I guess just going back to the chart. In November 2012, when
9 correspondence was sent and it's attached to the opposition Exhibit 2, it
10 was disclosed in the correspondence that Scott was authorizing a
11 petition to redress the Canarellis withholding of distribution based upon
12 their interpretation of HEMS. I know they reference an agenda in 2012
13 November of Scott lawsuit threaten. I think it's clear based upon the one
14 right above it, it was against the Canarellis, they were the only family
15 trustees at the time.

16 Obviously, I have the date they resigned, the date the
17 purchase agreement was. You've already addressed what the petition
18 sought as it related to the trust, namely an accounting and the appraisal
19 pursuant to the terms of the agreement. And on the -- the left here, and
20 they reference this in their opposition repeatedly, everything they
21 reference is where it either says Larry or the family trustees that -- it --
22 specifically, it says Larry will not authorize an accounting, Larry will not
23 authorize an inventory, Larry is in a conflict, he was on both sides of the
24 transaction, he violated his fiduciary duties, he entered the sale to
25 punish Scott and harm the interest.

1 Every single one of those allegations are against Larry only on
2 the --

3 DISCOVERY COMMISSIONER: What was the relationship
4 between Mr. Lubbers and the Canarellis?

5 MS. DWIGGINS: Well, it depends. He was wearing multiple
6 hats.

7 DISCOVERY COMMISSIONER: Right.

8 MS. DWIGGINS: He was our trustee at the time, he was the
9 attorney for them, he was -- I don't know if he was a manager, but he
10 can't serve two masters at one time. He is our trustee. And the only
11 statements made against him is Lubbers admitted having no knowledge
12 of the assets of the trust. He admitted having no knowledge of the
13 management of the trust. There was not one allegation of wrongdoing
14 against him and Lubbers was only named because he was the acting
15 trustee at the time and that's who has to be named.

16 And then if you just go down, Your Honor, obviously, we talk
17 about the call and -- and the notes and whatnot. But Scott reserved his
18 right to unwind the sale in December '13, because he didn't have
19 sufficient information. We didn't have the appraisal. In fact, we hadn't
20 met with Nicolatus at that point in time, which is the next one.

21 In 2015 in November, Lubbers signs the consent with Gary
22 authorizing him to speak with us and then I think probably most
23 importantly, Your Honor, is even in December 2015, on the 30th, we had
24 prepared a draft petition and sent it to them to try and facilitate
25 settlement and have a discussion. And we specifically stated in writing

1 that Scott was fond of Lubbers and had no present intention to proceed
2 against him. And that -- I mean, based upon that, there's no way there
3 was any anticipated litigation against Lubbers as our trustee.

4 And as long as he's serving as our trustee, he can't serve as
5 their attorney at the same time and say litigation might have been
6 expected against them and therefore it extends to me.

7 And -- and I think what also demonstrates this during this
8 period of time is Ed was repeatedly meeting with Scott on almost a
9 weekly basis. From 2002 -- '12 forward. And when we filed the petition
10 in June of '17, Ed terminated these meetings and specifically told Scott, I
11 could not sit across the table from a man that is suing me. That is the
12 first time he did it, because it was in June when we ultimately filed the
13 petition, the decision was made to proceed against him based on
14 information we had.

15 But up until that point and even as late as December '15, there
16 was absolutely no anticipation of litigation against Lubbers as our
17 trustee.

18 DISCOVERY COMMISSIONER: From your perspective, I
19 believe that to be true. But that is not the test. The test is what
20 Mr. Lubbers thought.

21 MR. WILLIAMS: Right.

22 DISCOVERY COMMISSIONER: And unfortunately, we don't
23 know all of it, but I suspect he was concerned -- I think the work product
24 privilege does apply. I think it wasn't just anticipated. There was actual
25 litigation. There was a petition filed, that's how you start litigation in this

1 particular setting. So I think it's disingenuous to say there wasn't
2 litigation. There was. I think the test is what Lubbers perceived. I think
3 he perceived that there was potentially a problem here or there,
4 otherwise we wouldn't have page 13285.

5 And candidly, I think as it relates just to the petition, I do think
6 the trustee exception applies to the attorney/client privilege. But
7 this 13285, I don't know who typed this document. I think the notes on it
8 appear to be Lubbers'. I'm not a handwriting expert, but they do appear
9 to be his. I don't know if he is actually responding to something that was
10 sent to him. It says Scott analysis, so I don't know who's doing the
11 analysis. I don't know if he's doing this analysis as a lawyer, if he in fact
12 typed the notes. Does anyone really know the answer to that question
13 of who typed this document? Do we know?

14 MR. WILLIAMS: Well, Your Honor, as I sit here, we produced
15 those out of Lubbers' hard file. And it is our position that they are
16 Lubbers' notes. Now, whether a secretary typed them for him or
17 whether he typed them himself, I can't answer that question for you.

18 DISCOVERY COMMISSIONER: Okay.

19 MR. WILLIAMS: But I'd like to go back, because I think Her
20 Honor is right, and just a couple of things to respond to Ms. Dwiggins.
21 I'm not going to take long at all.

22 I'd like this marked as -- as Court's Exhibit 1, if that's possible.
23 Or Court's Exhibit -- however you would do it. I just want this in the
24 record.

25 DISCOVERY COMMISSIONER: Want me to see if we have

1 our exhibits down, because we don't do this very often.

2 MR. WILLIAMS: I definitely want this in the record.

3 DISCOVERY COMMISSIONER: Okay.

4 MR. WILLIAMS: Next, let's talk about the petition, and let's
5 talk -- I mean, theirs is no ambiguity whatsoever that this petition,
6 Exhibit 1 to our opposition that Ms. Dwiggins just went through,
7 absolutely alleges allegations of wrongdoing against both the Canarellis
8 and Mr. Lubbers. And their original position in their motion was it made
9 absolutely no wrongful allegations either one of them. And we came
10 back and said, Look at all of these. And I said, well, maybe they are
11 against the -- the Canarellis.

12 DISCOVERY COMMISSIONER: Mr. Williams, you're
13 welcome to make your record, but I agree with you.

14 MR. WILLIAMS: Okay.

15 DISCOVERY COMMISSIONER: Okay? I -- I agree that when
16 the petition was filed, anticipation of litigation, including litigation of
17 Mr. Lubbers, had to be considered. I agree with you.

18 MR. WILLIAMS: Thank you. So that -- and I'll make it very
19 short then. Please review when the Court -- if the Court is so inclined,
20 paragraph C6. That is directed against the family trustee, singular, who
21 was Mr. Lubbers at the time, and it claims he breached his fiduciary
22 obligations to the beneficiary. It doesn't get any clearer than that.

23 Exhibit 2 that they say was directed only against the
24 Canarellis, Your Honor, Mr. Solomon writes directly to Ed Lubbers and
25 says:

1 I am also informed that you, Ed, are demanding all of the
2 original receipts that Scott saved for purchases made in the month of
3 October before you make any further decisions concerning
4 distributions. Such a burdensome --

5 I'm skipping a sentence.

6 -- such a burdensome and unilateral imposition is per se bad
7 faith.

8 That's not against the Canarellis. That's against the Lubbers.

9 DISCOVERY COMMISSIONER: What is the date of the
10 document you read it from?

11 MR. WILLIAMS: That's November 14, 2012.

12 MS. DWIGGINS: He wasn't even a family trustee with
13 authority to make distributions.

14 MR. WILLIAMS: Well, then Mr. Solomon got it wrong. I -- it's
15 not my -- it's not my -- I can't go back and tell you what Mr. Solomon did
16 or didn't do.

17 MS. DWIGGINS: He was the liaison between us.

18 MR. WILLIAMS: What would Mr. Lubbers expect?

19 DISCOVERY COMMISSIONER: Ms. Dwiggins, it's not what
20 you believed. You may -- and your client may well have had not an
21 intention at that point of bringing a lawsuit directly against Mr. Lubbers,
22 but it's what Mr. Lubbers believed. And based on this typewritten
23 document, 13285 dated 10/14/13, it appears to me that certainly there
24 were considerations of -- of concern. I'll say that. Considerations of
25 concern.

1 Is that vague enough, Mr. Williams?

2 But having said that, we get back to the same analysis.

3 Attorney/client? Yeah, I think this one probably is. Asking for opinions,
4 asking for consideration of certain issues? Yes.

5 Now we get to the trustee exception. In this case, it appears
6 to go far beyond just dealing with the trust accounting.

7 MS. DWIGGINS: Your Honor, may I interject just one
8 second?

9 DISCOVERY COMMISSIONER: Yes.

10 MS. DWIGGINS: Because according to Mr. Williams'
11 declaration, this memo was prepared by Mr. Lubbers before he retained
12 or before he participated in the call. So --

13 DISCOVERY COMMISSIONER: Okay. So --

14 MS. DWIGGINS: So in order for it to be attorney/client
15 privilege, there has to be a communication of that with the lawyer.

16 DISCOVERY COMMISSIONER: And we don't know, because
17 we don't know what took place during the call.

18 MR. WILLIAMS: Your Honor, the -- the declarations from
19 Mr. Lee and Ms. Renwick to the extent that they can get into this, have
20 generally described the subject matters that were discussed with
21 Mr. Lubbers on October 14th, 2013, and thereafter. And they are
22 entirely consistent with the content of what you see in these notes,
23 particularly the first three lines pose questions, okay. I'm not getting into
24 the content. But they are consistent with what the lawyers say was
25 discussed.

1 DISCOVERY COMMISSIONER: And then they talked about
2 future legal proceedings.

3 MR. WILLIAMS: Well, it -- it's the epitome of work product
4 and attorney/client, Your Honor. It's basically assessing here's where
5 we're strong, here's where we're weak. Here's what we should probably
6 do from a strategy standpoint. It doesn't get any more quintessential
7 work product, opinion work product, and the fact that it's being shared
8 with lawyers, attorney/client privilege.

9 MS. DWIGGINS: There is absolutely no indication that that
10 was shared with lawyers. And --

11 DISCOVERY COMMISSIONER: Yeah. I can't -- I -- it looks
12 like something that would -- let me say it that way. Whether it actually
13 was paragraph per paragraph, question per question, we don't know,
14 because we don't know what happened during the discussion. And the
15 real problem we have, and this is the reality and we've said it again and
16 again, you don't have and we don't have Mr. Lubbers here to tell us.

17 MS. DWIGGINS: Well -- well --

18 DISCOVERY COMMISSIONER: Not that he could. He would
19 have to assert a privilege and -- and maintain it.

20 MS. DWIGGINS: Well, I'm not sure. Because I think part of it
21 is factual, which I'm sure we're going to go through. But I just want to
22 point out the fact that -- that when the billing statements in part talk
23 about legal defenses, if you noticed, there's also redactions there. We
24 don't know if perhaps Ed was being advised by the attorneys that he has
25 a potential claim against the Canarellis.

1 MR. WILLIAMS: Well, Your Honor, now --

2 DISCOVERY COMMISSIONER: Well, I -- I am not
3 speculating.

4 MR. WILLIAMS: -- they're just speculating.

5 DISCOVERY COMMISSIONER: I am trying so hard to get the
6 lawyers to talk about facts and not believe assumptions or speculations.
7 We have to look at the facts of what we have.

8 MR. WILLIAMS: Right.

9 DISCOVERY COMMISSIONER: We have a date on this
10 typewritten memo consistent with the date that he consulted with his
11 lawyers. We have some handwritten notes on it. We have what I would
12 consider to be things that you would talk with your lawyer about. And if
13 we want to say an attorney/client communication, I think this probably
14 more than anything else I've reviewed in camera appears to be that.

15 But there's also information here that is factual, that is not
16 necessarily something that I would say would not be discoverable in
17 some form. And here's what I really struggle. We can call this
18 attorney/client and we can protect it. The problem is that we have a
19 trustee exception that I -- I do believe applies. And so anything that
20 deals with the trust, with Scott's trust, anything that deals with managing
21 that trust or from a factual just, you know, mechanical perspective, I am
22 really reluctant to protect. I -- because it's a fact.

23 Now, under ordinary circumstances, we might be able to glean
24 that fact another way. But we can't. We can't. This gives us insight into
25 what the trustee, if these are, in fact, Mr. Lubbers' notes, which I -- I --

1 we're going to say that they are, that seems to be the weight of the
2 evidence. This is the only way we get to on or about October 2013 what
3 he was considering needed to be done with respect to Scott's trust. This
4 is the only way we get to the sum of that information.

5 And I don't know the reference to NAPT is --

6 MS. DWIGGINS: It's the Asset Protection Trust.

7 MR. WILLIAMS: Asset Protection Trust.

8 DISCOVERY COMMISSIONER: Okay. That's not relevant
9 here, correct?

10 MS. DWIGGINS: It's a different trust. No, Your Honor.

11 DISCOVERY COMMISSIONER: Okay. So we don't have
12 to -- I'm working -- I'm working my way up. I'm starting at the bottom and
13 going in reverse just for fun. Sometimes that's how I think. So here we
14 go.

15 The last paragraph, not relevant, protect it.

16 The two paragraphs above that I'm not so inclined to protect,
17 because they deal with the trust, the ultimate issues regarding the
18 administration of that trust that are at issue now. And I just don't think
19 they should be protected because there is no other way to get to that
20 information. And it's factual.

21 MR. WILLIAMS: Your -- Your Honor --

22 DISCOVERY COMMISSIONER: It is not opinion.

23 MR. WILLIAMS: No, if I -- let's --

24 DISCOVERY COMMISSIONER: Well, belief is not an opinion.

25 MR. WILLIAMS: Your Honor, but starting --

1 DISCOVERY COMMISSIONER: I wish we all could
2 understand that, a belief is not a -- a fact.

3 MR. WILLIAMS: It's not a fact, right.

4 DISCOVERY COMMISSIONER: Right.

5 MR. WILLIAMS: I understand that.

6 DISCOVERY COMMISSIONER: It's not a fact.

7 MR. WILLIAMS: So when you start the second sentence, and
8 I'm not going to read it into the record, Your Honor, but I'm now on third
9 paragraph from the bottom --

10 DISCOVERY COMMISSIONER: Yes.

11 MR. WILLIAMS: -- okay, the second sentence starts, and if
12 you just read from there, I don't think there's any way in the world that
13 someone could find that those are facts. Those are clearly his opinions.
14 Those are his assessments of this case.

15 DISCOVERY COMMISSIONER: As it relates to the
16 administration of the trust.

17 MR. WILLIAMS: No. Most respectfully, we're talking --

18 DISCOVERY COMMISSIONER: What does it relate to then?
19 Because I'm confused.

20 MR. WILLIAMS: The -- the transaction. The sales
21 transaction.

22 DISCOVERY COMMISSIONER: Right. Which is part of the
23 administration of Scott's trust.

24 MR. WILLIAMS: That's -- that's what this entire litigation is
25 about.

1 DISCOVERY COMMISSIONER: That's why -- that's correct.
2 That is correct. And that goes to the administration of the trust. And --
3 and the key issue on this -- on -- that -- the reason why we're here. And
4 there is no other way to know that information that Mr. Lubbers had or
5 his thought about the trust at that time than this note -- than these notes.

6 MR. WILLIAMS: But, Your Honor, so we talked about the
7 initial petition, that it only sought an account.

8 DISCOVERY COMMISSIONER: Uh-huh.

9 MR. WILLIAMS: Okay. And that's where you made some
10 decisions based on the fact that the fiduciary exception would apply.

11 DISCOVERY COMMISSIONER: Right.

12 MR. WILLIAMS: There's then --

13 DISCOVERY COMMISSIONER: Don't you think the
14 accounting deals with the assets and the trust?

15 MR. WILLIAMS: Of course they -- of course an accounting
16 has to do with the assets of the trust, Your Honor.

17 DISCOVERY COMMISSIONER: That's right.

18 MR. WILLIAMS: But they were reserving their rights at this
19 time to unwind the sales transaction and then filed a subsequent petition
20 where we're litigating, as you well know, about the valuation that was
21 employed and the purchase price employed as part of that sales
22 transaction. That's not administration. That's not trust administration,
23 Your Honor.

24 DISCOVERY COMMISSIONER: Really?

25 MR. WILLIAMS: No. Most respectfully, it's not.

1 DISCOVERY COMMISSIONER: Well, what do you -- what do
2 you call it then? It doesn't deal with anything else but Scott's trust.

3 MR. WILLIAMS: It -- Your Honor, everything in this case --

4 DISCOVERY COMMISSIONER: And the assets in the sale.

5 MR. WILLIAMS: -- has to do with Scott's trust.

6 DISCOVERY COMMISSIONER: Not everything.

7 MR. WILLIAMS: Your Honor, everything does.

8 DISCOVERY COMMISSIONER: Not everything.

9 MR. WILLIAMS: Well, Your Honor, the entire -- the entire
10 case is about Mr. Canarelli's trust. I mean, seriously, the purchase
11 transaction --

12 DISCOVERY COMMISSIONER: It talks about the -- the
13 actual trust itself and managing the trust and what they were going to --
14 what they did as it relates to the value of the trust. What -- what their
15 thoughts were on that.

16 MR. WILLIAMS: Right.

17 DISCOVERY COMMISSIONER: Right.

18 MR. WILLIAMS: Their opinions --

19 MS. DWIGGINS: Your Honor, if --

20 MR. WILLIAMS: -- their assessments of where -- you know,
21 I -- I don't want to --

22 DISCOVERY COMMISSIONER: But he's playing the trustee
23 role. He's got his trustee hat on. He's doing this for the benefit of the
24 beneficiary. He's not doing this for his own well being, although I
25 suppose one could argue he is, because he's acting as trustee. But this

1 isn't about litigation against him.

2 MR. WILLIAMS: Sure -- Your Honor --

3 DISCOVERY COMMISSIONER: No. It's about how to
4 manage the trust and the assets of it.

5 MR. WILLIAMS: Your Honor, he's been threatened, he's been
6 alleged to have breached his fiduciary duty in the initial petition. The
7 family trustee. Paragraph C6.

8 DISCOVERY COMMISSIONER: I didn't think there was a
9 breach of fiduciary duty against him in the initial petition.

10 MR. WILLIAMS: Your Honor, I read it.

11 DISCOVERY COMMISSIONER: Did I miss something? I
12 thought it was in 2015.

13 MR. WILLIAMS: Your Honor --

14 MS. DWIGGINS: It was for --

15 MR. WILLIAMS: Your Honor.

16 MS. DWIGGINS: What he just read, singular, was the failure
17 to account.

18 MR. WILLIAMS: Your Honor.

19 MS. DWIGGINS: Only.

20 MR. WILLIAMS: The family trustee, singular, Mr. Lubbers,
21 has violated the fiduciary obligations due and owing to the petitioner.
22 That is in the initial petition.

23 MS. DWIGGINS: Keep reading.

24 By failing to provide Petitioner with an inventory of the trust
25 assets or render an accounting.

1 MR. WILLIAMS: Right. But, Your Honor --

2 MS. DWIGGINS: That's different than the sale.

3 MR. WILLIAMS: Right. That's exactly right, Your Honor. I
4 couldn't have said it any better than Ms. Dwiggins. You have been
5 focused on the fact that an accounting was demanded and that that's
6 administrative, and in his role as trustee, that there may be a fiduciary
7 exception that applies to that. The sale is different. That's the exact
8 point. The sale is different.

9 MS. DWIGGINS: And I think it --

10 MR. WILLIAMS: That's not accounting.

11 MS. DWIGGINS: Sorry.

12 MR. WILLIAMS: That's why they have, at this period of time
13 in 2013, they're specifically reserving their rights to challenge the sale.
14 They then come in and they -- they don't challenge the sale to set it
15 aside, but they challenge the sale to say you didn't sell it for enough.
16 And that's what we're litigating now, Your Honor. That's not trust
17 administration.

18 So when Mr. Lubbers is talking about risks and what he thinks
19 are strong points --

20 DISCOVERY COMMISSIONER: If you -- you don't think
21 managing the assets of Scott's trust is trust administration?

22 MR. WILLIAMS: Of -- yes, Your Honor. That's -- I'm not
23 saying that managing the trusts aren't. But the issue is this transaction.
24 The transaction where his --

25 DISCOVERY COMMISSIONER: And that was part of

1 administering the trust.

2 MS. DWIGGINS: And it was in a sense that he had to make --
3 when he made the decision to sell, it was guided by whether or not it
4 was in the best interests.

5 DISCOVERY COMMISSIONER: It had to be, because he is
6 trustee.

7 MS. DWIGGINS: And that is an administrative function. And
8 when he's talking about potentially defending any claim to unwind, which
9 never even has occurred, it's -- it would -- he would have to be arguing
10 what his decision was, why it was made, and that it was in the best
11 interests. Which --

12 MR. WILLIAMS: Because --

13 MS. DWIGGINS: -- which I guess goes to the other part,
14 which -- which I think is the most critical, is -- is where it says:

15 First there was resistance --

16 DISCOVERY COMMISSIONER: Don't read it into the record.

17 MS. DWIGGINS: Oh, sorry. That -- the part right above it that
18 starts, and then the first line of that paragraph we were just looking at it.
19 I don't see how that's anything but factual in nature. And I think the
20 ultimate question is if I asked him those questions during a deposition,
21 ultimately, why decisions were certain -- why certain decisions were
22 made, who they were discussed with, what was discussed, I would
23 ultimately get those answers if he was telling the truth under oath. There
24 is no way that those would be protected as to the reason why certain
25 decisions were made to allow distributions, not allow distributions, and

1 ultimately sell.

2 MR. WILLIAMS: Look at the line that precedes all of it, Your
3 Honor.

4 MS. DWIGGINS: And -- and that doesn't matter, because A,
5 that's what his belief is, which is it doesn't matter what he says the belief,
6 because the part right under it is he confirms that that is what happened
7 or essentially what happened, which are facts. And again, I go back to
8 the simple point if I ask question during a deposition as to why decisions
9 were made, and he was being truthful, would I get those answers?

10 DISCOVERY COMMISSIONER: So, Mr. Williams, I guess my
11 question is to you.

12 MR. WILLIAMS: Uh-huh.

13 DISCOVERY COMMISSIONER: If I protect -- the last
14 paragraph isn't relevant. And if I -- if I allow the two paragraphs above
15 that, but then protect the rest of the document, how do we know -- how
16 do we have the confirmation that's independent of the petitioner as to
17 what happened here? Who do we get that information from?

18 MR. WILLIAMS: With respect to which sections, Your Honor?

19 DISCOVERY COMMISSIONER: The -- the paragraph right in
20 the middle of the page.

21 MR. WILLIAMS: The one with the four lines?

22 DISCOVERY COMMISSIONER: I believe. That starts, I
23 believe.

24 MR. WILLIAMS: Right.

25 DISCOVERY COMMISSIONER: And everything underneath

1 it.

2 MR. WILLIAMS: Ask Larry Canarelli.

3 DISCOVERY COMMISSIONER: Where do we get --

4 MR. WILLIAMS: Ask Larry Canarelli. He was the family
5 trustee through the majority of this period of time, Your Honor. Take his
6 deposition. They're going to.

7 DISCOVERY COMMISSIONER: But what if it's different than
8 what's in this document?

9 MR. WILLIAMS: Well, Your Honor, but that's not -- whether a
10 person testifies consistent with what's in a document or not --

11 DISCOVERY COMMISSIONER: But the -- but -- but this is
12 not his document he's testifying to.

13 MR. WILLIAMS: Right.

14 DISCOVERY COMMISSIONER: The person who could --

15 MR. WILLIAMS: I'm -- this document --

16 DISCOVERY COMMISSIONER: -- testify to it is no longer
17 with us.

18 MR. WILLIAMS: Your Honor, this document theoretically
19 should never be in evidence. It shouldn't be the subject of examination.

20 DISCOVERY COMMISSIONER: Well, then, maybe it should
21 have --

22 MR. WILLIAMS: If Mr. Lubbers --

23 DISCOVERY COMMISSIONER: -- been more carefully
24 culled --

25 MR. WILLIAMS: Your Honor.

1 DISCOVERY COMMISSIONER: -- before being produced.

2 MR. WILLIAMS: If Mr. Lubbers was here today and
3 Ms. Dwiggins went to ask him, Can you tell me in this period of time
4 were certain distributions being made, and if -- you know, he could -- of
5 course, she can ask that. And he could say no, that period of time they
6 weren't. I'm -- I'm making this up, I'm not agreeing with this set of facts.
7 But, you know, or, you know, did they resume at some point? Of course,
8 you can ask those types of things.

9 MS. DWIGGINS: And I could ask the follow-up that says
10 why? And he -- and that's not protected.

11 DISCOVERY COMMISSIONER: Yeah. I think --

12 MS. DWIGGINS: His --

13 DISCOVERY COMMISSIONER: -- we have to have
14 resolution on the trustee exception. I think we have to have some
15 resolution on that.

16 MS. DWIGGINS: I don't even think --

17 DISCOVERY COMMISSIONER: I'm giving you my --

18 MS. DWIGGINS: -- we even get there because of this.

19 DISCOVERY COMMISSIONER: -- recommendation.

20 MS. DWIGGINS: I think these are facts, they're admissions of
21 a party opponent.

22 DISCOVERY COMMISSIONER: Right.

23 MS. DWIGGINS: And they go to the credibility of Larry.

24 DISCOVERY COMMISSIONER: But facts in a contained in
25 an attorney/client privileged communication, to make that

1 communication remain privileged.

2 MS. DWIGGINS: And the Court has the ability under the law
3 to redact the document so as to protect anything other than facts. And I
4 think the --

5 DISCOVERY COMMISSIONER: How would you recommend
6 I redact this document?

7 MS. DWIGGINS: From the part that says the word, First,
8 down to where it says, Happened, in the next paragraph, I -- I think is all
9 factual in nature, because I believe if I ask the questions during the
10 deposition, he would answer accordingly as to the -- what was done,
11 when it was done, why distribution stopped, why they were resumed,
12 when discussions were first being talked about the sale, who they were
13 talked about. I mean, I could go into probably 100 questions just about
14 this alone.

15 And if he was being truthful, I would ultimately get those
16 answers and they wouldn't be protected.

17 DISCOVERY COMMISSIONER: Mr. Williams --

18 MS. DWIGGINS: What would be a basis of privilege to say
19 that we acquiesced and the --

20 DISCOVERY COMMISSIONER: Don't read anymore into the
21 record.

22 MS. DWIGGINS: -- what the purpose was. I'm not --

23 DISCOVERY COMMISSIONER: And if you --

24 MS. DWIGGINS: -- just saying --

25 DISCOVERY COMMISSIONER: I'm serious.

1 MS. DWIGGINS: -- what the purpose was.

2 DISCOVERY COMMISSIONER: Mr. Williams, how would you
3 redact the document?

4 MR. WILLIAMS: I wouldn't. I mean, Your Honor, and I'm not
5 saying that to be flip.

6 DISCOVERY COMMISSIONER: Yeah, all right.

7 MR. WILLIAMS: But -- no, no, no. No. Let me tell you what
8 my position is and I understand the court will rule.

9 DISCOVERY COMMISSIONER: I think you need to put your
10 lawyer hat on right now. Okay?

11 MR. WILLIAMS: Right.

12 DISCOVERY COMMISSIONER: And help me out here.

13 MR. WILLIAMS: Okay. So --

14 DISCOVERY COMMISSIONER: Because some of this is
15 factual.

16 MR. WILLIAMS: Here's -- here's what I would say. Okay.
17 This is my position and then let me -- Your Honor, my position is the
18 entire document is protected as attorney/client privilege. My position is
19 the entire document is protected because of work product. My -- I'll --
20 third position would be that even to the extent that there are facts
21 contained within this document, they are inextricably intertwined with
22 mental impressions and attorney/client privilege communications such
23 that there can't be an effective redaction.

24 So what I don't -- I'm not trying to be disrespectful, Your
25 Honor, all I'm saying --

1 DISCOVERY COMMISSIONER: No, I know that.

2 MR. WILLIAMS: All I'm saying is that I don't want to be in a
3 position of telling you how a document can be redacted and then have
4 that used against me if we are, in fact, at a higher court arguing about
5 fiduciary exceptions or whatever the case may be. That's all I'm saying,
6 Your Honor.

7 DISCOVERY COMMISSIONER: All right.

8 MS. DWIGGINS: And I think the substantial need applies in
9 the fact that he has passed, let alone we haven't even talked about the
10 waiver yet.

11 DISCOVERY COMMISSIONER: Well, I'm going to address
12 the waiver just briefly, because I don't want to spend a lot of time on it. I
13 actually have two other motions of yours I have to address.

14 MR. WILLIAMS: Right.

15 DISCOVERY COMMISSIONER: Which is if you send the
16 documents to America West, and this is where I think there -- there is a
17 very -- American West, I'm sorry -- I think that there is a very -- this is a
18 very complicated and difficult issue, because there is no question in my
19 mind that Mr. Lubbers stood in relationship with the Canarellis and that
20 they were on the same side for some of these particular issues. And
21 frankly, that's in part why we have the petition.

22 So having said that, I think the *Kotter* case says you don't
23 have to have a written agreement, you can share work product, in
24 particular, attorney/client privileged information without it acting as a
25 waiver. And that's the *Kotter* decision.

1 MS. DWIGGINS: I understand --

2 DISCOVERY COMMISSIONER: I can't distinguish what
3 happened here from that.

4 MS. DWIGGINS: Okay. Well, there's a difference between
5 that information being shared with them versus the entire entity. How
6 were these documents protected? Who were they accessible to?
7 There's not the common interest with the entity AWDI. You're talking
8 about Larry and Bob possibly alone. So why were they even brought to
9 America West? Why were individuals --

10 DISCOVERY COMMISSIONER: Well, I'm not sure --

11 MS. DWIGGINS: -- going through them? Which I
12 demonstrated by the e-mail --

13 DISCOVERY COMMISSIONER: Ms. Dwiggins, can you just
14 give me a break for a minute, please?

15 Mr. Williams, who went through the documents?

16 MR. WILLIAMS: Your Honor, I can't tell you who went
17 through -- they -- they cited -- Tina Goode, is has assisted Ed and Bob
18 Evans and everyone in this case in helping getting documents produced,
19 Your Honor. There -- there are a number of responses to this on waiver.
20 AW -- you are exactly right. It doesn't matter if I gave work product
21 protected materials to everyone at AWDI, as long as they didn't turn it
22 over to my adversary.

23 DISCOVERY COMMISSIONER: It was not a smart move, by
24 the way.

25 MR. WILLIAMS: Well, Your Honor, Mr. Lubbers at the time,

1 when he was alive, was operating out of those offices. Your Honor,
2 that's where he was.

3 DISCOVERY COMMISSIONER: Well, that cuts against you
4 too.

5 MR. WILLIAMS: I don't -- I don't know that -- but my point is
6 this: Giving the documents to AWDI and whether it was only Ms. Goode
7 or whether Bob Evans or -- Your Honor, you can give work product to a
8 third party. What you can't do is give it to your adversary. That's *Kotter*,
9 you are exactly right on that.

10 With respect to common interest under the attorney/client
11 privilege, because we're not just talking about common interest privilege
12 on work product, which is the *Kotter* case, the NRS, the attorney/client
13 privilege statute, Subsection 3 of 49.095 codifies it and recognizes that
14 common interest applies not -- you don't even have to be in litigation,
15 Your Honor. You don't have to be a coparty with someone, like the
16 argument was made that AWDI is not a party and can't be a party in this
17 case, so there can be no common interest with Mr. Lubbers. Your
18 Honor, that's not true. Because --

19 DISCOVERY COMMISSIONER: I'm not going to find there
20 was a waiver.

21 MR. WILLIAMS: Okay. I'm -- I'll shut up, Your Honor. You've
22 been very patient with us and I'm -- I'm not going to belabor it.

23 DISCOVERY COMMISSIONER: I wish -- I probably should
24 have been more patient and I apologize if I haven't been.

25 MR. WILLIAMS: No, you're --

1 DISCOVERY COMMISSIONER: These are very difficult
2 issues, and unfortunately the one person who could address a lot of
3 these issues is not with us. I do think that the most problematic
4 document we have in this grouping is this 285 document. I think it is
5 attorney/client. But to the extent that it deals with the administration of
6 the trust, and I use that phrase broadly, I do not think that it can remain
7 privileged.

8 And what that really means, according to case law that I have
9 looked at, is that Scott could have come in at any time and said, I want
10 to see your lawyer's files. I want to see what's in there, to Mr. Lubbers. I
11 want to see what you all talked about. I mean, that's really what that
12 exception applies to.

13 I understand that he was concerned, Mr. Lubbers was
14 concerned, and he should have been. He wore a number of different
15 hats. I'm sure he anticipated litigation. But that goes with the work
16 product privilege.

17 With regard to the attorney/client privilege, you can waive that
18 and there can be an exception to it.

19 With respect to the work product, I can work on protecting the
20 opinions that may arguably be contained herein, knowing -- knowing and
21 understanding that Mr. Lubbers was a lawyer. But it would be my
22 recommendation to the district court that with respect to
23 Document 13285, that everything that is in the 1, 2, 3 -- let's see,
24 everything starting at the top of the page, including the handwritten
25 notes to the number first in the indent would be protected and clawed

1 back as opinion work product.

2 And potentially, attorney/client privilege without an exception,
3 because it doesn't deal with the common interest with the trust. Scott's
4 trust, which is the ultimate issue and why we're here.

5 Starting with the indented paragraph that starts with the
6 number first, up through and including the second-to-the-last paragraph
7 that ends with the word so, I'm going to maintain it as confidential, but it
8 will not be clawed back and it will not be deemed privileged based on
9 both the exception to the attorney/client, because this information is
10 factual and deals with the administration of Scott's trust, including the
11 assets of the trust. And in terms of the work product, it's -- it's factual to
12 the extent there may be some slight opinion -- I -- I really don't think
13 there's what I would consider to be legal opinion in there. I think it's
14 more matter of fact opinion regarding his view as a trustee. There's no
15 other way to get to this information. There's an extraordinary need to
16 have it disclosed. And that would be my recommendation.

17 And then the last paragraph I'm going to allow them to claw it
18 back, because it's not relevant.

19 So 13285 will be redacted in part. It will be confidential. I'm
20 going to make and give the respondent 2.34(e) relief, so you can make
21 your objection to the district court judge. And until such time, this
22 document will remain privileged and cannot be used or attached to any
23 other document filed with the court or used for any other purpose.

24 With respect to it already being used, it's my understanding
25 that the document itself was submitted for in camera to the judge, am I

1 right on that?

2 MR. WILLIAMS: Only to you, Your Honor.

3 DISCOVERY COMMISSIONER: Only to me. What
4 happened -- so it's --

5 MS. DWIGGINS: It's referenced in our surcharge petition.

6 DISCOVERY COMMISSIONER: So you'll have to,
7 Mr. Williams, bring your Motion to Seal. I can't seal. I'm -- I don't have
8 that ability. I can strike a document. I can't strike Judge Sturman's
9 documents. I can strike my own.

10 MR. WILLIAMS: Uh-huh.

11 DISCOVERY COMMISSIONER: I would ask you to make
12 your Motion to Seal.

13 MS. DWIGGINS: I would be willing to stipulate to just extract
14 that exhibit or redact that portion. We've done it with other documents in
15 the case.

16 DISCOVERY COMMISSIONER: All right. The document
17 itself would have to be redacted and the exhibits would have to be
18 removed. If you want to make that agreement on the record pending
19 further resolution by the Court, you're welcome to do that.

20 MS. DWIGGINS: I think it would be a --

21 DISCOVERY COMMISSIONER: And that would save you a
22 motion, Mr. Williams.

23 MS. DWIGGINS: I think it would be agreeing to redact that
24 portion of the brief where it's referenced, and I otherwise think it's --

25 DISCOVERY COMMISSIONER: I would request you do a stip

1 and order and have Judge Sturman sign it, and then you can take her
2 order to the district court and have them redact and -- and pull the
3 document.

4 MR. WILLIAMS: Understood, Your Honor. I'll work with
5 Ms. Dwiggins on this. And -- because I'm sensitive to this document
6 being reviewed by the district court as part of the motion that we filed to
7 dismiss the petition, because -- and I'm not going to reargue anything,
8 but I will deal with it. I understand what the Court is saying and we will
9 deal with it appropriately. And I appreciate what both the Court's order
10 is -- or recommendation.

11 DISCOVERY COMMISSIONER: If I have something further I
12 could offer you, I would. I just don't. But I will give you the time under
13 EDCR 2.34 to make your proper objection. And that would include until
14 final resolution by a higher court.

15 MR. WILLIAMS: Thank you, Your Honor. And -- and for
16 clarity, that applies only to 13285?

17 DISCOVERY COMMISSIONER: Correct.

18 MR. WILLIAMS: Understood. Okay.

19 DISCOVERY COMMISSIONER: And then everything else I
20 think I -- did I deal with everything else? I hope.

21 MS. DWIGGINS: I believe so. And just so Your Honor is
22 aware, there has been -- I guess the order hasn't been entered yet. But
23 there has been a modification to the confidentiality agreement. So
24 there's really only limited things that are now considered confidential and
25 they really relate to just the personal finances of the siblings trust, Scott,

1 and the Canarellis. But understanding that you want these to mean
2 confidential, we'll just make sure they're within the scope of that modified
3 order.

4 DISCOVERY COMMISSIONER: I did put confidentiality on
5 the others. I didn't ask you if you wanted 2.43(e) relief on the other set
6 of documents.

7 MR. WILLIAMS: Your Honor, my position, for the record,
8 would be that I do. And if the Court's willing to give me 2.34(e) relief for
9 the other documents --

10 DISCOVERY COMMISSIONER: I'll give you the relief on
11 those sets.

12 MR. WILLIAMS: Thank you.

13 DISCOVERY COMMISSIONER: Sure. All right.

14 One thing I've learned the hard way is it's very difficult to the
15 put the cat back in the bag. And I think this case and this motion work is
16 case in point on that. So before it gets any worse, I'll give you 2.34
17 relief. But I will -- but I will say that I did spend a considerable amount of
18 time thinking about this. I don't want you to think that I didn't. I did. And
19 I made the best decisions I could. But you are welcome to object. I
20 have no problem with that. We'll maintain these as privileged until such
21 time as the objection is ruled on by the district court judge. And in which
22 case I would just say within five business days after the Court rules on
23 the objection, that the documents will be treated as -- as I've indicated.

24 MR. WILLIAMS: Setting aside, I mean, any attempt to seek
25 further relief from the supreme court or whatever.

1 DISCOVERY COMMISSIONER: Right. An order --
2 MR. WILLIAMS: If the -- if the district court, for example, were
3 to give us a stay, it would -- it would still maintain that protection.
4 DISCOVERY COMMISSIONER: Exactly.
5 MR. WILLIAMS: Understood.
6 DISCOVERY COMMISSIONER: Until the resolution of the
7 confidentiality or the privileged nature of the documents has been -- has
8 been fully resolved, including any appeals.
9 MS. DWIGGINS: I understand, Your Honor.
10 MR. WILLIAMS: Very good. Thank you, Your Honor.
11 DISCOVERY COMMISSIONER: All right.
12 And, Ms. Dwiggins, can you prepare the report and
13 recommendation on this one.
14 MS. DWIGGINS: Of course.
15 DISCOVERY COMMISSIONER: Sorry.
16 MS. DWIGGINS: No, that's fine.
17 DISCOVERY COMMISSIONER: You do such a good job
18 though. It's why I keep asking you.
19 MS. DWIGGINS: She's taking good notes back here. I hear
20 her typing.
21 DISCOVERY COMMISSIONER: I know. She does a great
22 job.
23 MS. DWIGGINS: She told me her fingers hurt.
24 MR. WILLIAMS: And, Your Honor, was this -- did this get
25 marked?

1 you've had to review, more importantly.

2 MR. SCHWARZ: Thank you to your staff.

3 DISCOVERY COMMISSIONER: Thank you.

4 [Proceedings concluded at 4:57 p.m.]

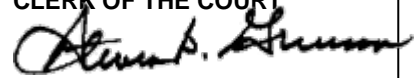
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17 ATTEST: I do hereby certify that I have truly and correctly transcribed the
18 audio/video proceedings in the above-entitled case to the best of my
19 ability.

20 

21 _____
22 Shawna Ortega, CET*562
23
24
25

7



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20 **DISTRICT COURT**
21 **CLARK COUNTY, NEVADA**

22 In the Matter of:

23 SCOTT LYLE GRAVES CANARELLI
24 IRREVOCABLE TRUST, dated
25 February 24, 1998.

26 Case No: P-13-078912-T
27 Dept. No.: 26

28 **NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE than an *Order on Respondents' Motion for Judgment on the Pleadings and/or Partial Summary Judgment on Petitioner's First Prayer of Relief* was entered by this Court on September 21, 2018, a copy of which is attached hereto.

DATED September 21, 2018.

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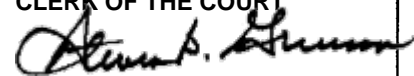
CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2018, I caused a copy of the foregoing **NOTICE OF ENTRY OF ORDER**, to be served through the Eighth Judicial District Court's electronic filing system, addressed to the following party:

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

In the Matter of:

SCOTT LYLE GRAVES CANARELLI
IRREVOCABLE TRUST, dated
February 24, 1998.

Case No: P-13-078912-T
Dept. No: 26

Date of Hearing: May 30, 2018
Time of Hearing: 10:30 am

**ORDER ON RESPONDENTS' MOTION FOR JUDGMENT ON THE PLEADINGS
AND/OR PARTIAL SUMMARY JUDGMENT ON PETITIONER'S
FIRST PRAYER FOR RELIEF**

On May 30, 2018, this Court held a hearing (the "Hearing") on Respondents' Motion for Judgment on the Pleadings and/or Partial Summary Judgment on Petitioner's First Prayer for Relief. Present at the hearing were: J. Colby Williams and Philip R. Erwin, of the law firm Campbell & Williams, and Elizabeth Brickfield, of the law firm Dickinson Wright PLLC, on behalf of Respondents; and Dana Dwiggins and Jeffrey P. Luszeck, of the law firm Solomon Dwiggins Freer Ltd., on behalf of Petitioner Scott Canarelli. After considering the papers and pleadings and hearing the argument of counsel, the Court made the following findings and orders:

The Court FINDS that due and proper notice of the Hearing was provided to all necessary parties. The parties do not dispute, and the Court thus FINDS, that the requests set forth in the First

Prayer for Relief contained in the Petition to Surcharge filed on June 27, 2017 (specifically, subparts 1(a) through 1(n), *see* Pet. at 37:21 – 38:23) have been satisfied or otherwise are not necessary/able to be performed given Respondents' satisfaction of certain requests contained therein.

Accordingly,

IT IS HEREBY ORDERED that Respondents' Motion for Partial Summary Judgment on Petitioner's First Prayer for Relief (*i.e.*, subparts 1(a) through 1(n)) is GRANTED.

IT IS FURTHER ORDERED that nothing in this Order shall preclude Petitioner at this time from pursuing any of his other claims for relief set forth in the Petition or any supplement thereto or preclude Respondents from presenting any defenses in response thereto.

IT IS FURTHER ORDERED that this Order cannot be used as evidence to prove the valuation by Stephen Nicolatus or any payments made pursuant to said valuation have been adopted as conclusive.

Dated: this 19th day of September, 2018.


DISTRICT COURT JUDGE

Submitted By:

 Approved as to Form and Content:

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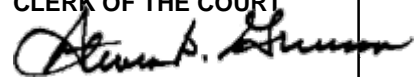

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13 *Attorneys for Scott Canarelli*

14 **DISTRICT COURT**
15 **CLARK COUNTY, NEVADA**

16 In the Matter of the

Case No.: P-13-078912-T
Dept. No.: XXVI/Probate

17 THE SCOTT LYLE GRAVES
18 CANARELLI IRREVOCABLE TRUST,
19 dated February 24, 1998.

20 **STIPULATION AND ORDER TO SEAL DOCUMENTS PREVIOUSLY FILED WITH**
21 **THE COURT**

22 Petitioner Scott Lyle Graves Canarelli ("Petitioner"), by and through his counsel, the law
23 firm of Solomon Dwiggins & Freer, Ltd. and Respondents Frank Martin, Special Administrator of
24 the Estate of Edward C. Lubbers, as former Family Trustee and/or the Independent Trustee of the
25 Scott Lyle Graves Canarelli Irrevocable Trust dated February 24, 1998 (the "Trust"), and Lawrence
26 Canarelli and Heidi Canarelli, Former Family Trustees of the Trust (collectively, "Respondents"),
27 by and through their counsel, the law firms of Campbell & Williams and Dickinson Wright PLLC
28 and hereby stipulate as follows:

1. Pursuant to Rules SRCR 3(4)(a) and (h) of the Nevada Rules for Sealing and
Redacting Court Records, Nevada permits the court to seal or redact when it "is permitted or
required by federal or state law," or when it is justified or required by another "compelling
circumstance."

2. On August 29, 2018, the Parties appeared before the Discovery Commissioner for a hearing on several matters including a motion to determine whether certain documents disclosed by Respondents (the "Disputed Documents") are protected by the attorney/client privilege or the work product doctrine and, therefore, may be clawed back by Respondents as they contend the Disputed Documents were inadvertently produced.

3. Prior to the filing of such motion, Petitioner referenced the Disputed Documents in certain filings before this Court, both directly in briefing and as exhibits.

4. During the August 20 hearing, the Discovery Commissioner ruled, in part, that some of the content contained within the Disputed Documents was not protected but nonetheless should be deemed confidential at this time.

5. As a matter of good faith and in order to comply with the Discovery Commissioner's confidential designation of the Disputed Documents, the Parties hereby request an order from this Court directing the Clerk to seal the following documents previously filed with this Court: (1) the Supplement to Petition to Surcharge Trustee and Former Trustees for Breach of Fiduciary Duties, Conspiracy and Aiding and Abetting; Petition for Breach of Fiduciary Duty for Failure to Properly Account; and Petition for an Award of Attorneys' Fees, Accountant Fees and Costs, filed May 18, 2018 ("Supplement to the Surcharge Petition"); (2) the Motion for Determination of Privilege Designation for RESP013284-RESP013288 and RESP78899-RESP78900, filed July 13, 2018 ("Motion for Determination"); (3) the Opposition to Motion to Dismiss Petitioner's Supplement to Petition to Surcharge Trustee and Former Trustees for Breach of Fiduciary Duties, Conspiracy and Aiding and Abetting; Petition for Breach of Fiduciary Duty for Failure to Properly Account; and Petition for an Award of Attorneys' Fees, Accountant Fees & Costs, filed July 31, 2018 ("Opposition to Motion to Dismiss"); and (4) the Reply to Opposition to Motion for Determination of Privilege Designation for RESP013284-RESP013288 and RESP78899-RESP78900; and Opposition to Countermotion for Remediation of Improperly Disclosed Attorney-client Privileged and Work Product Protected Materials, filed August 24, 2018 ("Reply to Motion for Determination") (collectively the "Filed Documents").

6. The Parties further agree that, after the Filed Documents are sealed, such

documents should be refiled with the redactions agreed to by the Parties.

DATED this 21 day of September, 2018.

DATED this 20th day of September,
2018.

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*Counsel for Respondents Lawrence and
Heidi Canarelli, and Frank Martin,
Special Administrator of the Estate of
Edward C. Lubbers*

ORDER

GOOD CAUSE BEING FOUND, IT IS HEREBY ORDERED that the Supplement to
the Surcharge Petition filed on May 18, 2018 shall be SEALED.

IT IS FURTHER HEREBY ORDERED that Petitioner shall file a redacted copy of the
Supplement to the Surcharge Petition, with redactions as agreed to by Respondents.

IT IS FURTHER HEREBY ORDERED that the Motion for Determination filed on July
13, 2018 shall be SEALED.

IT IS FURTHER HEREBY ORDERED that Petitioner shall file a redacted copy of the
Motion for Determination, with redactions as agreed to by Respondents.

IT IS FURTHER HEREBY ORDERED that the Opposition to Motion to Dismiss shall
be SEALED.

9

THIS IS YOUR COURTESY COPY
DO NOT FORWARD TO JUDGE
DO NOT ATTEMPT TO FILE

DCRR

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*Counsel for Respondents Lawrence Canarelli,
Heidi Canarelli and Edward Lubbers*

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of

THE SCOTT LYLE GRAVES
CANARELLI IRREVOCABLE TRUST,
dated February 24, 1998.

Case No.: P-13-078912-T
Dept. No.: XXVI/Probate

**DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS ON (1) THE
MOTION FOR DETERMINATION OF PRIVILEGE DESIGNATION, (2) THE
SUPPLEMENTAL BRIEFING ON APPRECIATION DAMAGES.**

Hearing Date: August 29, 2018

Hearing Time: ^{1:30}
2:00 p.m.

Attorneys for Petitioner: Dana A Dwiggin
Jeffrey P. Luszeck
Tess E. Johnson

Attorneys for Respondents: J. Colby Williams
Philip R. Erwin
Elizabeth Brickfield
Joel Z. Schwarz

Attorneys for (1) Lawrence Canarelli and Heidi Canarelli, as trustees of the Stacia Leigh Lemke Irrevocable Trust; (2) Lawrence Canarelli and Heidi Canarelli, as trustees of the Jeffrey Lawrence Graves Canarelli Irrevocable Trust; (3) Lawrence Canarelli and Heidi Canarelli, as trustees of the

1 Alyssa Lawren Graves Canarelli Irrevocable Trust; and (4) American West Development, Inc.:

2 Jennifer L. Braster
3 Andrew J. Sharples

4 Attorney for the Special Administrator for the Estate of Edward C. Lubbers: Liane K. Wakayama¹

5 **I.**
6 **FINDINGS**

7 **A. *Motion for Determination of Privilege Designation***

8 THE COMMISSIONER HEREBY FINDS that Respondents have asserted the
9 attorney/client privilege and/or the work product doctrine on the documents Bates Numbered
10 RESP0013284-13288 (which appear to have been drafted in or around October 2013) and
11 RESP0078899-78900 (which appear to have been drafted on December 19, 2013) (collectively the
12 “Disputed Documents”). *See* Hr’g Tr. dated Aug. 29, 2018 at 29:7-8; 31:7-8; 32:16-21.

13 THE COMMISSIONER FURTHER HEREBY FINDS that the Disputed Documents appear
14 to be Edward C. Lubbers’ (“Lubbers”) handwritten and/or typewritten notes. *Id.* at 32:16-21.

15 **1. Attorney/Client Privilege**

16 THE COMMISSIONER FURTHER HEREBY FINDS that, as detailed further below,
17 certain of the Disputed Documents are protected by the attorney-client privilege.

18 THE COMMISSIONER FURTHER HEREBY FINDS that, as detailed further below, even
19 if the Disputed Documents are protected by the attorney-client privilege certain of them (or portions
20 thereof) are subject to disclosure under the “fiduciary exception” to the extent that said documents
21 pertain to the administration of The Scott Lyle Graves Canarelli Irrevocable Trust (the “SCIT”). *Id.*
22 at 31:19-32:3

23 THE COMMISSIONER FURTHER HEREBY FINDS that although the “fiduciary
24 exception” has not yet been determined by the Nevada Supreme Court, *id.* at 30:4-5, 30:22-23, NRS
25 49.115(5) creates an exception to the attorney/client privilege as to communications relevant to

26
27 ¹ Because Ms. Wakayama departed the hearing prior to the Discovery Commissioner addressing the
28 matters that are the subject of this Report and Recommendation, her signature is not included below
as a reviewing attorney.

1 matters of common interest between two or more clients when the communication was made by
2 any of them to a lawyer retained or consulted in common when offered in an action between any of
3 the clients. *Id.* at 30:5-10.

4 THE COMMISSIONER FURTHER HEREBY FINDS that the petition filed on September
5 30, 2013 (“Initial Petition”) sought, among other things, an accounting for the SCIT, an irrevocable
6 trust of which Scott is a beneficiary. *Id.* at 30:18-20, 83:1-5.

7 THE COMMISSIONER FURTHER HEREBY FINDS that Lubbers was the Family Trustee
8 at the time the Initial Petition was filed. So, the actions he was taking were for the benefit of the
9 SCIT, arguably triggering application of the fiduciary exception. *Id.* at 30:20-21.

10 THE COMMISSIONER FURTHER HEREBY FINDS that Petitioner’s request for an
11 accounting in the Initial Petition did not automatically create an adversarial relationship between
12 Petitioner and Lubbers. *Id.* at 32:13-15. However, Mr. Lubbers, being a lawyer, was sophisticated
13 enough to know he could have some potential exposure and was concerned the parties may be
14 headed toward litigation. *Id.* at 30:14-17; 90:19-25.

15 **2. Attorney Work Product**

16 THE COMMISSIONER FURTHER HEREBY FINDS that the attorney work product
17 doctrine does not provide absolute protection, but is qualified in nature. *Id.* at 52:10-17.

18 THE COMMISSIONER FURTHER HEREBY FINDS that Lubbers was not acting as an
19 attorney when he prepared the Disputed Documents. *Id.* at 35:8-13.

20 THE COMMISSIONER FURTHER HEREBY FINDS that non-attorneys can prepare
21 protected work product. *Id.* at 38:3-39:17. However, NRCP 26(b)(3) only references opinion work
22 product in connection with “an attorney or other representative of a party[.]”. *Id.* at 54:11-18.

23 THE COMMISSIONER FURTHER HEREBY FINDS that Lubbers anticipated litigation
24 at the time the Initial Petition was filed and at the time the Disputed Documents were prepared. *Id.*
25 at 89:4-90:25.

26 THE COMMISSIONER FURTHER HEREBY FINDS that as a result of Lubbers’ passing
27 on April 2, 2018, he is unavailable to be deposed regarding any factual matter related to the creation
28

1 and factual content of the Disputed Documents. *Id.* at 55:17-22, 65:7-11, 71:2-5, 79:4-7, 80:15-21,
2 82:6-8, 93:23-94:4.

3 **3. Documents Bates Numbers RESP0013284-13288**

4 THE COMMISSIONER FURTHER HEREBY FINDS that Respondents produced
5 documents Bates Numbered RESP0013284-13288 on December 15, 2017 as part of their Initial
6 Disclosures.

7 THE COMMISSIONER FURTHER HEREBY FINDS that Respondents clawed back the
8 documents Bates Numbered RESP0013284-13288 on June 5, 2018, less than three weeks after
9 Petitioner attached them as an exhibit to his supplemental Petition filed May 18, 2018. *Id.* at 55:23-
10 25; 57:18-58:25.

11 i. *RESP0013284*

12 THE COMMISSIONER FURTHER HEREBY FINDS that RESP0013284 appears to be
13 handwritten notes that the Commissioner assumes Lubbers made contemporaneous with a
14 teleconference he had with his lawyers on or about October 14, 2013. *Id.* at 76:20-22, 78:3-5,
15 81:21-22.

16 THE COMMISSIONER FURTHER HEREBY FINDS that RESP0013284 is probably
17 protected by the attorney/client privilege, but it nonetheless falls under the “fiduciary exception”
18 and NRS 49.115(5) because it deals with Lubbers’ preparation of an accounting for the SCIT, which
19 is for the benefit of Petitioner. *Id.* at 79:12-16, 81:23-82:1, 82:24-83:5.

20 THE COMMISSIONER FURTHER HEREBY FINDS that, to the extent RESP0013284
21 may be considered work product because it was created in anticipation of litigation, it falls under
22 the exception of substantial need since there is no other reasonable way for Petitioner to obtain the
23 information contained therein from Lubbers. *Id.* at 79:5-7.

24 THE COMMISSIONER FURTHER HEREBY FINDS that RESP0013284 contains fact as
25 opposed to opinion information. *Id.* at 82:8-11.

26 ii. *RESP0013285*

27 THE COMMISSIONER FURTHER HEREBY FINDS that RESP0013285 is a typed
28 document with handwritten notes. The handwritten date is consistent with the date Lubbers

1 consulted with his lawyers, and the notes reflect the types of things one would discuss with his/her
2 attorney. The typed notes, therefore, appear to be an attorney-client communication. *Id.* at 93:9-
3 14.

4 THE COMMISSIONER FURTHER HEREBY FINDS that Respondents produced
5 RESP0013285 from Mr. Lubbers' hard copy files. It is unclear who typed RESP0013285, however
6 the Commissioner believes the handwritten portion was authored by Lubbers. *Id.* at 88:6-17.

7 THE COMMISSIONER FURTHER HEREBY FINDS that from the beginning of
8 RESP0013285, including the handwritten notes, to the indented paragraph starting with the word
9 "1st" is both work product and protected under the attorney-client privilege without an applicable
10 exception. *Id.* at 109:21-110:4.

11 THE COMMISSIONER FURTHER HEREBY FINDS that the indented paragraph starting
12 with the word "1st" on RESP0013285 through and including the first sentence of the following
13 paragraph that starts with "[w]hether" and ends with "happened" are factual in nature (hereinafter
14 the "Factual Statements"). *Id.* at 101:19-24, 103:20-22, 105:14-15, 110:5-16.

15 THE COMMISSIONER FURTHER HEREBY FINDS that while certain portions of
16 RESP0013285 may constitute opinion work product, the Factual Statements constitute ordinary
17 work product. To the extent the Factual Statements are intertwined with opinion work product,
18 there is nonetheless substantial need to have this information disclosed as Petitioner has no other
19 reasonable way to obtain the information referenced in the Factual Statements. *Id.* at 110:11-16.

20 THE COMMISSIONER FURTHER HEREBY FINDS that to the extent the Factual
21 Statements are contained within an attorney-client privileged communication, they nevertheless fall
22 under the "fiduciary exception" and NRS 49.115(5) because the topics are administrative in nature
23 – e.g. management of the SCIT -- and are otherwise factual in nature. *Id.* at p. 93:17-22, 94:18-24,
24 110:7-11.

25 THE COMMISSIONER FURTHER HEREBY FINDS that the second sentence of the
26 paragraph starting with "[w]hether" up through and including the paragraph starting with the word
27 "annual" is subject to disclosure. *Id.* at 110:5-16. Said portion of RESP0013285 is factual in nature,
28 and there is substantial need to have this information disclosed as Petitioner has no other reasonable

1 way for Petitioner to obtain the same. *Id.* at 110:11-16. To the extent this portion of RESP0013285
2 may be protected under the attorney/client privilege, it nonetheless falls under the “fiduciary
3 exception” because the topics are administrative in nature – e.g. management of the SCIT -- and
4 are otherwise factual in nature. *Id.* at 93:17-22, 94:18-24, 110:7-11.

5 THE COMMISSIONER FURTHER HEREBY FINDS that the final paragraph of
6 RESP0013285 is not relevant as it does not relate to the SCIT or the instant matter and, thus, may
7 be clawed back. *Id.* at 94:15, 101:13-14, 110:17-18.

8 iii. *RESP0013286 and RESP0013287*

9 THE COMMISSIONER FURTHER HEREBY FINDS that RESP0013286 and 13287 do
10 not appear to contain factual information related to the SCIT, and as such, should be clawed back.
11 *Id.* at 76:9-13.

12 iv. *RESP0013288*

13 THE COMMISSIONER FURTHER HEREBY FINDS that it is unclear when Lubbers
14 composed the notes labeled RESP0013288 because there is no date on them, *id.* at 77:17-18, 81:12-
15 15, 82:16-21, but they appear to contain facts about the SCIT and the petition for an accounting,
16 not Lubbers’ opinions. *Id.* at 76:22-25, 77:8-9, 77:24.

17 THE COMMISSIONER FURTHER HEREBY FINDS no reason to find RESP0013288
18 protected under the attorney/client privilege because it contains factual information pertaining to
19 the Initial Petition. *Id.* at 77:12-17, 82:20-21. To the extent RESP0013288 is protected by the
20 attorney/client privilege, it nonetheless falls under the “fiduciary exception” because it primarily
21 discusses an accounting for the SCIT. *Id.* at 77:12-23, 81:16-18.

22 THE COMMISSIONER FURTHER HEREBY FINDS that to the extent RESP0013288 is
23 considered work product, it falls under the exception of substantial need and contains facts as
24 opposed to an opinion. *Id.* at 77:24-25, 81:19-20.

25 **4. No Waiver**

26 THE COMMISSIONER FURTHER HEREBY FINDS that under *Cotter v. Eighth Judicial*
27 *District Court in and for County of Clark*, 134 Nev. Adv. Op. 32, 416 P.3d 228 (2018), even if a
28

1 party does not have a written agreement, it can share work product and attorney/client privileged
2 information without it acting as a waiver. *Id.* at 106:22-25.

3 THE COMMISSIONER FURTHER HEREBY FINDS that American West Development,
4 Inc. or any of its affiliates' possession of Lubbers' files does not constitute a waiver of the
5 attorney/client privilege and/or the work product doctrine based on the common interest doctrine.
6 *Id.* at 108:19-20.

7 **5. Documents Bates Numbered RESP0078899-78900**

8 THE COMMISSIONER FURTHER HEREBY FINDS that the documents identified by
9 Bates Numbers RESP0078899-78900 are notes that Lubbers took during a meeting that he had with
10 Stephen Nicolatus, the independent appraiser, Lubbers' counsel, Petitioner and Petitioner's counsel
11 in December 2013. *Id.* at 51:6-12, 64:10-15.

12 THE COMMISSIONER FURTHER HEREBY FINDS that Respondents do not contend the
13 documents Bates Numbered RESP0078899-78900 are protected by the attorney/client privilege.
14 They instead contend the notes are protected by the attorney work product doctrine. *Id.* at 62:20-
15 24, 64:2-18.

16 THE COMMISSIONER FURTHER HEREBY FINDS that RESP0078899-78900 do not
17 contain Lubbers' opinions but rather information that is primarily factual in nature. *Id.* at 51:23-
18 52:2, 64:6-11, 71:1-2.

19 THE COMMISSIONER FURTHER HEREBY FINDS that, even if RESP0078899-78900
20 constitute work product, there is substantial need that the documents not be deemed protected
21 because there is no other way for Petitioner to obtain said information from Lubbers *via* deposition
22 or other means. *Id.* at 55:17-22, 65:7-11, 71:2-5.

23 ***B. Supplemental Briefing on Appreciation Damages.***

24 THE COMMISSIONER FURTHER HEREBY FINDS that, in prior hearings the
25 Commissioner based certain findings and recommendations regarding the production of financial
26 documents post 2013 in terms of contract claims only and damages stemming therefrom and not
27 taking tort claims, including, but not limited to, Petitioner's claims of breach of fiduciary duty
28 against Respondents as the Former Trustees of the SCIT. *Id.* at 141:14-16.

1 THE COMMISSIONER FURTHER HEREBY FINDS that although appreciation of
2 damages is not applicable under a breach of contract analysis, *id.* at 117:20-22, if the Court finds
3 that there was a breach of fiduciary duty, bad faith and/or fraud, it would likely recognize
4 appreciation of damages as a remedy. *Id.* at 117:1-3, 117:22-24, 141:20-23.

5 THE COMMISSIONER FURTHER HEREBY FINDS that if the Court finds that there was
6 a breach of fiduciary duty, then the amount of any distribution from the Purchased Entities² post
7 March 31, 2013 to the Siblings' Trust is relevant and discoverable. *Id.* at 117:17-19, 138:5-12,
8 141:24-25, 142:3-5.

9 THE COMMISSIONER FURTHER HEREBY FINDS that Counsel for the Purchased
10 Entities and counsel for the Subpoenaed Sold Entities have agreed to produce the audited income
11 statements from 2014 and 2017 and the Commissioner believes it is appropriate for Counsel to do
12 so. *Id.* at p. 130:21-23, 140:12-14.

13
14 **II.**
RECOMMENDATIONS

15 **A. *Motion for Determination of Privilege Designation***

16 IT IS HEREBY RECOMMENDED that RESP0013284 is subject to production. *Id.* at 73:1-
17 4, 82:24-83:5.

18 IT IS FURTHER RECOMMENDED that with respect to RESP0013285:
19
20

21 ² "Purchased Entities" refers to entities sold under the Purchase Agreement, which are as
22 follows: (1) CanFam Holdings; LLC; (2) Colorado Housing Investments, Inc.; (3) Colorado Land
23 Investments, Inc.; (4) Heritage 2, Inc.; (5) Indiana Investments, Inc.; (6) Inverness 2010, LLC; (7)
24 Model Renting Company, Inc.; (8) SJSA Investments, LLC; (9) AWH Ventures, Inc.; (10) Arizona
25 Land Investments, Inc.; (11) Brentwood 1, LLC; (12) Bridgewater 1, LLC; (13) Brookside 1, LLC;
26 (14) Carmel Hills, LLC; (15) Colorado Land Investments 2, Inc.; (16) Fairmont 2, LLC; (17)
27 Highlands Collection 1, LLC; (18) Kensington 2, Inc.; (19) Kingsbridge 2, LLC; (20) Lexington
28 1, LLC; (21) Lexington 2, LLC; (22) Model Renting 2008, LLC; (23) Model Renting 2009, LLC;
(24) Model Renting 2010, LLC; (25) Model Renting 2012, LLC; (26) Newcastle 1, LLC; (27)
Reserve 1, LLC; (28) Reserve 2, LLC; (29) Silverado Springs 2, LLC; (30) Silverado Springs 3,
LLC; (31) Silverado Summit, LLC; (32) SJSA Ventures, LLC; (33) Stonebridge 1, LLC; (34)
Woodbridge 1, Inc.; and (35) Woodbridge 2, LLC.

- 1 (1) from the beginning of RESP0013285, including the handwritten notes, to the
2 indented paragraph starting with the word “1st” shall be redacted, *id.* at 109:21-
3 110:1;
- 4 (2) the indented paragraph starting with the word “1st” through and including the first
5 sentence of the following paragraph that starts with “[w]hether” and ends with
6 “happened” is subject to production, *id.* at 101:19-24, 103:20-22, 104:5-16, 110:5-
7 16;
- 8 (3) the second sentence of the paragraph starting with “[w]hether” up through and
9 including the paragraph starting with the word “annual” is subject to production, *id.*
10 at 110:5-16;
- 11 (4) the final paragraph on RESP0013285 shall be redacted. *Id.* at 94:15.

12 IT IS FURTHER RECOMMENDED that RESP0013286 and 13287 shall be clawed back.
13 *Id.* at 76:9-13, 76:15-19.

14 IT IS FURTHER RECOMMENDED that RESP0013288 is subject to production. *Id.* at
15 77:2-3, 78:1.

16 IT IS FURTHER RECOMMENDED that RESP0078899-78900 are subject to production.
17 *Id.* at 70:22-25, 71:5-6, 72:21-22.

18 IT IS FURTHER RECOMMENDED that Respondents be granted EDCR 2.34(e) relief until
19 the District Court enters the instant Report and Recommendation. *Id.* at 110:19-23, 113:7-11.

20 IT IS FURTHER RECOMMENDED that Petitioner be precluded from referencing or
21 attaching the Disputed Documents in any future filing with this Court or for any other purpose, until
22 a decision is rendered by the District Court. *Id.* at 110:19-23, 113:7-11.

23 ***B. Supplemental Briefing on Appreciation Damages.***

24 IT IS FURTHER RECOMMENDED that the Subpoenaed Sold Entities shall provide their
25 audited income statements for the years 2014 through 2017. *Id.* at 140:12-14.

26 IT IS FURTHER RECOMMENDED that the Siblings’ Trusts shall provide records of all
27 distributions made to the Siblings’ Trusts from the Purchased Entities during the period of January
28 1, 2014 to August 29, 2018, including the name of the entity making the distribution, the date the

1 distribution was made, the name of the trust receiving the distribution and the amount of the
2 distribution. *Id.* at 140:15-18.

3 IT IS FURTHER RECOMMENDED that the Siblings' Trusts and the Subpoenaed Sold
4 Entities be granted relief under EDCR 2.34(e), *id.* at p. 137:14-16, however, within five (5) business
5 days of this Court's entry of the instant Report and Recommendations, the Siblings' Trusts shall
6 provide the records stated in the instant Report and Recommendation. *Id.* at 140:15-18.

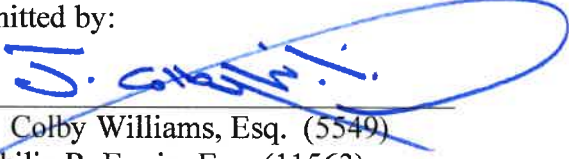
7 IT IS FURTHER RECOMMENDED that the Distribution Records be given a confidential
8 designation under NRCP 26(c), thereby protecting the same from being used or attached in filings
9 or other documents submitted to this Court without redactions or an *in camera* designation. *Id.* at
10 138:13-18.

11 The Discovery Commissioner, met with counsel for the parties, having discussed the issues
12 noted above and having reviewed any material proposed in support thereof, hereby submits the
13 above recommendations.

14 DATED this 5 day of December, 2018.

15
16 
17 DISCOVERY COMMISSIONER

18 Submitted by:

19 By: 
20 J. Colby Williams, Esq. (5549)
21 Philip R. Erwin, Esq. (11563)
22 CAMPBELL & WILLIAMS
23 700 South Seventh Street
24 Las Vegas, Nevada 89107

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*Counsel for Respondents Lawrence
Canarelli, Heidi Canarelli and Edward
Lubbers*

CASE NAME: *In re The Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998.*
CASE NUMBER: P-13-078912-T

Approved as to form and content by:

Approved as to form and content by:

By: _____
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Andrew J. Sharples (#12866)
NAYLOR & BRASTER
1050 Indigo Drive, Suite 200
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By: _____
Dana A. Dwiggin (#7049)
Jeffrey P. Luszeck (#9619)
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Counsel for non-parties American West Development, Inc., Lawrence Canarelli and Heidi Canarelli, as trustees of The Alyssa Lawren Graves Canarelli Irrevocable Trust, The Jeffrey Lawrence Graves Canarelli Irrevocable Trust, and The Stacia Leigh Lemke Irrevocable Trust

Attorneys for Petitioner

NOTICE

Pursuant to NRCP 16.1(d)(2), you are hereby notified you have five (5) days from the date you receive this document within which to file written objections.

The Commissioner's Report is deemed received three (3) days after mailing to a party or the party's attorney, or three (3) days after the clerk of the court deposits a copy of the Report in a folder of a party's lawyer in the Clerk's office. E.D.C.R. 2.34(f).

A copy of the foregoing Discovery Commissioner's Report was:

_____ Mailed to Petitioner/Respondents at the following address on the _____ day of _____, 20____:

Dana A. Dwiggin
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_____ Placed in the folder of counsel in the Clerk's office on the _____ day of _____, 20____.

↓ Electronically served counsel on Dec 6, 2018, pursuant to N.E.F.C.R.

Rule 9.

By Natilie Gh
Commissioner Designee

CASE NAME: *In re The Scott Lyle Graves Canarelli*
Irrevocable Trust, dated February 24, 1998.
CASE NUMBER: P-13-078912-T

ORDER

The Court, having reviewed the above report and recommendations prepared by the
Discovery Commissioner and,

_____ The parties having waived the right to object thereto,

_____ No timely objection having been received in the office of the Discovery Commissioner
pursuant to E.D.C.R. 2.34(f),

_____ Having received the objections thereto and the written arguments in support of said
objections, and good cause appearing,

* * *

AND

_____ IT IS HEREBY ORDERED the Discovery Commissioner's Report & Recommendations are
affirmed and adopted.

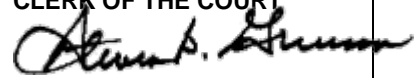
_____ IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations
are affirmed and adopted as modified in the following manner. (attached hereto)

_____ IT IS HEREBY ORDERED that a hearing on the Discovery Commissioner's Report and
Recommendations is set for _____, 20_____, at ____: ____ a.m.

Dated this _____ day of _____, 20_____.

DISTRICT COURT JUDGE

10



ODCR

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Edward C. Lubbers, Former Trustees*

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the

THE SCOTT LYLE GRAVES
CANARELLI IRREVOCABLE TRUST,
dated February 24, 1998.

Case No. P-13-078912-T

Dept. No. XXVI/Probate

**RESPONDENTS' OBJECTIONS, IN
PART, TO DISCOVERY
COMMISSIONER'S REPORT AND
RECOMMENDATIONS ON MOTION
FOR DETERMINATION OF
PRIVILEGE DESIGNATION**

Hearing Date:

Hearing Time:

Respondents Lawrence Canarelli (“Larry”) and Heidi Canarelli (“Heidi”) (collectively “the Canarellis”), and Frank Martin, Special Administrator of the Estate of Edward C. Lubbers (“Lubbers” and, together with the Canarellis, “Respondents”), as former Family Trustees of the Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998 (the “SCIT”), through undersigned counsel, hereby object (in part) to the Discovery Commissioner’s Report and Recommendations on Motion for Determination of Privilege Designation. These Objections are based on the papers and pleadings on file herein, the exhibits attached hereto, the following Points and Authorities, and any oral argument the Court considers at the time of the hearing.

NOTICE OF MOTION

TO: ALL PARTIES, and

TO: THEIR COUNSEL OF RECORD

PLEASE TAKE NOTICE that the undersigned will bring the above **Objections** on for hearing before Department XXVI or other appropriate judicial officer on the **24th** day of **January**, 2019, at the hour of **9:30** **a**.m., or as soon thereafter as counsel can be heard.

DATED this 17th day of December, 2018.

CAMPBELL & WILLIAMS

By /s/ J. Colby Williams
J. COLBY WILLIAMS, ESQ. (5549)
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*Attorneys for Lawrence and
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Special Administrator of the Estate of
Edward C. Lubbers, Former Trustees*

POINTS AND AUTHORITIES

I. INTRODUCTION

The underlying Discovery Commissioner's Report and Recommendation ("DCRR") addresses important issues of attorney-client privilege and work product protection, the ultimate resolution of which will have a significant impact on the direction of these proceedings. That is because Petitioner Scott Canarelli ("Petitioner" or "Scott") has sought to use Lubbers' privileged and protected materials (typed and handwritten notes) affirmatively to expand his claims in this action. Respondents have moved to dismiss Petitioner's Supplemental Petition based on Lubbers' notes, but that matter is on hold while the threshold privilege issues are finally determined by this Court and, if necessary, the Nevada Supreme Court.

The Discovery Commissioner found the subject notes to be protected by the attorney-client privilege and work product doctrine, at least in part. The Commissioner, however, ruled *sua sponte* that a so-called "fiduciary exception" to Nevada's attorney-client privilege requires production of portions of the notes. Respondents contend this ruling is wrong for two independent reasons. First, Nevada has not recognized the common law fiduciary exception to its statutory attorney-client privilege. Second, even if Nevada has recognized the fiduciary exception (and it has not), the exception certainly does not apply here as Lubbers prepared the subject notes for his own protection after Petitioner filed his original pleading in this action alleging that Lubbers had breached his fiduciary obligations as trustee of the SCIT.

As for work product, the Discovery Commissioner appropriately determined that Lubbers anticipated litigation with Petitioner at the time he prepared his notes. She nonetheless found that the bulk of the notes comprise "ordinary" (*i.e.*, fact)—as opposed to "opinion"—work product, and thus ordered production on grounds that Petitioner had shown a substantial need to obtain the notes due to Lubbers' death. Respondents contend these rulings are likewise erroneous.

II. BACKGROUND

A. Factual Summary

Respondents provided a lengthy factual history in their underlying Opposition filed on August 10, 2018, which they incorporate but will not repeat here. The essential facts are as follows:

Petitioner filed his Initial Petition in this action on September 30, 2013. *See* Opp’n at 6:16-8:16. Prior to that date, Petitioner’s counsel, Solomon Dwiggins & Freer (“SDF”), had threatened to file a petition seeking, *inter alia*, to remove Larry and Heidi as Family Trustees of the SCIT due to hostility between the parties and disputes over distributions. *See id.* at 5:12-6:7. Lubbers specifically noted this development in an agenda item dated November 15, 2012 (“Scott – lawsuit threatened”), which was then sent to Larry and Bob Evans of The American West Homebuilding Group. *Id.* The Initial Petition contained a number of adversarial allegations against the Canarellis and Lubbers, who was Family Trustee by that time, including that “the Family Trustee violated the fiduciary obligations due and owing to Petitioner[.]” *Id.* at 7:4-8:16.

Less than two weeks after Petitioner’s service of the Initial Petition, Lubbers retained the law firm Lee, Hernandez, Landrum, Garofalo & Blake (“LHLGB”) to represent him in connection with responding to the Initial Petition (and the two other petitions filed by Scott). *See* Opp’n at 8:19-9:2. In anticipation of a telephone call with attorneys David Lee and Charlene Renwick on October 14, 2013, Lubbers prepared (or had prepared) typed notes. *Id.* at 9:3-11. Generally described, the notes initially set forth a series of questions that Lubbers sought to pose to counsel regarding how to respond to the Initial Petition. *See id.* The notes go on to describe Lubbers’ “beliefs” regarding the case, including how Respondents should respond to the Initial Petition, and how the Court may view the case. *See id.* Finally, the notes reflect Lubbers’ assessment of the strengths and weaknesses of certain legal issues. *See id.* Lubbers created additional

1 handwritten notes during his October 2013 call with LHLGB, and during a later meeting in
2 December 2013 attended by the parties, their respective counsel, Steve Nicolatus, and Bob Evans.
3 *See Opp'n* at 12:11-14:25.¹

4 Scott filed his Petition to Surcharge on June 27, 2017. Respondents' counsel inadvertently
5 produced Lubbers' October 2013 notes as part of Respondents' Initial Disclosures on December
6 15, 2017. *See Opp'n* at 11:17-12:4. Respondents' counsel inadvertently produced Lubbers'
7 December 2013 notes on April 6, 2018 as part of a supplement to Respondents' Initial
8 Disclosures. *Id.* at 12:5-9. The parties had previously agreed to a written ESI Protocol that
9 expressly governs the procedure for dealing with such inadvertent productions. *Id.* at 13:20-14:8.
10 With no forewarning, though, Petitioner unilaterally included Lubbers' October 2013 notes as an
11 exhibit to his Supplemental Petition filed on May 18, 2018. *See id.* at 12:16-13:4. Petitioner also
12 publicly quoted from Lubbers' October 2013 notes in the body of his Supplemental Petition,
13 which seeks to add fraud and expanded breach of fiduciary duty claims against Respondents. *Id.*
14 Respondents sent a letter on June 5, 2018 clawing back the October 2013 notes pursuant to the
15 parties' ESI Protocol, which prompted a series of communications between counsel for the parties
16 and ultimately led to the filing of the underlying Motion and Countermotion. *See Opp'n* at 13:5-
17 19.

18 In contrast to the manner in which Petitioner has attempted to use the *October* 2013 notes,
19 Petitioner did not seek to make unilateral use of Lubbers' separately-produced *December* 2013
20
21
22

23 ¹ Petitioner provided copies of Lubbers' notes to the Discovery Commissioner *in camera* as
24 sealed Exhibits 1 and 2 to his underlying Motion. In the context of moving to dismiss Petitioner's
25 Supplemental Petition filed on May 18, 2018, which attached certain of the notes at issue herein
26 as Exhibit 4 thereto, Respondents notified the Court that it may wish to exercise caution before
27 reviewing Lubbers' typed notes so that it did not become unwittingly tainted as the notes reflect
28 Lubbers' beliefs as to how the Court may view this litigation. *See* Letter from C. Williams dated
August 13, 2018. Respondents wish to remind the Court of this issue so that it has the chance to
consider how best to proceed with the review of the DCRR.

notes. *See id.* at 14:17-25. His counsel instead notified Respondents’ counsel of the potential inadvertent production of those notes, after which the parties engaged in the clawback procedure set forth in the ESI Protocol and narrowed their dispute to two pages of documents. *See id.*

B. Procedural History

Petitioner filed his Motion for Determination of Privilege Designation of RESP013284-RESP013288 and RESP78899-RESP78900 on July 13, 2018; Respondents filed their Opposition and Countermotion for Remediation of Improperly Disclosed Attorney-Client Privileged and Work Product Protected Materials on August 10, 2018; Petitioner filed his Reply and Opposition on August 24, 2018, and the Discovery Commissioner conducted a thorough hearing on August 29, 2018.

As a threshold matter, the Discovery Commissioner found that Lubbers anticipated litigation at the time he prepared the typed and handwritten notes in or about October 2013 shortly after Scott filed his Initial Petition. *See, e.g.,* Hr’g Tr. dated Aug. 29, 2018 at 87:22-88:4; 89:15-17; 90:19-25.² The Commissioner further found that the typed notes “reflect things that you would talk with your lawyer about. And if we want to say an attorney/client communication, I think this is probably more than anything else I’ve reviewed in camera appears to be that.” *Id.* at 93:9-14. In the end, the Commissioner found that the notes reflected attorney-client communications, *see id.* at 109:1-5 (“I think it is attorney/client”), but found that the fiduciary exception permitted disclosure of portions of the notes to Petitioner. *See id.* at 109:5-12. To her credit, the Commissioner acknowledged that “the fiduciary privilege has not been determined in Nevada yet,” *see id.* at 30:4-5, and that this “critical issue” would likely need to go “all the way

² True and correct excerpts of the Hearing Transcript dated August 29, 2018 are attached hereto as Exhibit 1.

up” to the Nevada Supreme Court. *See, e.g., id.* at 50:1-10; 77:12-13; 103:13-15.

The Commissioner further found that the notes reflected work product, including opinion work product, but found that Petitioner had a substantial need to obtain portions of the notes. *Id.* at 109:19-110:16. The Commissioner thereafter recommended that the notes be disclosed to Petitioner in redacted form, but stayed enforcement of her recommendations under EDCR 2.34(e) to permit Respondents to file objections with the district court. *Id.* at 110:19-23.

C. Respondents’ Objections to the DCRR

The Discovery Commissioner entered the DCRR on December 6, 2018.³ Respondents object, in part, to the DCRR as follows (objected to language is in bold, italicized text):

Findings

1. Finding I(A)(1), Page 2, ll. 18-21: “even if the disputed Documents are protected by the attorney-client privilege ***certain of them (or portions thereof) are subject to disclosure under the ‘fiduciary exception’ to the extent that said documents pertain to administration of The Scott Lyle Graves Canarelli Irrevocable Trust (the “SCIT”).***”

2. Finding I(A)(1), Page 2, l. 23-Page 3, l. 3: “although the ‘fiduciary exception’ has not yet been determined by the Nevada Supreme Court . . . ***NRS 49.115(5) creates an exception to the attorney-client privilege as to communications relevant to matters of common interest between two or more clients when the communication was made by any of them to a lawyer retained or consulted in common when offered in an action between any of the clients.***”

3. Finding I(A)(1), Page 3, ll. 8-9: “***So, the actions he [Lubbers] was taking were for the benefit of the SCIT, arguably triggering the fiduciary exception.***”

RESP0013284

4. Finding I(A)(3)(i), Page 4, ll. 16-19: “RESP0013284 is probably protected by the attorney-client privilege, ***but it nonetheless falls under the ‘fiduciary exception’ and NRS 49.115(5) because it deals with Lubbers’ preparation of an accounting for the SCIT, which is for the benefit of Petitioner.***”

5. Finding I(A)(3)(i), Page 4, ll. 20-23: “to the extent RESP0013284 may be considered work product because it was created in anticipation of litigation, ***it falls***

³ A true and correct copy of the DCRR is attached hereto as Exhibit 2.

1 *under the exception of substantial need since there is no other reasonable way*
2 *for Petitioner to obtain the information contained therein from Lubbers.”*

3 6. Finding I(A)(3)(i), Page 4, ll. 24-25: “*RESP0013284 contains fact as*
4 *opposed to opinion information.”*

5 ***RESP0013285***

6 7. Finding I(A)(3)(ii), Page 5, ll. 11-14: “*the indented paragraph starting*
7 *with the word ‘I’ on RESP0013285 through and including the first sentence of*
8 *the following paragraph that starts with ‘whether’ and ends with ‘happened’ are*
9 *factual in nature (hereinafter the ‘Factual Statements’).”*

10 8. Finding I(A)(3)(ii), Page 5, ll. 15-19: “while certain portions of
11 RESP0013285 may constitute opinion work product, *the Factual Statements*
12 *constitute ordinary work product.* To the extent the Factual Statements are
13 intertwined with opinion work product, *there is nonetheless substantial need to*
14 *have this information disclosed as Petitioner has no other reasonable way to*
15 *obtain the information referenced in the Factual Statements.”*

16 9. Finding I(A)(3)(ii), Page 5, ll. 20-23: “to the extent the Factual Statements
17 are contained within an attorney-client privileged communication, *they*
18 *nevertheless fall under the ‘fiduciary exception’ and NRS 49.115(5) because the*
19 *topics are administrative in nature – e.g. management of the SCIT – and are*
20 *otherwise factual in nature.”*

21 10. Finding I(A)(3)(ii), Page 5, l. 25 – Page 6, l. 4: “*the second sentence of the*
22 *paragraph starting with ‘whether’ up through and including the paragraph*
23 *starting with the word ‘annual’ is subject to disclosure. . . . Said portion of*
24 *RESP0013285 is factual in nature, and there is substantial need to have this*
25 *information disclosed as Petitioner has no other reasonable way for Petitioner to*
26 *obtain the same. . . . To the extent this portion of RESP0013285 may be protected*
27 *under the attorney/client privilege, it nonetheless falls under the ‘fiduciary*
28 *exception’ because the topics are administrative in nature – e.g. management of*
the SCIT – and are otherwise factual in nature.”

RESP0013288

11. Finding I(A)(3)(iv), Page 6, ll. 13-16: “it is unclear when Lubbers composed
the notes labeled RESP0013288 because there is no date on them . . . *but they*
appear to contain facts about the SCIT and the petition for accounting, not
Lubbers’ opinions.”

12. Finding I(A)(3)(iv), Page 6, ll. 17-21: “*no reason to find RESP0013288*
protected under the attorney/client privilege because it contains factual
information pertaining to the Initial Petition. . . . To the extent RESP0013288 is

protected by the attorney/client privilege, *it nonetheless falls under the ‘fiduciary exception’ because it primarily discusses an accounting for the SCIT.*”

13. Finding I(A)(3)(iv), Page 6, ll. 22-24: “to the extent RESP0013288 is considered work product, *it falls under the exception of substantial need and contains facts as opposed to opinion.*”

RESP0078899-78900

14. Finding I(A)(5), Page 7, ll. 16-17: “**RESP0078899-78900 do not contain Lubbers’ opinion but rather information that is primarily factual in nature.**”

15. Finding I(A)(5), Page 7, ll. 19-22: “even if RESP0078899-78900 constitute work product, *there is substantial need that the documents not be deemed protected because there is no other way for Petitioner to obtain said information from Lubbers via deposition or other means.*”

Recommendations

a. Recommendation II(A), Page 8, ll. 16: “**RESP0013284 is subject to production.**”

b. Recommendation II(A), Page 8, l. 18 – Page 9, l. 10: “with respect to RESP0013285: (2) *the indented paragraph starting with the word ‘Ist’ on RESP0013285 through and including the first sentence of the following paragraph that starts with ‘whether’ and ends with ‘happened’ is subject to production;* (3) *the second sentence of the paragraph starting with ‘whether’ up through and including the paragraph starting with the word ‘annual’ is subject to production.*”

c. Recommendation II(A), Page 9, ll. 14: “**RESP0013288 is subject to production.**”

d. Recommendation II(A), Page 9, ll. 16: “**RESP0078899-78900 are subject to production.**”

III. ARGUMENT

A. Standard of Review.

The District Court should “accept the [Discovery Commissioner’s] findings of fact unless they are clearly erroneous.” *In re Hansen*, 2008 WL 6113446, at *1 (Nev. Nov. 19, 2008) (citing NRCp 53(e)(2)). Additionally, the Court should adopt a report and recommendation “unless the findings are based upon material errors in the proceedings or a mistake in law; or are unsupported

by any substantial evidence; or are against the clear weight of the evidence.” *Id.* (quoting *Russell v. Thompson*, 96 Nev. 830, 834 n.2, 619 P.2d at 537, 539-40 n.2 (1980)). The Court is also free to modify the report, reject it, receive further evidence, or recommit it with instructions. *See* NRCP 53(e)(2); *but see Valley Health Sys., LLC v. Eighth Judicial Dist. Ct.*, 127 Nev. 167, 172-73, 252 P.3d 676, 679-680 (2011) (neither district court nor Supreme Court will consider new arguments that could have been raised before Discovery Commissioner but were not).

B. Nevada Does Not Recognize A “Fiduciary Exception” To The Attorney-Client Privilege.

Despite finding (correctly) that RESP0013284 and RESP0013285 contained attorney-client privileged communications, the Discovery Commissioner nevertheless determined that RESP0013284 and portions of RESP0013285 were subject to production under a “fiduciary exception” to the attorney-client privilege. This is Respondents first opportunity to brief the issue as the Discovery Commissioner raised it *sua sponte* at the August 29, 2018 hearing. *See* Ex. 1 at 50:7-8 (“The commissioner is now raising it as an issue.”). Having now had a meaningful chance to address the matter, the fiduciary exception clearly has no application here.⁴

1. Recognition of a Fiduciary Exception to the Attorney-Client Privilege is the Province of the Legislature, not the Courts.

The attorney-client privilege in Nevada is a creature of statute. *See* NRS 49.095. It is not a common law privilege as in the federal courts and those states that have adopted a fiduciary

⁴ Notably, Petitioner never argued in his underlying Motion that the fiduciary exception rendered Lubbers’ notes fair game, *see* Mot. dated July 13, 2018 (on file), so Respondents had no reason to address this nonexistent assertion in the briefing below. *See* Ex. 1 at 49:11-50:4. Though Petitioner did make passing reference to the fiduciary exception for the first time in his Reply, *see id.* at 16:5-12, he only did so in support of the generalized contention that a finding as to the adversarial nature of his Initial Petition would not “equate to an adversarial relationship as to all issues relating to the administration of the SCIT.” *Id.* Again, Petitioner never analyzed the fiduciary exception in the context of the notes at issue.

1 exception to the privilege. Nevada’s statutory scheme expressly provides for five exceptions to
2 the attorney-client privilege. *See* NRS 49.115. None of them embody the fiduciary exception
3 relied upon by the Discovery Commissioner. *See id.*⁵

4 When engaging in statutory interpretation, Nevada has long followed the maxim *expressio*
5 *unius est exclusio alterius*, which means the expression of one thing is the exclusion of another.
6 *See, e.g., Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967) (“The maxim
7 ‘expressio Unius Est Exclusio Alterius’, the expression of one thing is the exclusion of another,
8 has been repeatedly confirmed in this State.”). Employing this principle, the Nevada Supreme
9 Court has repeatedly concluded that where a statutory or constitutional provision provides a single
10 exception, no additional exceptions exist beyond those expressly stated. *See, e.g., Thomas v.*
11 *Nevada Yellow Cab Corp.*, 130 Nev. 484, 488, 327 P.3d 518, 521 (2014); *Ramsey v. City of N.*
12 *Las Vegas*, 133 Nev. ---, ---, 392 P.3d 614, 619 (2017) (collecting cases). Accordingly, the
13 legislature’s failure to include a fiduciary duty exception within the framework of NRS 49.115
14 (or elsewhere) should be deemed an intentional omission. *See Ashokan v. Dept. of Ins.*, 109 Nev.
15 662, 670, 856 P.2d 244, 249 (1993) (recognizing “legislature’s demonstrated ability to draft
16 privilege statutes within very precise parameters”).

17 The Nevada Supreme Court has rejected previous attempts to engraft judicially-created
18 exceptions onto statutory privileges. *See, e.g., State ex rel. Tidvall v. Eighth Judicial Dist. Ct.*,
19 91 Nev. 520, 539 P.2d 456 (1975). In *Tidvall*, a bank sued its customer to recover money and
20 personalty in which it claimed a security interest. *Id.* at 522-23, 539 P.2d at 457-58. The customer
21 served subpoenas and Rule 34 document requests seeking *inter alia* certain bank reports deemed
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26 ⁵ Succinctly stated, the fiduciary exception to the attorney-client privilege “provides that a
27 fiduciary, such as a trustee of a trust, is disabled from asserting the attorney-client privilege
28 against beneficiaries on matters of trust administration.” *See Murphy v. Gorman*, 271 F.R.D. 296,
305 (D.N.M. 2010) (citations omitted).

absolutely privileged under NRS 665.055, *et seq.* *Id.* When the district court denied the bank’s objections and ordered production, the bank sought writ relief. *Id.* In granting writ relief to the bank, the Nevada Supreme Court determined that NRCP 34 (governing production of documents in civil litigation) did not override the legislative enactment of absolute privilege: “[t]he privilege at issue in the present case is a statutory privilege, and as such, is a pronouncement of public policy. The legislature or the people, as the case may be, formulate policy.” *Id.* at 524, 539 P.2d at 459 (quoting *Grant and McNamee v. Payne*, 60 Nev. 250, 258, 107 P.2d 307, 311 (1940) (cautioning against “judicial legislation” as “[t]he courts are given no hand in [formulating policy].”)).

The same reasoning is persuasive here. While the attorney-client privilege is not absolute in its application, the salient point is that the five exceptions to the privilege under NRS 49.115 have already been codified by the legislature and reflect the public policy of the State. Accordingly, if there is to be a sixth exception to the attorney-client privilege in the form of a “fiduciary exception,” such a change must be enacted by the legislature, not the courts.⁶

Marshall v. Eighth Judicial Dist. Ct., 128 Nev. 915, 381 P.3d 637, 2012 WL 2366435 (2012) (unpublished), cited by the Discovery Commissioner below, does not compel a different result. As a threshold matter, the case is unpublished and not precedent as the Commissioner

⁶ Other jurisdictions with statutory attorney-client privileges are in accord. *See, e.g., Wells Fargo Bank v. Superior Court*, 990 P.2d 591, 595-97 (Cal. 2000) (“What courts in other jurisdictions give as common law privileges they may take away as exceptions. We, in contrast, do not enjoy the freedom to restrict California’s statutory attorney-client privilege based on notions of policy or ad hoc justification.”); *Huie v. DeShazo*, 922 S.W.2d, 920, 924-25 (Tex. 1996) (“If the special role of a fiduciary does justify such an exception, it should be instituted as an amendment to Rule 503 through the rulemaking process, rather than through judicial interpretation.”); *Murphy*, 271 F.R.D. at 318-19 (predicting the New Mexico Supreme Court “would not permit a judicially created expansion of the exceptions to the attorney-client privilege to add a fiduciary exception, which has not been recognized in the New Mexico Constitution or the New Mexico Rules of Evidence.”).

properly recognized. *See* Ex. 1 at 31:9-18 (“it’s unpublished, it’s an early decision, so technically is [sic] has no business being cited.”). Regardless, the *Marshall* court did not adopt a fiduciary exception but merely observed that “Nevada does not appear to have resolved the issue [*i.e.*, whether a beneficiary is entitled to inspect opinions of counsel the trustee procures in administering the trust] and its related work product implications.” 2012 WL 2366435, at *2. *Marshall*, hence, has no bearing on whether a fiduciary exception exists in Nevada. *See Jackson v. Harris*, 64 Nev. 339, 351, 183 P.2d 161, 166 (1947) (cases cannot be urged as authority for points which may be lurking in the record but which were not put in issue); *In re Tartar*, 339 P.2d 553, 557 (Cal. 1959) (“Cases are not authority for propositions not considered.”).

2. **NRS 49.115(5) Does Not Justify Disclosure of Lubbers’ Notes.**

Though the DCRR repeatedly invokes NRS 49.115(5) as an additional basis for justifying production of Lubbers’ notes, or portions thereof, this exception to the attorney-client privilege cannot apply as it is limited to situations where an attorney is employed by two or more clients to give advice on a matter in which they have a common interest. *See* NRS 49.115(5) (communication is not privileged when “relevant to a matter of common interest between *two or more clients* if the communication was made by any of them *to a lawyer retained or consulted in common*, when offered in an action between any of the clients.”) (emphasis added). Should the clients later become adverse, either client is then permitted to examine the lawyer as a witness regarding the communications made when the lawyer was acting for all. *See id.*; *see also Hall CA-NV, LLC v. Ladera Dev., LLC*, 2018 WL 6272890, at *6 (D. Nev. Nov. 30, 2018) (“Under Nevada law, ‘when a lawyer acts as the common attorney of two parties, their communications to him are privileged as far as they concern strangers, but as to themselves they stand on the same footing as to the lawyer, and either can compel him to testify against the other as to their negotiations.’”) (quoting *Livingston v. Wagner*, 23 Nev. 53, 42 P. 290, 292 (1895)).

Dual representation, in other words, is the lynchpin to this exception. Here, however, Petitioner has never argued—and there is zero evidence in the record—that LHLGB was ever retained or consulted by Lubbers *and* Scott on any matter. That Lubbers was Family Trustee of the SCIT and, thus, a fiduciary to Scott does not mean that LHLGB represented Scott or owed him any fiduciary duties by virtue of its status as Lubbers’ counsel. *See* NRS 162.310(1) (“An attorney who represents a fiduciary does not, solely as a result of such attorney-client relationship, assume a corresponding duty of care or other fiduciary duty to a principal.”). Because LHLGB represented Lubbers only, the Discovery Commissioner’s reliance on NRS 49.115(5) to justify production of Lubbers’ notes constitutes an additional mistake in law.

C. Assuming *Arguendo* That A Fiduciary Exception Exists In Nevada, It Does Not Justify Production Of Lubbers’ Notes.

Even if Nevada recognized a fiduciary exception to the attorney-client privilege, and it does not, the Discovery Commissioner nonetheless erred when she found that the exception required production of Lubbers’ notes, or portions thereof. Lubbers did not prepare his notes in connection with administration of the SCIT. Lubbers instead prepared them for his own protection *after* Scott filed his Initial Petition alleging that Lubbers (as well as Larry and Heidi) had breached fiduciary duties owed to Scott as the beneficiary of the SCIT.

The fiduciary exception, even in those jurisdictions where it is recognized, has limited application. “The rationales underlying the fiduciary exception are not present when a trustee seeks legal advice in a personal capacity on matters not of trust administration.” *In re Kipnis Section 3.4 Trust*, 329 P.3d 1055, 1062 (Ariz. Ct. App. 2014); *see also Riggs National Bank v. Zimmer*, 355 A.2d 709, 711 (Del.Ch. 1976) (requiring production of legal opinion where advice “was prepared ultimately for the benefit of beneficiaries of the trust *and not for the trustees’ own defense in any litigation*[.]”) (emphasis added). Where, as here, a trustee retains counsel in order

1 to defend himself against the beneficiary, the attorney-client privilege remains intact. *See United*
2 *States v. Mett*, 178 F.3d 1058, 1063-64 (9th Cir. 1999); Restatement (Third) of Trusts § 82 cmt. f
3 (“A trustee is privileged to refrain from disclosing to beneficiaries or cotrustees opinions obtained
4 from, and other communications with, counsel retained for the trustee’s personal protection in the
5 course, or in anticipation, of litigation[].”).⁷

6 The Discovery Commissioner correctly found that Lubbers anticipated litigation with Scott
7 at the time he prepared he prepared his notes in October 2013. *See* Ex. 1 at 89:15-17 (“I agree
8 that when the petition was filed, anticipation of litigation, including litigation of Mr. Lubbers, had
9 to be considered.”); 90:22-25 (“based on this typewritten document, 13285 dated 10/14/13, it
10 appears to me that there were considerations of – of concern.”). Indeed, Lubbers was already in
11 litigation with Scott at the time he prepared his notes in October 2013 as Scott filed his Initial
12 Petition on September 30, 2013. *See id.* at 87:24-25 (“I think the work product privilege does
13 apply. I think it wasn’t just anticipated. There was actual litigation.”). While Petitioner attempted
14 below to recharacterize this filing as a benign pleading that sought nothing more than an
15 accounting, the reality is that the Initial Petition contained multiple adversarial allegations,
16 including that there had been a falling out between Scott and his parents, that hostility existed
17 between them, that the Family Trustees (including Lubbers) had breached their fiduciary duties
18 to Scott, that the parties had a conflict of interest when entering in to the Purchase Agreement at
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24 ⁷ Though their opinions are not precedential, two Nevada courts have likewise recognized the
25 limitations of the fiduciary exception. *See Marshall*, 2012 WL 2366435, at *2 (“when there is a
26 conflict of interest between the trustee and the beneficiaries and the trustee procures an opinion
27 of counsel for the trustee’s own protection, the beneficiaries are generally not entitled to inspect
28 it.”); *Haigh v. Constr. Indus. & Laborers Joint Pension Tr. for S. Nevada, Plan A & Plan B*, 2015
WL 8375150, at *4 (D. Nev. Dec. 9, 2015) (“Once the interests of the [] fiduciary and beneficiary
diverge the fiduciary exception no longer applies[.]”) (quotations omitted).

1 issue herein, and that the Purchase Agreement was designed to punish Scott or otherwise harm
2 his financial interests. *See* Opp’n at 7:4-8:16 (summarizing allegations).⁸

3 The Initial Petition, moreover, had been preceded by a letter from Scott’s counsel in
4 November 2012 alleging that Lubbers’ conduct toward Scott was “*per se* bad faith” and
5 threatening to file suit to remove the trustees of the SCIT as their “neutrality [was] compromised.”
6 *See* Opp’n at 5:16-6:3 and Ex. 2. Lubbers specifically noted the threat of litigation in an agenda
7 prepared the next day. *See id.* at 6:4-8 and Ex. 4. After filing his Initial Petition, Scott
8 continuously reserved his right to challenge the appropriateness of the Purchase Agreement and
9 the actions of the Trustees in connection therewith. *See id.* at Exs. 6-7. That Lubbers was
10 reasonable in anticipating litigation when he retained LHLGB in October 2013 is not only borne
11 out by the Initial Petition and the events that preceded it, but also because Scott expanded on his
12 Initial Petition against Lubbers (and now his estate) in June 2017 and again in May 2018 to pursue
13 claims premised on the very conduct he had reserved back in 2013—*i.e.*, “the actions of such
14 Trustees, vis-à-vis the Purchase Agreement, dated May 31, 2013.” *Id.*, Ex. 6 at 3:10-13.

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17 Lubbers’ attorneys at LHLGB have provided sworn testimony regarding the matters they
18 discussed with Lubbers in October 2013. *See* Opp’n at 9:12-17; Lee Decl. ¶¶ 4-8; Renwick Decl.
19 ¶¶ 4-7; and Ex. 5. Those matters are wholly consistent with the content of Lubbers’ typed notes
20 (Bates No. RESP0013285). While Respondents will not divulge the contents of the notes in this
21 public filing, they clearly have nothing to do with administration of the SCIT. To the contrary,
22 they seek advice regarding how to respond to Scott’s petitions, they contain Lubbers’ mental
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25 ⁸ Petitioner brought his Initial Petition pursuant to NRS 164.010, 164.015, 153.031 and 164.030,
26 specifically referencing and relying on 153.031(1)(f). *See* Opp’n, Ex. 1 ¶ C.2. That statute and
27 the Initial Petition refer to “settling the accounts and reviewing the acts of the trustee, including
28 the exercise of discretionary powers.” *Id.* A request by a beneficiary that the Court review the
trustee’s acts and exercise of powers is, by definition, adversarial.

impressions about the strengths and weaknesses of Respondents’ legal positions, and they reflect his beliefs as to how the Court may view the case. The notes, simply put, seek advice for Lubbers’ own protection, not for administration of the SCIT. As such, the fiduciary exception is inapplicable—even if one existed in Nevada.

D. Lubbers’ Work Product-Protected Notes Are Not Discoverable Based On “Substantial Need.”

The Discovery Commissioner correctly found that Lubbers anticipated litigation at the time he prepared his notes. *See* Ex. 2 at 3:23-25. And though the Commissioner found that Lubbers was not acting in his capacity as an attorney at the time he prepared his notes, *see id.* at 3:18-19, she properly found that non-attorneys can prepare protected work product. *See id.* at 3:20-21; *see also Goff v. Harrah's Operating Co.*, 240 F.R.D. 659, 660 (D. Nev. 2007) (“It may be surprising to long-time practitioners that ‘a lawyer need not be involved at all for the work product protection to take effect.’”) (quotation omitted). Despite finding that Lubbers’ notes would be subject to work product protection because they were prepared in anticipation of litigation, the Discovery Commissioner determined that portions of the notes were subject to production because they contained “facts,” and Petitioner had shown a substantial need to obtain them given that Lubbers had passed away and was no longer able to be deposed. Respectfully, these findings are against the clear weight of the evidence and constitute mistakes in law.

1. RESP0013285

As it relates to Lubbers’ typed notes (RESP0013285), even Petitioner recognized below that “Lubbers articulated certain questions and provided responses *based upon his beliefs*.” *See* Mot. at 14:3-5 (emphasis added). Beliefs are not facts. They are instead synonymous with “opinions.” *See* www.merriam-webster.com/dictionary/belief. The Discovery Commissioner acknowledged as much, *see* Ex. 1 at 95:1-6 (“a belief is not a -- a fact. . . . It’s not a fact.”), but

found that RESP0013285 contained a mix of facts and opinions, and ordered certain portions of the document produced. *See* Ex. 2 at 5:11-19.

Respondents submit that a review of RESP0013285 makes clear that it is comprised of Lubbers' questions, analyses, and beliefs regarding the Initial Petition and the Purchase Agreement at issue herein. As such, this material constitutes "opinion" work product, not "ordinary" fact work product. While ordinary work product may be subject to production based on a showing of substantial need under NRCP 26(b)(3), "[o]pinion work product enjoys an almost absolute immunity from discovery," *Laxalt v. McClatchy*, 116 F.R.D. 438, 441 (D. Nev. 1987), and "is only discoverable when counsel's mental impressions are at issue and there is a compelling need for disclosure." *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 634 (D. Nev. 2013). The limited exceptions to non-disclosure where an attorney's mental impressions are "at issue" include situations where the attorney has been designated as an expert witness or where "advice of counsel" has been raised as a defense. *See, e.g., Vaughn Furniture Co., Inc. v. Featureline Mfg., Inc.*, 156 F.R.D. 123 (M.D.N.C. 1994) (attorney's mental impressions become discoverable when named as an expert witness); *Coleco Indus., Inc. v. Universal City Studios*, 110 F.R.D. 688, 690 (S.D.N.Y. 1986) (when the defendant raised an "advice of counsel" defense, opinion work product became discoverable). Neither situation applies here.

Moreover, even if a portion of the typed notes is deemed to contain "facts," which is not the case, those "facts" are still contained in a communication with counsel that should remain privileged and protected from production. *See Wardleigh v. Second Judicial Dist. Ct.*, 111 Nev. 345, 352, 891 P.2d 1180, 1184 (1995) ("relevant facts known by a corporate employee of any status in the corporation would be discoverable even if such facts were relayed to the corporate attorney as part of the employee's communication with counsel. ***The communication itself, however, would remain privileged.***") (emphasis added); *Upjohn Co. v. United States*, 449 U.S.

383, 396, 101 S. Ct. 677, 685–86 (1981) (“While it would probably be more convenient for the Government to secure the results of petitioner’s internal investigation by simply subpoenaing the questionnaires and notes taken by petitioner’s attorneys, such considerations of convenience do not overcome the policies served by the attorney–client privilege.”). Again, the Discovery Commissioner recognized this principle, *see* Ex. 1 at 103:24-104:1 (“facts [] contained in an attorney/client privileged communication, to make that communication remain privileged”), and found that notes did, in fact, constitute an attorney-client communication. *See* Ex. 2 at 4:27-5:13.

Notwithstanding her threshold findings of privilege, the Commissioner found that a portion of the notes was subject to production either because the fiduciary exception applied or because that portion of the notes was factual, and Petitioner had shown substantial need. Respondents have already addressed the inapplicability of the fiduciary exception above. Regarding the Commissioner’s commendable efforts to draw a line between discoverable facts and otherwise attorney-client privileged and/or work product protected material, the unmistakable reality is that any purported “facts” contained within RESP0013285 are inextricably intertwined with Lubbers’ mental impressions and opinions—specifically Lubbers’ belief as to how this Court may view the instant litigation. The notes should not, therefore, be subject to production on even a limited basis. *See, e.g., SEC v. Roberts*, 254 F.R.D. 371, 382-82 (N.D. Cal. 2008) (refusing production of attorney’s notes where “the facts contained within the notes are likely inextricably tied with the attorney’s mental thoughts and impressions.”).

2. RESP0013284

The Commissioner found that RESP0013284 was likely protected by the attorney-client privilege, but found that it was subject to production under the fiduciary exception. *See* Ex. 2 at 4:16-19. Generally described, these notes contain a question from Lubbers and reflect items that Lubbers needed to provide to his attorney, David Lee. In other words, they relate to Lubbers’

1 responses to Scott's multiple petitions filed on September 30, 2013, not trust administration. As
2 such, any fiduciary exception would not apply to these notes either.

3 The Commissioner also found that the notes constituted protected work product because
4 they were prepared because of litigation, but that Petitioner had shown a "substantial need" to
5 obtain them under NRCP 26(b)(3) on account of Lubbers' death. *See* Ex. 2 at 4:20-23. Again,
6 however, any facts contained in RESP0013284 are embodied within an attorney-client privileged
7 communication and not subject production regardless of any alleged "substantial need." *See*
8 *Wardleigh, supra; Upjohn, supra.*

9
10 **3. RESP0013288**

11 The Commissioner did not find that RESP0013288 was protected by the attorney-client
12 privilege, but found the notes would be subject to production based on the fiduciary exception
13 even if they were. *See* Ex. 2 at 6:17-21. The notes reflect a question posed by Lubbers and a
14 recitation of sections from the Initial Petition. The notes, once more, do not deal with trust
15 administration. Nor do the notes reflect facts that are discoverable based on substantial need.
16 They instead reflect Lubbers' mental impressions as to what he deemed worth memorializing
17 from the Initial Petition.

18
19 **4. RESP0078899-RESP0078900**

20 Finally, Petitioner cannot satisfy the "substantial need" standard required to obtain any
21 facts contained in Lubbers' December 2013 notes (RESP0078899-RESP0078900) because he has
22 other ways to obtain evidence of what occurred at the December 19, 2013 meeting at which the
23 notes were taken. After all, Petitioner and his counsel were in attendance and should already
24 know what occurred at the meeting. Additionally, Petitioner could also seek to depose Steve
25 Nicolatus or Bob Evans, both of whom were also present at the meeting. *See In re Western States*
26 *Wholesale Natural Gas Antitrust Litig.*, 2016 WL 2593916, at *8 (D. Nev. May 5, 2016) (denying
27
28

access to work product materials where party could obtain the substantial equivalent without undue hardship). The simple truth is that Scott is obviously more interested in obtaining these notes so he can see what Lubbers considered to be significant during the subject meeting. That, of course, is improper as such mental impressions are not discoverable regardless of any purported substantial need.

CONCLUSION

Based on the foregoing, the Court should sustain Respondents' objections and find that Lubbers' notes are not subject to production as Nevada does not recognize a fiduciary exception to the attorney-client privilege and, regardless, any such exception has no application to the notes at issue. Additionally, the notes are not subject to production based on substantial need as they reflect Lubbers' mental impressions (not facts) and, in any event, are otherwise contained in attorney-client privileged communications.

DATED this 17th day of December, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of December, 2018, I caused a true and correct copy of the foregoing **Respondents' Objections, In Part, to Discovery Commissioner's Report and Recommendations for Determination of Privilege Designation** to be served through the Eighth Judicial District Court's electronic filing system, to the following parties:

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EXHIBIT 1

1 **RTRAN**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 IN THE MATTER OF THE TRUST OF:) Case No. P-13-078912-T
7 THE SCOTT LYLE GRAVES CANARELLI)
8 IRREVOCABLE TRUST, DATED) DEPT. XXVI/Probate
9 FEBRUARY 24, 1998)

10 BEFORE THE HONORABLE BONNIE BULLA,
11 DISCOVERY COMMISSIONER

12 WEDNESDAY, AUGUST 29, 2018

13 ***TRANSCRIPT OF PROCEEDINGS RE:***
14 **ALL PENDING MOTIONS AND ADDITIONAL BRIEFING**

15 **APPEARANCES:**

16 For the Petitioner: DANA ANN DWIGGINS, ESQ.
17 TESS E. JOHNSON, ESQ.
18 JEFFREY P. LUSZECK, ESQ.

19 For the Trustee/Respondent(s): JON COLBY WILLIAMS, ESQ.
20 ELIZABETH BRICKFIELD, ESQ.
21 PHILIP R. ERWIN, ESQ.
22 JOEL Z. SCHWARZ, ESQ.

23 For the Nonparty Witnesses: JENNIFER L. BRASTER, ESQ.
24 ANDREW J. SHARPLES, ESQ.

25 For the Special Administrator: LIANE K. WAKAYAMA, ESQ.

RECORDED BY: FRANCESCA HAAK, COURT RECORDER

1 going to have to bear with me through this, because --

2 MS. BRASTER: That's fine, Your Honor.

3 DISCOVERY COMMISSIONER: -- I want to start in a different
4 order.

5 I'm going to start for the Motion for Determination of Privilege
6 Designation. There are two groups of records at issue. The first group
7 is RESP013284 through RESP013288. And the second group of
8 documents is RESP7899 through RESP78900. There are so many
9 issues here. And I don't think that counsel thought through all of the
10 issues. And I can tell you this, because we've spent quite a bit of time
11 looking at it and thinking them through ourselves. I think that my first
12 question for everybody is who's the client in 2012, 2013? Who's the
13 client?

14 MS. DWIGGINS: I could answer that. I have an engagement
15 letter. It is Mr. Lubbers in his capacity as trustee. I assume you're
16 talking of the Lee Hernandez firm?

17 DISCOVERY COMMISSIONER: Do you think Mr. Lubbers is
18 the client?

19 MS. DWIGGINS: Yes, I do. In his capacity as a trustee.

20 DISCOVERY COMMISSIONER: I think it's possible Scott's
21 the client.

22 MS. DWIGGINS: Well, I think the fiduciary exception would
23 apply, which I reference in my brief, which is one of the reasons why I
24 don't think it's privileged.

25 DISCOVERY COMMISSIONER: Well --

1 MS. DWIGGINS: But it's definitely not him individually or him
2 in his capacity as an attorney.

3 DISCOVERY COMMISSIONER: But I think the question is
4 who's the client? And the fiduciary exception has not been determined
5 in Nevada yet. At least by the Nevada Supreme Court. We do however
6 have an exception under NRS 49.115, as to communications relevant to
7 a matter of common interest between their two or more clients that the
8 communication was made by any of them to a lawyer retained or
9 consulted in common when offered an inaction between any of the
10 clients.

11 Here's the conceptual problem that I have, is that in 2012, at
12 the end of 2012 or 2013, before the petition is filed, and petition primarily
13 is one of accounting initially, I don't think there's any question on that,
14 although I think Mr. Lubbers probably, being a lawyer, was sophisticated
15 enough to know that depending on how this played out, he could have
16 some exposure. I don't think there's any question as to the concern that
17 we may be headed into litigation.

18 The problem is the petition itself -- the petition itself is for an
19 accounting of which Scott and his trusts are the beneficiary as well as
20 the other siblings. But Mr. Lubbers is the trustee at that point. So the
21 actions that he is taking are for the benefit of the trust.

22 With respect to the exception, the trustee exception, again,
23 Nevada has not ruled on this, although there is a 2012 unpublished
24 decision which would suggest that there would be circumstances in
25 which the trustee could hire an attorney and the communication be the

1 attorney and the trustee would be privileged and then there are other
2 circumstances where it would not be.

3 And I think the question is for whose benefit is the trustee
4 acting?

5 So when I looked at the -- this very complex issue about these
6 documents, the first issue I really addressed was is there an exception to
7 the attorney/client privilege? And we have two areas of privilege. We
8 have attorney/client and work product. So taking the attorney/client first,
9 is there an exception possibly to that privilege? And I think under our
10 statute as it's written, as well as the unpublished decision, which is
11 *Marshall vs. Eighth Judicial District Court*, and the Westlaw cite is 2012
12 Westlaw 236635 --

13 MS. DWIGGINS: I'm sorry, could you say that -- 23 --

14 DISCOVERY COMMISSIONER: 236635. Now, it's
15 unpublished, it's an early decision, so technically it has no business
16 being cited. So you all didn't do anything wrong by not citing it. In fact,
17 you did it right. But having said that, it does give you some insight into
18 what the supreme court might do on this.

19 The supreme court cited a New York case that recognized the
20 trustee exception. So I think that one of the issues I had looking at this
21 was, early on, you know, what -- what was the purpose of the initial
22 petition for accounting, who was that going to benefit? It wasn't just the
23 trustee, it was the beneficiaries.

24 So there is an argument, I think, that the trustee exception
25 applies, at least in 2012, 2013. And the only reason I say that -- that --

1 give those timeframes is that's when the documents are created, I
2 believe.

3 MS. DWIGGINS: And that was the only relief requested was
4 for an accounting and just an appraisal pursuant to the agreement.

5 DISCOVERY COMMISSIONER: Right. And I don't think, you
6 know, I think if Mr. Lubbers were here, I think he would probably agree
7 with that, that that was for the benefit of the -- of the trust and yet I would
8 also think that he would probably say, Yeah, I was concerned that a
9 petition was filed. Because now I know I've got a potential issue with
10 this particular trust.

11 But you know what, when you're a trustee, you have to accept
12 that. There are challenges in being a trustee. And one of them is when
13 the beneficiary says, Hey, I want an accounting. That doesn't
14 automatically put the trustee and the beneficiary in an adversarial
15 relationship. I guess that is the best way to say it.

16 But having said that, all of that, the documents that I reviewed
17 were Mr. Lubbers' documents. And Mr. Lubbers may be the client,
18 along with the beneficiary, potentially, if there's a -- an exception. But
19 the documents at least that I reviewed were his notes. And they came in
20 both handwritten notes and typewritten notes. And I don't think there's
21 any disagreement on that. They're -- they're his notes.

22 So Ms. Dwiggins raises an interesting issue, which is there's
23 no indication that they were actually sent to the lawyer, or were they
24 prepared contemporaneously with the phone call with the lawyer, were
25 they in preparation of the phone call with the lawyer to address the

1 petition? We don't know. I think they were probably contemporaneous
2 or at least perhaps prepared immediately following the call and some of
3 them may have been prepared in advance of the call to -- to set forth the
4 areas that Mr. Lubbers wanted to discuss with his initial lawyer, which I
5 believe was Mr. Lee?

6 MR. WILLIAMS: Correct.

7 DISCOVERY COMMISSIONER: Okay.

8 MS. DWIGGINS: Well, there's also no indication as to
9 whether or not, at least on the typed memo, all or any portion of it was
10 actually discussed during that call.

11 DISCOVERY COMMISSIONER: Well, and if the privilege is
12 intact, we'll never know, because it's going to be a privileged
13 conversation.

14 MR. WILLIAMS: Well, and Your Honor, that's my point. We
15 see throughout -- and I have a lot to say in response to what you've said.
16 But I'm listening to you, because it's important to get your views. But
17 one of the recurrent themes throughout this is that, well, Attorney Lee
18 didn't say this, Attorney Renwick didn't say that. You know, they didn't
19 say XYZ or ABC.

20 But, Your Honor, I don't have to disclose privileged
21 communications in order to uphold the underlying --

22 DISCOVERY COMMISSIONER: I -- I agree with you.

23 MR. WILLIAMS: -- protection of the documents. So I can't
24 have Mr. Lee come in and say, Ed Lubbers told me these five things.
25 Because then that would be a waiver. Or I couldn't take these notes to

1 Mr. Lee and say, Review these notes, tell me if you talked to Ed about
2 these, because then what would we hear? I refreshed his recollection or
3 I've made testimonial use of those notes.

4 So I can't -- I can only use the lawyers to give you general
5 descriptions of what was discussed.

6 DISCOVERY COMMISSIONER: Unless there's a trustee
7 exception, in which case the beneficiaries can talk with the lawyers. I
8 mean, that's -- that's one of the issues that nobody really talked about --
9 well, I know Ms. Dwiggins raised it. But I don't think it was really
10 addressed all that thoroughly, and this is just --

11 MS. DWIGGINS: Well, I --

12 DISCOVERY COMMISSIONER: -- Commissioner Bulla's
13 impression.

14 MR. WILLIAMS: Your Honor, most respectfully, the words
15 fiduciary exception to peers in their reply brief, but they -- and this is a
16 new -- this was never argued by the petitioner that they were entitled to
17 these notes because of fiduciary exception. So if I might, Your Honor, I
18 just --

19 DISCOVERY COMMISSIONER: Yeah, well --

20 MR. WILLIAMS: Get a few things out.

21 DISCOVERY COMMISSIONER: -- because this is one of the
22 issues that I think you do have to address.

23 MR. WILLIAMS: Well --

24 DISCOVERY COMMISSIONER: I mean, this is an issue
25 and -- and it's one if commissioner Bulla's going to make a ruling, she's

1 going to address. And -- and, frankly, if the decision is not met with your
2 approval, there are higher courts that you can address it with, which I am
3 happy to have some guidance on this.

4 MR. WILLIAMS: Sure.

5 DISCOVERY COMMISSIONER: But quite candidly, that is
6 one concern. But it is a very small concern in the big picture of what we
7 need to talk about today.

8 There is no question in my mind, moving on for the moment,
9 that Mr. Lubbers was acting as the lawyer. He was not. He was acting
10 as the trustee. I know that there is an issue on whether or not some of
11 the notes actually contained his opinions or thought processes. I'm not
12 saying they didn't, but he wasn't analyzing it from the perspective of
13 being a lawyer.

14 MR. WILLIAMS: But, Your Honor --

15 DISCOVERY COMMISSIONER: If anything, he was
16 analyzing it maybe from the perspective of being a client. Is he a lawyer
17 or was he a lawyer? Yes. He had both hats. But he was not acting --
18 he was not giving himself legal advice. Which is why he retained an
19 attorney.

20 MR. WILLIAMS: Correct, Your Honor. But the law is clear
21 that work product isn't only generated by attorneys or at the direction of
22 an attorney. Parties can generate work product.

23 DISCOVERY COMMISSIONER: I'm not talking about work
24 product right now.

25 MR. WILLIAMS: But you talked about mental impressions and

1 opinions, which is work product.

2 DISCOVERY COMMISSIONER: Right. I understand that.
3 But I just -- I -- you're right. But I want to try to get -- see, there's been
4 two privileges asserted, attorney/client. And yes, to the extent that --
5 that unless the trustee exception applies to the extent that Mr. Lubbers
6 had conversations with Mr. Lee as his attorney, unless the trustee
7 exception applies, then they would be privileged.

8 MS. DWIGGINS: Well, that's the key word, whether or not
9 those communications took place. And --

10 DISCOVERY COMMISSIONER: Well, clearly, Ms. Dwiggins,
11 communications took place. They produced --

12 MS. DWIGGINS: Well --

13 DISCOVERY COMMISSIONER: What was discussed, we will
14 not know. And the whole point of the privilege is that we will not know.
15 But that's not -- I don't really care about that. Okay? Because we don't
16 know what was discussed and that's not really the issue.

17 The bigger issue we have on the two sets of documents that
18 were "inadvertently produced" is, number one, was the clawback
19 provision timely utilized, and number two, if the documents do not fall
20 within the attorney/client privilege, and again, Mr. Lubbers and -- and
21 why I say this --

22 And -- I'm sorry, Mr. Williams, sometimes I get going and I
23 don't --

24 MR. WILLIAMS: It's okay.

25 DISCOVERY COMMISSIONER: -- I need to just kind of

1 maybe stop, but this was my thought process, is he's not acting as the
2 lawyer. These are not attorney/client documents he has created. Now,
3 he can create a document as the client and send it to the lawyer, but I
4 have no evidence that that happened here. And I think really if -- if these
5 documents are protected by anything, it's work product. That's what
6 they would be protected by.

7 MS. DWIGGINS: And they only asserted opinion work
8 product.

9 DISCOVERY COMMISSIONER: Right.

10 MR. WILLIAMS: Wait a second --

11 DISCOVERY COMMISSIONER: Okay. But -- but wait a
12 minute --

13 MR. WILLIAMS: I didn't --

14 DISCOVERY COMMISSIONER: And the opinion work
15 product --

16 MR. WILLIAMS: That doesn't make any sense.

17 DISCOVERY COMMISSIONER: -- there's fact work product
18 and opinion work product. If you want to know the difference --

19 MS. DWIGGINS: And, well, that's --

20 DISCOVERY COMMISSIONER: -- Magistrate Ling [phonetic]
21 did a pretty good job of talking about that, if you really want to know the
22 difference. I'm not sure it's all that critical here.

23 But again, for it to be opinion work product, he would have to
24 be the lawyer in the relationship. He's not, he's the trustee.

25 MR. WILLIAMS: Your Honor, I most respectfully disagree with

1 that.

2 DISCOVERY COMMISSIONER: I know you do. But --

3 MR. WILLIAMS: Most -- most respectfully. I mean, the -- the
4 case law is clear that parties can create work product. The lawyer does
5 not have to be involved. I've cited you --

6 DISCOVERY COMMISSIONER: Oh, no. No.

7 MR. WILLIAMS: Okay.

8 DISCOVERY COMMISSIONER: I agree with that.

9 MR. WILLIAMS: And so --

10 DISCOVERY COMMISSIONER: No, I'm getting back --

11 MR. WILLIAMS: So now you're talking about opinions?

12 DISCOVERY COMMISSIONER: Right. I --

13 MR. WILLIAMS: So -- and that's part of --

14 DISCOVERY COMMISSIONER: He's not -- he's --

15 MR. WILLIAMS: -- the work product analysis, Your Honor.

16 None of the cases that say that work product can be created by the
17 party --

18 DISCOVERY COMMISSIONER: I understand that --

19 MR. WILLIAMS: -- none of them say --

20 DISCOVERY COMMISSIONER: -- it can. I'm so sorry. I'm
21 just taking this one step at a time.

22 MR. WILLIAMS: Right.

23 DISCOVERY COMMISSIONER: I'm not protecting the work
24 product because he was the lawyer giving opinions. Okay. He's not the
25 lawyer. He's the client.

1 MR. WILLIAMS: Understood.

2 DISCOVERY COMMISSIONER: Can he create work

3 product? Yes.

4 MR. WILLIAMS: Okay.

5 DISCOVERY COMMISSIONER: He can.

6 MR. WILLIAMS: Understood.

7 DISCOVERY COMMISSIONER: I understand that.

8 MR. WILLIAMS: Okay.

9 DISCOVERY COMMISSIONER: I'm just taking this one level

10 at a time. The first level is, is it work product by a lawyer? No. He's the

11 trustee.

12 MR. WILLIAMS: Okay.

13 DISCOVERY COMMISSIONER: He wears two hats. He has

14 a lawyer hat, he has a trustee hat. Which hat is he wearing here? He's

15 wearing the trustee hat. So it's not work product by a lawyer.

16 Can it be work product by the client? Yes. Sure. Can it be

17 work product by a third party? Sure.

18 MR. WILLIAMS: Understood. That makes sense, Your

19 Honor.

20 DISCOVERY COMMISSIONER: I absolutely understand that.

21 I may not be articulating it very well, but I do understand it.

22 So now we're in the realm of work product by a client. Did he

23 have opinions contained within this information? And what I'd like to do

24 now, I've got to break this up into groups. I'm going to take Group 78899

25 through 78900 first.

1 MS. DWIGGINS: Your Honor, before you do, I guess I just
2 want to clarify. Because my understanding is opinion work product only
3 applies to opinions by an attorney.

4 DISCOVERY COMMISSIONER: Well, now, that is why -- I --

5 MS. DWIGGINS: Because there are mental impressions,
6 opinions, and -- hold on, let me get the other language -- by an attorney.
7 Let me find the language, sorry.

8 DISCOVERY COMMISSIONER: I uphold my case, if I can
9 find it.

10 MS. DWIGGINS: I don't know why I -- just give me a moment,
11 because I have way too many tags here.

12 DISCOVERY COMMISSIONER: It can be a representative --

13 MS. DWIGGINS: There -- mental impression, collusions,
14 opinions, or legal theories of an attorney --

15 DISCOVERY COMMISSIONER: It can be representative.

16 MS. DWIGGINS: -- or other representative of a party.

17 MR. WILLIAMS: Right.

18 DISCOVERY COMMISSIONER: Yeah. It can --

19 MS. DWIGGINS: Okay. Well, then that -- wouldn't that by
20 definition mean someone other than Lubbers? Not the client.

21 DISCOVERY COMMISSIONER: Oral representative
22 concerning litigation.

23 MS. DWIGGINS: To me that means someone other than
24 Lubbers.

25 DISCOVERY COMMISSIONER: Well, what if the client --

1 they're the lawyer, said to Mr. Lubbers, Put your analysis down on paper
2 for me.

3 MR. WILLIAMS: Right. Your Honor, I mean -- and again,
4 we're jumping around. And I -- I -- this is complicated stuff.

5 DISCOVERY COMMISSIONER: It is.

6 MR. WILLIAMS: And let me be the first to tell you I know we
7 put too much paper in front of you. But they raised a number of
8 arguments with respect to waiver and everything else I'm sure we'll talk
9 about that we had to address. So I apologize for the length of the
10 briefing.

11 But -- but it's absolutely our position that a party can create
12 opinion work product. We see here that the repeated refrain that --
13 with -- Mr. Lubbers was sitting in a deposition, I could ask him about all
14 this.

15 DISCOVERY COMMISSIONER: Okay.

16 MR. WILLIAMS: Most respectfully, if I were defending that
17 deposition and the questioner asked, Mr. Lubbers, tell us what you think
18 the strengths of your -- of your case are, tell us what you think the
19 weaknesses are, I would be objecting and instructing not to answer
20 based on his views.

21 Now, maybe I've practiced in a different realm for 25 years
22 and I've had that wrong. But I'm not aware of any court that require
23 Mr. Lubbers to answer that question if he were still here, or if that same
24 type of question was posed to Mr. Canarelli. Those are the mental
25 impressions of a client or the opinions of a client about the litigation.

1 And that's what, most respectfully, I submit are contained in the notes.

2 And that raises a concern for me. I don't know where we're
3 going to go here, but I just, before we do, want to put on the record I
4 don't think it's appropriate for a public hearing where the transcripts
5 arguably are going to be public, to be talking about the contents of the
6 notes that we contend are privileged or work product protected. I think
7 that just exacerbates --

8 DISCOVERY COMMISSIONER: I can't seal this hearing and I
9 won't. So if you want the hearing sealed, you'll have to ask the district
10 court judge to do that.

11 MR. WILLIAMS: Your Honor, most respectfully, I'm not asking
12 you to seal the hearing. What I'm asking everyone to do is as we go
13 through this, to exercise discretion, and when they talk about the notes,
14 in other words, for example, if we wanted to talk about the typewritten
15 notes, as they've been referred, the way I would handle it, Your Honor,
16 would be to say let's look at the first three lines, you know, without
17 reading them into the record. Because we're just --

18 DISCOVERY COMMISSIONER: It wasn't my plan to read
19 them into the record.

20 MR. WILLIAMS: And I didn't know that -- I didn't know where
21 the Court's going. I just wanted that to be on the record before any of us
22 went anywhere. I'm not saying the Court was going to, but I just wanted
23 to make that clear.

24 DISCOVERY COMMISSIONER: I appreciate that.

25 MS. DWIGGINS: Your Honor, I guess let's avoid the elephant

1 in the room. We obviously are all concerned about one portion. This all
2 boils down to one portion of that typed memo.

3 MR. WILLIAMS: Most respectfully it doesn't, Your Honor.
4 That's my point. Because --

5 DISCOVERY COMMISSIONER: Well, I don't know if I saw it
6 that way. Now, you all might see it that way, because you're litigating --

7 MR. WILLIAMS: I don't.

8 DISCOVERY COMMISSIONER: -- the cases. I looked at it. I
9 think the *Kotter* case that the supreme court recently came down with,
10 suggests that they want the in camera review done --

11 MS. DWIGGINS: Uh-huh.

12 DISCOVERY COMMISSIONER: -- to determine whether or
13 not it, you know, it is a document that -- that should be made privileged.
14 So that's what I did --

15 MR. WILLIAMS: Your Honor, absolutely.

16 DISCOVERY COMMISSIONER: -- even though
17 unfortunately, a lot of this documentation is already in the public record.

18 MR. WILLIAMS: Right.

19 DISCOVERY COMMISSIONER: And, you know, I feel like
20 we're jumping around and I really wanted to try to do this in a reasonable
21 order. So if you can just bear with me --

22 MR. WILLIAMS: I will.

23 DISCOVERY COMMISSIONER: -- let me try to at least give
24 you some direction of where I'm going. And then I'll let you argue your
25 position.

1 MR. WILLIAMS: Fair enough, Your Honor. Thank you.

2 DISCOVERY COMMISSIONER: Okay. So let me just start
3 quickly with the document range that I wanted to, 78899-78900. Let me
4 tell you what bothers me about this particular production is it didn't have
5 Bates labels on the production. This is the one, right? There were two
6 pages without Bates labels.

7 MR. WILLIAMS: You're talking about Exhibit 2 to the motion,
8 right?

9 MS. DWIGGINS: Is that the Nicolatus meeting?

10 MR. WILLIAMS: These are what Petitioners call the Nicolatus
11 notes. They have a date, I think I can say this without a problem,
12 of 12/19/2013.

13 MS. DWIGGINS: And these, just to put them in context, were
14 part of a --

15 DISCOVERY COMMISSIONER: Correct.

16 MS. DWIGGINS: -- 48-page document.

17 DISCOVERY COMMISSIONER: Right.

18 MS. DWIGGINS: You're right, they weren't Bate labeled. I
19 actually brought them to their attention.

20 DISCOVERY COMMISSIONER: When?

21 MS. DWIGGINS: May 3rd or -- no, I don't --

22 MR. WILLIAMS: Your Honor, I -- I can --

23 MS. DWIGGINS: I brought them to their attention, because, to
24 be quite candid, I thought they might have been Mr. Williams' notes.

25 DISCOVERY COMMISSIONER: Whose notes?

1 Mr. Williams'?

2 MS. DWIGGINS: Mr. Williams', which apparently they were.

3 DISCOVERY COMMISSIONER: They're his notes?

4 MS. DWIGGINS: Yes.

5 MR. WILLIAMS: These are Mr. Lubbers'.

6 MS. DWIGGINS: Yes, these are. But there was a
7 combination of 48 pages of one document.

8 DISCOVERY COMMISSIONER: Okay.

9 MS. DWIGGINS: On the first part of it, I believe they might
10 have been Mr. Williams'. So when I saw them, I brought them -- I
11 actually called them or sent an e-mail asking if they were available, if
12 they were near a computer that they could pull them up, so they're -- I
13 wasn't transmitting them and creating another copy. And as soon as
14 Mr. Williams pulled them up and they were on the phone, he said, Those
15 are my notes.

16 MR. WILLIAMS: Exactly.

17 MS. DWIGGINS: And we went --

18 DISCOVERY COMMISSIONER: Okay. So we clawed back
19 that part of the production, correct?

20 MS. DWIGGINS: Which was actually --

21 DISCOVERY COMMISSIONER: Everybody agreed to.

22 MS. DWIGGINS: -- all but it was, I think, what, 46 of the 48
23 pages? Because there was Hunter Williams notes at his office, and I
24 think somebody else's. I -- I agreed without a question that Mr. Williams'
25 notes --

1 DISCOVERY COMMISSIONER: Okay. So this part of the
2 production, though, was -- these two pages were actually part of that
3 production as well.

4 MS. DWIGGINS: Correct. And we --

5 DISCOVERY COMMISSIONER: Did you see those two
6 pages at that time? Did you bring to Mr. Williams' attention, hey, there's
7 two pages without Bates labels here?

8 MS. DWIGGINS: We went through the entire 48 pages
9 together on the phone and I -- I honestly --

10 DISCOVERY COMMISSIONER: Including --

11 MS. DWIGGINS: Yes.

12 DISCOVERY COMMISSIONER: -- 899 and 900?

13 MS. DWIGGINS: Yes. And I can't remember, and you can
14 refresh -- they were both on the phone -- whether or not they had to
15 double check as to whether or not those were Mr. Lubbers' handwriting
16 or whether they said they were. I know there was some writing on
17 something that they had to confirm.

18 MR. WILLIAMS: Right. Your Honor, this is -- and I'm glad
19 we're talking about these. This is, respectfully, the way that the process
20 should work. The example that you're talking about, these two notes --
21 these two pages of notes. Because Ms. Dwiggins is exactly right. On
22 June 14th, she called my office and asked if I could get by a computer
23 because she believed that there may have been documents
24 inadvertently produced that contained attorney/client privilege -- or either
25 work product or attorney/client privilege, whatever -- notes.

1 And so I got on the phone with Mr. Erwin and Ms. Dwiggins,
2 and I don't know if Ms. Johnson was on the phone --

3 DISCOVERY COMMISSIONER: But what raised her
4 suspicion weren't these two pages, they were pages around it.

5 MR. WILLIAMS: Correct.

6 DISCOVERY COMMISSIONER: I'm not faulting her for not
7 calling you on these two pages.

8 MR. WILLIAMS: I'm not either. I'm not either.

9 DISCOVERY COMMISSIONER: Okay.

10 MR. WILLIAMS: No, no. I'm --

11 DISCOVERY COMMISSIONER: I'm faulting you all for
12 producing them --

13 MR. WILLIAMS: No, no, no. Your Honor --

14 DISCOVERY COMMISSIONER: -- if you really thought it was
15 privilege.

16 MR. WILLIAMS: I'm not -- I'm not faulting Ms. Dwiggins for
17 these two pages of notes either. In fact, I -- that's why I say in the
18 papers this I how it was supposed to work. She under the ESI protocol,
19 but more importantly, Rule 4.4(b), she saw something that looked
20 potentially protected. She called me. She gave me notice that it looked
21 like there's something that was inadvertently produced and then we
22 worked, Your Honor, most respectfully, let me just walk through it.
23 There were 48 pages, give or take, in this packet. We went through
24 them. We then clawed them back under the ESI protocol. She had --
25 she agreed with certain items that were clawed back, she disagreed with

1 others. We had further discussions about them in exchange for further
2 letters.

3 So of the universe of 48 documents in the packet, we got the
4 dispute down to these two pages with respect to her contention that
5 they're not protected and my contention that there is. It's exactly the
6 way that it should have worked with the other set of notes.

7 But -- but talking about these, I'm not faulting her at all.

8 DISCOVERY COMMISSIONER: But how could you fault her
9 for the other set of notes? What about those would have stood out to
10 her to call you?

11 MR. WILLIAMS: The typed notes?

12 DISCOVERY COMMISSIONER: Yeah.

13 MS. DWIGGINS: Your Honor had already ruled the --

14 DISCOVERY COMMISSIONER: I mean, there is a --

15 MS. DWIGGINS: -- fiduciary exception applied.

16 DISCOVERY COMMISSIONER: Huge production.

17 MS. DWIGGINS: They had clawed back documents twice
18 prior to that time. One of them was with -- 100 pages. I would assume
19 after the second clawback, or even in connection with the second
20 clawback, they did a thorough review. And as this court already had
21 applied the fiduciary exception, I had no reason to believe they were
22 privileged. He was our trustee at the time.

23 DISCOVERY COMMISSIONER: Which court applied that the
24 fiduciary exception?

25 MS. DWIGGINS: It was in the context of Mr. Gerety, sorry.

1 But we had already -- you.

2 MR. WILLIAMS: Your Honor, again --

3 DISCOVERY COMMISSIONER: Me?

4 MR. WILLIAMS: -- I just want to --

5 MS. DWIGGINS: Yeah. In connection with --

6 DISCOVERY COMMISSIONER: I don't remember looking at
7 it before, so that's a problem.

8 MS. DWIGGINS: It was in connection with Lubbers' retention
9 of Gerety and I was seeking his communications with Gerety.

10 DISCOVERY COMMISSIONER: Right.

11 MR. WILLIAMS: Your Honor, nowhere in the moving papers
12 or in the reply papers has Petitioner ever argued -- ever -- that the notes
13 are subject to production because they're encompassed within a
14 fiduciary exception to the attorney/client privilege. That's never been
15 argued. The fact that you raised it, Petitioner's now trying to capitalize
16 on it as if that was --

17 MS. DWIGGINS: It is in my reply brief.

18 MR. WILLIAMS: -- was in --

19 DISCOVERY COMMISSIONER: So it is --

20 MR. WILLIAMS: -- their mind with respect --

21 DISCOVERY COMMISSIONER: -- imperative on the lawyers
22 to raise to the Court law, the legal issues, whether --

23 MR. WILLIAMS: Right. And had --

24 DISCOVERY COMMISSIONER: -- they may or may not be --

25 MR. WILLIAMS: Had that --

1 DISCOVERY COMMISSIONER: And this is a critical issue in
2 this case.

3 MR. WILLIAMS: Had that been raised in the motion, Your
4 Honor, I would have addressed it in the opposition, but it wasn't. And if
5 they're going to point to somewhere in the reply where it's mentioned --
6 because it is mentioned, but not in this context --

7 DISCOVERY COMMISSIONER: The commissioner is now
8 raising it as an issue. Do you want to have time to supplement on it?
9 Because I do think it's an issue in this case that may end up going all the
10 way up.

11 MR. WILLIAMS: I -- I --

12 DISCOVERY COMMISSIONER: Because it is critical to the
13 analysis and the determination of whether -- you know, we've got so
14 many issues with these documents. That is one. That is --

15 MR. WILLIAMS: Right.

16 DISCOVERY COMMISSIONER: -- the start. But there are
17 more issues. Let me tell you what I'm concerned about with 889
18 and 900.

19 MR. WILLIAMS: Okay.

20 DISCOVERY COMMISSIONER: These are -- appear to me,
21 without giving too much information out, I'm not reading them into the
22 record, but that they do document a telephone call. I think we can say
23 that.

24 MS. DWIGGINS: I think that was -- every December -- I'm
25 sorry, the Nicolatus notes that we --

1 DISCOVERY COMMISSIONER: That -- okay.
2 MS. DWIGGINS: -- refer to those.
3 DISCOVERY COMMISSIONER: So let's talk about it.
4 Nicolatus.
5 MS. DWIGGINS: That was the meeting.
6 DISCOVERY COMMISSIONER: The fact that he participated,
7 as I understand it in the phone call, can we say that?
8 MS. DWIGGINS: It was --
9 MR. WILLIAMS: It's a meeting.
10 MS. DWIGGINS: It was a meeting.
11 MR. WILLIAMS: It's a meeting, Your Honor.
12 DISCOVERY COMMISSIONER: A meeting? Yeah. I -- I
13 think that waives any type of attorney/client privilege and --
14 MR. WILLIAMS: I'm --
15 DISCOVERY COMMISSIONER: -- okay. I think it waives it.
16 Because there should have been no expectation with an independent
17 appraiser present that you were going to be able to protect that
18 conversation.
19 Now, the work product issue of -- okay. So let's go one at a
20 time.
21 MR. WILLIAMS: Right.
22 MS. DWIGGINS: Well, Mr. --
23 DISCOVERY COMMISSIONER: Attorney/client, no. Work
24 product. Then we get back to the same situation that we kind of left off a
25 few minutes ago, which is the difference, I guess, between fact and

1 opinion. I think there is an argument that both are present, but the
2 opinions that he is giving is not as a lawyer. It is as the trustee.

3 Now, work product. Can you waive it? If you disclose it, is it
4 waived?

5 MR. WILLIAMS: Only if it's to your adversary. Not if it's to a
6 third party.

7 DISCOVERY COMMISSIONER: Right. That's the *Kotter*
8 case.

9 MR. WILLIAMS: Correct.

10 DISCOVERY COMMISSIONER: That's the new case where
11 they explain you can waive attorney/client, but not work product.

12 But work product is what? What kind of privilege is work
13 product? I feel like I'm running a Jeopardy! game. What kind of
14 privilege is work product? Absolute?

15 MS. DWIGGINS: No.

16 DISCOVERY COMMISSIONER: Qualified? Qualified
17 privilege. So what's the test?

18 MR. WILLIAMS: Well, the distinction is --

19 MS. DWIGGINS: Substantial need under ordinary and
20 extraordinary under --

21 DISCOVERY COMMISSIONER: Circumstance.

22 MS. DWIGGINS: -- under opinion.

23 MR. WILLIAMS: Your Honor, my understanding is if work
24 product applies, it applies. Okay. Rule 26(b)(3). Now, if it's ordinary
25 work product or fact work product, as it's been referred to, then you can

1 get it with substantial need.

2 DISCOVERY COMMISSIONER: Do you think our statute's
3 delineated?

4 MR. WILLIAMS: 26 -- NRCP 26(b)(3).

5 DISCOVERY COMMISSIONER: Well, let's take a look.

6 MR. WILLIAMS: Let's do it.

7 DISCOVERY COMMISSIONER: There -- it talks about it in
8 context of both expert and nonexpert. So I think we have to look at the
9 nonexpert one.

10 MR. WILLIAMS: Right. That's the first one, I think, Your
11 Honor.

12 DISCOVERY COMMISSIONER: Uh-huh.

13 MR. WILLIAMS: The way it's numbered is a little complicated
14 to find sometimes.

15 DISCOVERY COMMISSIONER: It always is complicated, I
16 know.

17 So I think we're looking at 26(a) -- I'm sorry, 26(b)(3)?

18 MR. WILLIAMS: Right.

19 DISCOVERY COMMISSIONER: Trial preparation? And --
20 trying to think of how much of this I can actually stand to read into the
21 record.

22 Subject to the provisions of Subdivision (b)(4) of the rule, a
23 party may obtain discovery of documents and tangible things
24 otherwise discoverable under Subdivision (b)(1) of this rule and
25 prepared in anticipation of litigation or for trial by or for another party

1 or by or for that other party's representative, including the other
2 party's attorney, consultant, surety indemnity, insurer, or agent.
3 Only upon a showing that the party seeking discovery has
4 substantial need of the materials in the preparation of the party's
5 case and that the party is unable without undue hardship to obtain
6 the substantial equivalent of the materials by other means. Okay.
7 So before April --

8 MR. WILLIAMS: Now, Your Honor -- but keep -- but keep
9 reading the next sentence, because that's the distinction between what
10 you just read, it relates to ordinary work product and then --

11 DISCOVERY COMMISSIONER: In ordering discovery of
12 such materials when required showing has been made, the Court
13 shall protect against the disclosure of the mental impressions,
14 conclusions, opinions, or legal theory of an attorney or other
15 representative of a party concerning the litigation.

16 MR. WILLIAMS: Correct.

17 DISCOVERY COMMISSIONER: But it doesn't say a party.
18 And I -- maybe that's what we need the briefing on.

19 MS. DWIGGINS: Well, and I think the whole preface before
20 that, Your Honor, is it be in anticipation of litigation, which I don't believe
21 it was. And, I mean, that's part of my argument I -- I want to walk
22 through as far as whether or not there was anticipation of litigation
23 against Lubbers.

24 DISCOVERY COMMISSIONER: Well, I agree that that is an
25 issue, because as I started this discussion, started the discussion by

1 talking about the trustee exception. Because the initial petition was only
2 for accounting.

3 MR. WILLIAMS: Right, Your Honor. But whether litigation is
4 adversarial for purposes of anticipating it under the work product
5 doctrine, is not tied to whether a claim is asserted against the other
6 party. They haven't cited you one case for that.

7 DISCOVERY COMMISSIONER: Well, that's why it's
8 anticipation.

9 MR. WILLIAMS: It's anticipation, right. Now --

10 DISCOVERY COMMISSIONER: Okay. So I buy your
11 position on this. Okay?

12 MR. WILLIAMS: Okay.

13 DISCOVERY COMMISSIONER: I'm going to buy your
14 position that Mr. Lubbers was concerned and felt that there would be the
15 need of potential litigation. Here's my problem.

16 MR. WILLIAMS: Okay.

17 DISCOVERY COMMISSIONER: And independent of how you
18 might characterize these notes, upon my in camera review, I felt that
19 there was mostly factual information there, and discussion of that
20 information, and while before April, we might have had a different
21 remedy by taking Mr. Lubbers' deposition, that is no longer an option,
22 sadly enough.

23 So the only thing we have to go on terms of what his -- if you
24 consider it to be his work product or opinion, is his notes. And then on
25 top of that, I have this issue of waiting six months to claw them back,

1 and there is an issue in Federal Court and there are a couple of cases
2 that talk about once you get these documentation in the public eye, or
3 in -- or attached to some sort of a dispositive type motion, which
4 arguably they are, that motion's pending in front of the judge, then they
5 become presumptively public.

6 MR. WILLIAMS: No, Your Honor. I think -- I understand what
7 you're talking about. If I were to file a dispositive motion, a Motion for
8 Summary Judgment, for example, and --

9 DISCOVERY COMMISSIONER: But you're not in that
10 situation.

11 MR. WILLIAMS: No, I'm not.

12 DISCOVERY COMMISSIONER: You're with petitions and --
13 and --

14 MR. WILLIAMS: Exactly.

15 DISCOVERY COMMISSIONER: -- and I understand that.

16 MR. WILLIAMS: And I didn't do it. They filed it as part of their
17 petition seeking to expand their claims. I didn't attach them as part of
18 my motion to have that dismissed.

19 DISCOVERY COMMISSIONER: But it's -- see, the problem is
20 it's any -- it's any side bringing it. And the --

21 MR. WILLIAMS: No.

22 DISCOVERY COMMISSIONER: -- petition is -- I -- I disagree
23 with you.

24 MR. WILLIAMS: Okay.

25 DISCOVERY COMMISSIONER: -- because the problem is

1 that the documents were out there. That's why you have to claw back
2 quickly and you have to have procedures in place. Once you do a huge
3 document production, you go back through. Once they had a telephone
4 call with you and some of the documents in this range were privileged,
5 did you look again? Did you assert a privilege? It wasn't until they
6 actually filed the petition with the attachment of the documents that the
7 red flag went up. I think that might be too late. Six months later from the
8 initial production.

9 MS. DWIGGINS: And they waited --

10 DISCOVERY COMMISSIONER: Don't shake your head at
11 me.

12 MR. WILLIAMS: I'm -- I don't know if you're talking to me. I
13 was --

14 DISCOVERY COMMISSIONER: No, I'm not.

15 MR. WILLIAMS: I was -- okay. Your Honor, so --

16 DISCOVERY COMMISSIONER: Be respectful to the Court,
17 please.

18 MR. WILLIAMS: Just for chronological purposes, the -- the
19 notes that we were just talking about .the two pages of handwritten
20 notes where Ms. Dwiggins called me in June, that occurs after the filing
21 of the petition, dealing with the typewritten notes. That occurs on
22 May 18th.

23 DISCOVERY COMMISSIONER: Which is even more
24 problematic, because you didn't move to object to them.

25 MR. WILLIAMS: No, no. Your Honor -

1 MS. DWIGGINS: They waited --
2 MR. WILLIAMS: Okay.
3 MS. DWIGGINS: -- three --
4 DISCOVERY COMMISSIONER: She's attached them --
5 MS. DWIGGINS: They --
6 DISCOVERY COMMISSIONER: -- to the petition --
7 MR. WILLIAMS: Right.
8 DISCOVERY COMMISSIONER: Is there any movement
9 afoot?
10 MR. WILLIAMS: Yes. Yes.
11 MS. DWIGGINS: They wait almost three weeks before they
12 send us a letter.
13 MR. WILLIAMS: Ms. Dwiggins -- most respectfully, Your
14 Honor, if I could just --
15 DISCOVERY COMMISSIONER: Okay. You don't need to
16 keep saying most respectfully, I understand you're being respectful.
17 MR. WILLIAMS: No. I'm saying I just would like to be able to,
18 if I'm talking, not be interrupted by counsel.
19 So they filed it on May 18th. We have an ESI protocol that
20 governs, at least ostensibly, the way we're supposed to handle these.
21 We agreed to it, Your Honor. And that's attached as an exhibit to the
22 papers.
23 DISCOVERY COMMISSIONER: Exhibit 3.
24 MR. WILLIAMS: We sent written notice less than three weeks
25 later, one week -- we were made aware of it as attached as an exhibit,

1 we sent a notice clawing it back. They then said, We disagree with you,
2 we don't think it's -- and we're not going to take any of the public
3 references to the document out of our pleading. Okay.

4 Now, the ESI protocol says even if you disagree with us, you
5 don't debate the matter in the letters. You agree to either destroy it or if
6 you're going to contest it, you sequester it. They didn't agree to do that
7 in the first letter. We then wrote back again and said, here is a more
8 detailed explanation from our position. In addition, there's an ESI
9 protocol, there's Rule 4.4(b) and there's merits incentives, all of which
10 compel you to follow a certain process here.

11 DISCOVERY COMMISSIONER: But that process does not
12 apply to the inadvertent production. It's two separate paragraphs. And
13 on the inadvertent production on the last line, it says:

14 A producing party may not request a return of the document
15 pursuant to this section if the document contains any discoverable
16 information .

17 MR. WILLIAMS: Wait a sec. Your Honor, that's not -- that's
18 the wrong section. Most -- again, that's -- the ESI protocol provision that
19 we're talking about is 21.

20 DISCOVERY COMMISSIONER: But then you have 22.

21 MR. WILLIAMS: But that --

22 DISCOVERY COMMISSIONER: Who drafted this document?

23 MR. WILLIAMS: But 22 deals with nonresponsive information.
24 That's like if I produced -- if I produced Ed Lubbers' vacation schedule to
25 go somewhere, and it -- because it's not responsive to any requests,

1 then I can seek to claw that back. That's what 22 addresses. It has --
2 most -- again, it doesn't have anything to do with this issue. We're
3 talking only about 21. It's only 21.

4 MS. DWIGGINS: Irrespective, Your Honor, the first part of 21
5 says:

6 You agree to promptly return, sequester, or destroy.

7 It's already public record at that point in time.

8 MR. WILLIAMS: But that's not --

9 MS. DWIGGINS: They wait three weeks --

10 DISCOVERY COMMISSIONER: Yeah.

11 MS. DWIGGINS: -- to even write us the letter, and they make
12 no effort to seal it, extract it from the record, or anything.

13 MR. WILLIAMS: Your Honor, the irony of this? We were just
14 in front of Judge Sturman where she was moving to sanction us for
15 conduct that went on in bankruptcy court where she contended lawyers
16 for the respondents or affiliates of the respondents publicly filed
17 documents in violation of a confidentiality agreement that she never
18 moved to seal or did any -- she just -- damage done.

19 MS. DWIGGINS: Well, hold --

20 MR. WILLIAMS: And now we're here saying --

21 MS. DWIGGINS: Hold on.

22 MR. WILLIAMS: Now we're here saying that we were
23 obligated to move to seal these? We have followed a protocol, Your
24 Honor. We followed a protocol.

25 MS. DWIGGINS: Your Honor, that was a --

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MR. WILLIAMS: They then --

MS. DWIGGINS: -- different situation.

MR. WILLIAMS: They then -- they then --

DISCOVERY COMMISSIONER: Don't interrupt, please.

MR. WILLIAMS: -- done it, we put them on notice of it, and they've continued to make them public. Your Honor, that's not my fault that they're making them public. I'm -- I'm following the process to get the relief that we're entitled to.

DISCOVERY COMMISSIONER: But on a clawback provision in general, I don't think either the judge or I signed off on this. I can tell you right now I would not have signed off on it.

MR. WILLIAMS: I agree with you it's not a court order.

DISCOVERY COMMISSIONER: I would not have signed off on it. But I can tell you this. There -- to have the benefit of a clawback provision to get the benefit of it, you have to act promptly. You have to have procedures in place to ensure that you are constantly reviewing your materials and you're clawing back inadvertent productions. Because they don't know whether it's inadvertent or not.

Now, there was a clue apparently on -- on handwritten notes that -- that Ms. Dwiggin was concerned about. And she called you. And the protocol worked, no question about it.

MR. WILLIAMS: Right.

DISCOVERY COMMISSIONER: But I'm not sure it was a clear on the other documents and I'm certainly not sure it was clear on 899 -- 899 through 900.

1 And let me ask you this question. Do those documents really
2 matter? I'm not --

3 MR. WILLIAMS: Your Honor --

4 DISCOVERY COMMISSIONER: -- talking about the other set.
5 I'm talking about this set.

6 MR. WILLIAMS: Which set?

7 DISCOVERY COMMISSIONER: That's -- 899 through 900.
8 Does it really matter that those documents are part of a public record?
9 Really?

10 MR. WILLIAMS: Nicolatus's?

11 DISCOVERY COMMISSIONER: Yeah.

12 MR. WILLIAMS: Those aren't the ones that are part of the
13 public record. It's Exhibit 1, Your Honor. It's the typewritten notes.

14 DISCOVERY COMMISSIONER: Okay. I'm talking about
15 Exhibit 2 right now.

16 MR. WILLIAMS: Right. That's not part of --

17 DISCOVERY COMMISSIONER: I broke them into --

18 MR. WILLIAMS: -- the public record.

19 DISCOVERY COMMISSIONER: -- two different groups.

20 MR. WILLIAMS: That's not part of the public record. That's
21 not my complaint. In my complaint on those is not --

22 DISCOVERY COMMISSIONER: Okay.

23 MR. WILLIAMS: -- that they're attorney/client privileged,
24 either. It was only work product.

25 MS. DWIGGINS: No, they part of it. They're -- they're --

1 MR. WILLIAMS: Exhibit 2?

2 DISCOVERY COMMISSIONER: I'm -- I'm raising the white
3 flag right now.

4 MR. WILLIAMS: Exhibit 2 was -- was submitted to you in
5 camera. As an exhibit. My complaint with Exhibit 1 is that they were
6 likewise submitted to you in camera as an exhibit, but those --

7 DISCOVERY COMMISSIONER: So do I need to address --

8 MR. WILLIAMS: -- are the ones that are also --

9 DISCOVERY COMMISSIONER: -- Exhibit 2 at all?

10 MR. WILLIAMS: -- publicly quoted. Your Honor, Exhibit 2 in
11 my view is less important than Exhibit 1, and in particular, the typewritten
12 notes. Now --

13 DISCOVERY COMMISSIONER: Can you guys move to claw
14 this back?

15 MR. WILLIAMS: Yes. Yeah.

16 DISCOVERY COMMISSIONER: Exhibit 2?

17 MR. WILLIAMS: Yes. Absolutely. That's how we got here is
18 that -- was that negotiation process --

19 DISCOVERY COMMISSIONER: I thought --

20 MR. WILLIAMS: -- I told you about that was 48 pages and we
21 ended up only having a dispute over two.

22 DISCOVERY COMMISSIONER: Okay. So Exhibit 2 is not
23 yet part of a public record?

24 MR. WILLIAMS: Exhibit 2 is not part of a public record.

25 DISCOVERY COMMISSIONER: Okay.

1 MR. WILLIAMS: It's been submitted to you in camera.

2 DISCOVERY COMMISSIONER: All right. So would you
3 agree with me that if there's any privilege that protects it, it's the work
4 product privilege?

5 MR. WILLIAMS: I would absolutely agree with you on that.

6 DISCOVERY COMMISSIONER: And would you agree with
7 me that -- I just don't see any opinion in here, unless I'm not able to read
8 the writing.

9 MR. WILLIAMS: Your Honor, I --

10 DISCOVERY COMMISSIONER: I think this is all pretty much
11 factual information based on a discussion and Mr. Nicolatus is present.

12 MR. WILLIAMS: Right.

13 MS. DWIGGINS: So was Mr. Solomon and my client.

14 MR. WILLIAMS: Right. And --

15 DISCOVERY COMMISSIONER: Yeah.

16 MR. WILLIAMS: -- and Your Honor, that's -- that's why I never
17 for once argued that it was attorney/client. Anything discussed in that
18 room wasn't going to be protected because there were third parties --

19 DISCOVERY COMMISSIONER: Right.

20 MR. WILLIAMS: -- the opposing party. But -- but to -- a
21 lawyer or a party taking notes in a meeting, even if the other parties --
22 Your Honor, take a deposition as an example. If I'm at a deposition, of
23 course, the other party's at the deposition. If my client's taking notes
24 during the deposition, they don't become subject of waiver just because
25 the other party was in the room. They can still be work product.

1 DISCOVERY COMMISSIONER: Okay.

2 MR. WILLIAMS: That's my point.

3 DISCOVERY COMMISSIONER: All right. So let's say that
4 Exhibit 2 is work product.

5 MR. WILLIAMS: Okay.

6 DISCOVERY COMMISSIONER: All right. Which I don't
7 disagree with your analysis there. But then we have to look at it. And
8 this is Mr. Lubbers' work product. There's no other way to get this
9 information. There's no other way to find out what he wrote down or
10 what he thought was important from that meeting other than these notes.
11 There is no other way to do it.

12 MR. WILLIAMS: Right. Well, Your Honor, but what
13 Mr. Lubbers decided to take down as being important in that meeting are
14 Mr. Lubbers' mental impressions or his opinions as to what was
15 important to take down, as to what went on in the meeting, this deals
16 with substantial need. And with respect to what went on in the meeting,
17 they can get that from either -- depose Nicolatus. Depose -- I mean,
18 most respectfully, Scott was there. Mr. Solomon was there. Bob Evans
19 was there. There are other people there who can be deposed that can
20 tell what happened in that meeting if they -- if that's important to them.
21 But they were there.

22 I don't think that's what's critically important here, Your Honor,
23 insofar as from their perspective or to be perfectly with the Court, from
24 mine. I have an obligation to protect what I believe are protected
25 records.

1 I think the more important issue here is the set of documents
2 at Exhibit 1, and in particular -- of those, the typewritten notes. Because
3 the typewritten notes are the ones that have been made public. It's the
4 typewritten notes that have been repeatedly made public in different
5 briefing after being on notice of what our position is.

6 So on those two pages that you -- you've started with, Your
7 Honor, I don't think there's much -- I don't think we're talking past each
8 other on those. I understand the Court's position and I hope you
9 understand mine.

10 MS. DWIGGINS: If I just may briefly --

11 DISCOVERY COMMISSIONER: I do.

12 MS. DWIGGINS: -- I don't agree with what he decided down
13 constitutes his mental impression. If that's the case, there would be no
14 concept of ordinary work product. Work product is everything somebody
15 wrote down and it's -- you accept that as a mental impression. It doesn't
16 matter who you are then if you wrote down. And when would ordinary
17 work product ever come into play then?

18 MR. WILLIAMS: Interviewing a witness and the witness telling
19 you these are the facts that happened and the lawyer takes down,
20 These are the facts that happened. That's ordinary work product, Your
21 Honor.

22 MS. DWIGGINS: I -- you could argue --

23 MR. WILLIAMS: That's the quintessentialist handbook.

24 MS. DWIGGINS: -- it's mental impression as well as that
25 that's what you consider it important to write down of what the witness

1 told you, unless you're doing a transcription of the entire interview.
2 There's no distinction there.

3 DISCOVERY COMMISSIONER: What safeguards were in
4 place when you produced these documents to make sure once you did a
5 production there wasn't an inadvertent disclosure, what did you do?

6 MR. WILLIAMS: I would start with the ESI protocol, Your
7 Honor, which --

8 DISCOVERY COMMISSIONER: That puts the burden on the
9 other side. What would you do?

10 MR. WILLIAMS: Well, it -- it -- but there's an important feature
11 of that and -- and this was a negotiated document signed by both
12 parties, agreed to by both parties. And what it said is, is that you can't
13 argue waiver based on the inadvertent production, which is what we're
14 talking about now is the fact -- in today's world, and I don't need to tell
15 the Court this, you live it day in and day out, I mean, discovery has
16 changed completely from the time I started practicing as a young lawyer.
17 Inadvertent productions are going to happen. There is no question
18 about that. And that's why we put in the protocol that if there ends up
19 being an inadvertent production, you can't argue that is the basis for
20 waiver or why you get the document. So I would start with that, Your
21 Honor.

22 MS. DWIGGINS: And I have not argued that.

23 MR. WILLIAMS: Right. But -- but the commissioner is
24 focused on it. And that's -- that's why I'm addressing it.

25 So with respect to the production --

1 DISCOVERY COMMISSIONER: I'm focused on more than
2 one thing.

3 MR. WILLIAMS: Oh, I --

4 DISCOVERY COMMISSIONER: Which might be my problem
5 at this point.

6 MR. WILLIAMS: All I'm talking about is what we're talking
7 about right now, Your Honor. I get that you have a number of things
8 you're concerned about.

9 But with respect to the additional safeguards, Your Honor,
10 the -- the initial productions were handled by Dickinson Wright, and you
11 can see from the history they were reviewing documents and they were
12 clawing documents back. They -- they just didn't get to these. I'm not,
13 you know -- that's -- that's not suggestive of any kind of fault. It's just
14 you know what's gone on in this case during the spring. We've been in
15 front of you a million times dealing with discovery issues and we've
16 gotten those as of today close to being worked out for the most part.

17 But there's been a lot going on. And so the fact that they
18 didn't come across this seven-page set of documents and get them
19 clawed back yet until they were publicly filed as an exhibit or attached as
20 an exhibit and publicly referenced in a document and then we moved on
21 it, Your Honor, I don't think that that suggests any kind of negligence or
22 lack of diligence on our part.

23 MS. DWIGGINS: Your Honor, I would disagree with that.
24 Because I attached as Exhibits 4 and 5 to our reply a letter dated
25 February 16th by Mr. Schwarz where they clawed back documents, and

1 another one on the 19th where they clawed back a large number of
2 documents, as you can see.

3 But the first one is Document 13471, which is within a couple
4 hundred pages of this. I would think once you do the first one, you
5 would do a thorough review of everything you've produced to that date
6 to see if there was anything else inadvertently disclosed, which I assume
7 is what led to the second clawback.

8 DISCOVERY COMMISSIONER: I'm just trying to understand,
9 Respondent's counsel, what did you all do to ensure -- did you just rely
10 on the ESI protocol, well, they'll let us know? But how would they --

11 MR. WILLIAMS: No.

12 DISCOVERY COMMISSIONER: -- know that? Because it's
13 identified as, you know, you've produced it, but how would they know
14 what it is? See, that's why I would -- I --

15 MR. WILLIAMS: So --

16 DISCOVERY COMMISSIONER: -- I would not have liked, I
17 don't really love this protocol.

18 MR. WILLIAMS: But -- but, Your Honor, it's not just --

19 DISCOVERY COMMISSIONER: I know you negotiated it.

20 MR. WILLIAMS: Yeah. But it's not just the protocol. If you
21 look at Rule 4.4(b), which deals with what happens when you get an
22 inadvertent disclosure --

23 DISCOVERY COMMISSIONER: All you have to do is notify.

24 MR. WILLIAMS: Right.

25 DISCOVERY COMMISSIONER: You don't have a clawback

1 provision.

2 MR. WILLIAMS: Correct. There was never a notification
3 here, Your Honor. I'm not talking about clawback, I'm talking about --

4 DISCOVERY COMMISSIONER: Well, how would they know?

5 MR. WILLIAMS: When --

6 DISCOVERY COMMISSIONER: Because you've not put a --
7 you've produced them.

8 MR. WILLIAMS: I -- I get that, Your Honor. But when I -- if I'm
9 a lawyer and I review this document, especially a lawyer as experienced
10 as Ms. Dwiggins, and I see some of the things in this document, Your
11 Honor, talking about what he perceives to be strengths and weaknesses
12 of his case?

13 DISCOVERY COMMISSIONER: Okay. I -- I am not --

14 MR. WILLIAMS: That's not --

15 DISCOVERY COMMISSIONER: I am not on the group yet.
16 I'm going to deal with this one --

17 MR. WILLIAMS: Okay. Oh, we're still --

18 DISCOVERY COMMISSIONER: -- first.

19 MR. WILLIAMS: -- talking about Exhibit 2?

20 DISCOVERY COMMISSIONER: Yes.

21 MR. WILLIAMS: Oh, Your Honor, again, I --

22 DISCOVERY COMMISSIONER: Okay. I'm going to require --

23 MR. WILLIAMS: -- I don't know how much --

24 DISCOVERY COMMISSIONER: -- that to retain its
25 nonprivileged but confidential designation, I don't see any alleged

1 opinions in that document that would concern me. Otherwise, also it -- it
2 appears to be more factual in nature. And although there are other
3 options to interview other witnesses, you could never take the deposition
4 of Mr. Lubbers and therefore there's no other way to get to his notes of
5 what he thought or what he documented from that meeting. So I'm
6 going to let it retain its nonprivileged designation.

7 MR. WILLIAMS: Okay, Your Honor.

8 DISCOVERY COMMISSIONER: And then we'll move on to
9 where you are concerned about.

10 MR. WILLIAMS: All right. And so I understand --

11 DISCOVERY COMMISSIONER: Which is third --

12 MR. WILLIAMS: -- the scope of the Court's ruling, you're
13 finding that there's substantial need to obtain -- that -- that it's work
14 product protected --

15 DISCOVERY COMMISSIONER: Right.

16 MR. WILLIAMS: -- but that there's a substantial need to
17 obtain it.

18 DISCOVERY COMMISSIONER: Because --

19 MR. WILLIAMS: Because Mr. Lubbers is not longer with us.

20 DISCOVERY COMMISSIONER: Right.

21 MR. WILLIAMS: Okay. And that it -- it maintains the -- I don't
22 know that that one was marked confidential, because that one was the
23 one that produced as a NATA file.

24 DISCOVERY COMMISSIONER: That's right.

25 MR. WILLIAMS: So, but --

1 DISCOVERY COMMISSIONER: What is it --
2 MS. DWIGGINS: It wasn't NATA.
3 DISCOVERY COMMISSIONER: -- is it -- should it be marked
4 confidential?
5 MS. DWIGGINS: It was a PDF.
6 DISCOVERY COMMISSIONER: Should it be parked
7 confidential, Mr. Schwarz? Mr. --
8 MR. WILLIAMS: I -- I think it should be, Your Honor.
9 DISCOVERY COMMISSIONER: Is that what the intent would
10 have been to mark it confidential?
11 MS. DWIGGINS: The -- the confidentiality agreement was
12 designed to protect financial information. Not every single document
13 disclosed in this case.
14 DISCOVERY COMMISSIONER: But -- but you've used that
15 designation on these documents.
16 MR. WILLIAMS: Right.
17 MS. DWIGGINS: They used it on everything. But --
18 MR. WILLIAMS: Your Honor, the -- the confidentiality
19 agreement it's Exhibit 11 to our opposition, is not limited only to financial
20 information.
21 DISCOVERY COMMISSIONER: Okay. All right. Well, we'll
22 extend the confidentiality label to those documents.
23 MR. WILLIAMS: Okay.
24 DISCOVERY COMMISSIONER: Moving right along. The
25 next set is 13284 through 13288. And these I think are the issue, I

1 mean, I think the -- the clear issue here is not so much with page 284,
2 which I think falls in line with the other group of documents, 286, I think
3 those are clearly similar to what I just allowed to remain unprivileged or
4 produced, but maintained as confidential. Do you have any dispute on --
5 on those two pages? It's 13284 and 13286 is what I'm looking anything.

6 MS. DWIGGINS: I think 7 and 8 are also part of the same
7 thing. Because you have keep in mind there were three different
8 petitions filed relating to three different trusts.

9 MR. WILLIAMS: All right. So why would -- why would they
10 even be getting his notes related to trusts other than what's at issue in
11 this action?

12 DISCOVERY COMMISSIONER: I would agree
13 that 13284, 13286, and 13287 appears to be factual information related
14 to the trust. Would someone on the respondent's side please tell me if
15 I'm incorrect on that.

16 MR. WILLIAMS: Well, so a couple of points, Your Honor. On
17 those three that you just mentioned, I -- I think on the first one --

18 DISCOVERY COMMISSIONER: Yes.

19 MR. WILLIAMS: -- I think that that reflects Mr. Lubbers' notes
20 that he took during the call with the lawyers. It's got the same date and
21 there are some notations that suggest that. That's the document that to
22 me reflects a discussion about the petition.

23 DISCOVERY COMMISSIONER: Right.

24 MR. WILLIAMS: Okay. So I would -- my position on this
25 document, and I'll -- I'll address all of them just to go in order.

1 DISCOVERY COMMISSIONER: Okay.

2 MR. WILLIAMS: I'll address all of them. I think this one is
3 both attorney/client privileged and work product would be my position.
4 We're -- we're skipping 85 for right now.

5 DISCOVERY COMMISSIONER: Correct.

6 MR. WILLIAMS: The typed notes.

7 The next two documents, Your Honor, 13286 at the top is
8 titled Secondary Trust. Ms. Dwiggins is correct. Three petitions were
9 filed at the same time regarding three different trusts. This is related to a
10 trust that is not at issue in this proceeding, the secondary trust.

11 Same with the next page, that's dealing with an asset
12 protection trust. So these two pages aren't even related to this case. I
13 don't think that they should be produced for that reason first, I guess
14 would be the easiest. But next is I think that they would also be work
15 product protected and/or attorney/client privileged to the extent that
16 Mr. Lubbers was talking with his lawyers about these and making the
17 notes after the initial petitions have been filed.

18 DISCOVERY COMMISSIONER: We don't know. That's the
19 problem, we don't know.

20 MR. WILLIAMS: That's -- it -- it is -- and, Your Honor --

21 DISCOVERY COMMISSIONER: The first page I would say is
22 more likely, but page 286 and 287 we don't know.

23 MR. WILLIAMS: Right. And -- but I will --

24 MS. DWIGGINS: I believe and I would say there's probably
25 no dispute that these four handwritten pages were taken at the same

1 time during the call.

2 DISCOVERY COMMISSIONER: Okay.

3 MS. DWIGGINS: But -- but I don't see how you could
4 separate them out. When you look at the context of the call was at
5 most 24 minutes, I think it's important for this Court to look at the scope
6 of what was discussed as reflected in his handwritten notes.

7 DISCOVERY COMMISSIONER: We have to have objective
8 parameters in place on this. I cannot start second-guessing what was
9 discussed, who was present, what was said. I can honestly barely read
10 Mr. Lubbers' notes. So I can tell what they relate to somewhat, but to
11 me the notes on the pages that I just talked to you about --

12 MR. WILLIAMS: Uh-huh.

13 DISCOVERY COMMISSIONER: -- deal with maybe if you
14 want to say kind of a summary of the petition and some client contact
15 information or attorney contact information. And the trust. Now, if the
16 secondary trust and the protection trust are not at issue, I don't know
17 why we can't claw back those two pages of notes. Which are 286
18 and 287.

19 MS. DWIGGINS: Again, Your Honor, my only concern is that
20 in light of the fact that this was all discussed presumably during this call
21 that again was 24 minutes at the most, I think it's important as to a
22 reasonable inference or whether or not this other stuff was discussed.

23 Your Honor understands how complicated --

24 DISCOVERY COMMISSIONER: How is that even going to
25 get into evidence?

1 MR. WILLIAMS: Well --

2 MS. DWIGGINS: I -- well, what I'm saying -- okay. They have
3 the heavy burden of proving privilege. And the fact of the matter is we
4 don't know. Because Mr. Lubbers is not here.

5 DISCOVERY COMMISSIONER: Right. He's not.

6 MS. DWIGGINS: For all we know is he took these down after
7 the call.

8 DISCOVERY COMMISSIONER: Well, I'm not going to
9 speculate as to whether they were created during or after the call. My
10 question on 286 and 287 is these appear to be summaries of petitions or
11 trusts dealing with -- or dealing with trusts that are not related to this
12 case, apparently. Is that true? Is that's true, I'm letting them claw that
13 back.

14 MS. DWIGGINS: That's fine, Your Honor.

15 DISCOVERY COMMISSIONER: Those two documents get --
16 get to be clawed back.

17 MR. WILLIAMS: It is true, Your Honor.

18 DISCOVERY COMMISSIONER: Right. So let me say it one
19 more time. You can claw back 286 and 287 in the series.

20 With respect to page 288 and 284, my -- my problem is that I
21 don't really know -- I'm assuming that 284 was contemporaneous with
22 the call. That would make sense to me. On 288, those are -- are notes
23 jotted down, they're facts about the trust. I am not going to put a
24 privilege on that 288. To me that is just dealing with the petition and
25 facts of the petition and he's documenting it.

1 MR. WILLIAMS: Right, Your Honor. But --

2 DISCOVERY COMMISSIONER: I'll put a confidentiality
3 stamp on it, but I'm not going to claw it back as being privileged.

4 MR. WILLIAMS: Well, there's already a confidentiality stamp
5 on it, Your Honor. But these -- Petitioner's not -- if these notes are being
6 created either during or after a phone call with a lawyer -- so I'm setting
7 aside the fiduciary exception issue.

8 DISCOVERY COMMISSIONER: There are not opinion --
9 there's not opinion here. It's facts.

10 MR. WILLIAMS: But that's -- but -- but that would be -- I'm
11 not -- that's work product, Your Honor. Attorney/client. If I have --

12 DISCOVERY COMMISSIONER: Then I'll -- then I'll apply the
13 trustee exception and we'll let it go up to the supreme court. Because to
14 me this is dealing with the petition on the irrevocable trust. He's making
15 notes on that. I do not see any reason to cloak this in attorney/client
16 privilege. It deals with the petition. It's factual information. I think that's
17 the documenting about the petition, although I don't know for certain. I
18 don't exactly know when he wrote this information, but even if it was
19 contemporaneous with the call, I think number one, it deals with the
20 petition and the -- and that was for an accounting. There was not an
21 adversarial problem at that point in time, even if they're -- one could
22 argue in anticipation of litigation, that is not what this document talks
23 about. That's number one.

24 Number two, if it's work product, it's factual. It's not opinion.
25 And he's not a lawyer giving any opinion as it relates to this document.

1 So I don't see a reason to put a privilege stamp on it.

2 MR. WILLIAMS: Okay.

3 DISCOVERY COMMISSIONER: That's with 288. I'm a little
4 more troubled by 284, because it does seem to be a documentation of
5 the call itself. I don't think there's anything in here that's particularly
6 exciting, to be candid with you.

7 MR. WILLIAMS: Right. Your Honor, of course, the privilege
8 doesn't turn on -- on whether something -- whether the notes --

9 DISCOVERY COMMISSIONER: Are exciting or not, I know
10 that.

11 MR. WILLIAMS: Right. You don't -- you don't look at the
12 content. But I want to go back to something that the Court said,
13 because I think it's important. And this has to do with this notion that the
14 initial petition wasn't adversarial. Okay. And that it was only seeking an
15 accounting. Your Honor --

16 DISCOVERY COMMISSIONER: But that's for the benefit of
17 the beneficiary.

18 MR. WILLIAMS: But let's see what's being said. Okay.
19 Mr. Lubbers goes to see lawyers because things are being said about
20 him. In addition to having an obligation to account, I get that, okay?
21 But, Your Honor, let's look at what is being said in the petition. Now,
22 can --

23 DISCOVERY COMMISSIONER: I -- I agree with you. Okay?
24 I do agree with you. But the document here that I'm looking at --

25 MR. WILLIAMS: Uh-huh.

1 DISCOVERY COMMISSIONER: -- doesn't specifically tell me
2 it was made contemporaneous with the call, it doesn't have a date on it.
3 All it does is document, I think, parts of the petition that deal with the
4 accounting on the trust. I think. That's what it looks like to me. There is
5 nothing privileged or even if it is privileged as work product for the --
6 the -- I'm just simply suggesting right now that there's no other way to
7 get to it. Mr. Lubbers is -- is not with us any longer. And the type of
8 work product that we would be concerned about protecting, this is not.
9 And you're telling me it could all be contemporaneous and -- and even
10 Ms. Dwiggins says maybe it was all done at the same time. I don't know
11 that to be the case.

12 And if it would be attorney/client as it deals with the
13 accounting part of this case, that's for the beneficiary. So really it's for
14 the benefit of the beneficiary. And one could reasonably argue under
15 case law that we have not adopted yet in Nevada, but one could
16 reasonably argue that this falls into the trustee exception.

17 MR. WILLIAMS: Okay. Your Honor, so a couple of points
18 there. With respect to Mr. Lubbers not being here, we all wish he was
19 here and we all wish we could have him provide direct evidence in the
20 form of them or an affidavit or what have you with respect to these
21 notes. We don't have that.

22 But I don't have -- my burden doesn't require me to have direct
23 evidence of this, Your Honor. I can establish the existence of the
24 privilege through circumstantial evidence. And it's not just these notes.
25 The lawyers, Lee and Renwick, provided declarations to the extent that

1 they could generally describing the subject matter of the items discussed
2 with Mr. Lubbers. And it -- this is an important point. Not just on
3 October 14th, 2013. If you look at their dealing records that they
4 provided, they continued to have discussions with Mr. Lubbers about
5 these types of topics.

6 So, Your Honor, the threshold argument is that there -- they
7 would be privileged. If Mr. Lubbers was taking notes during those calls
8 or even if he record -- even if he hung up the phone and said, Let me
9 write down what the lawyers told me, that would still be privileged, is my
10 position.

11 And then with respect to work product, you've analyzed it and
12 found that they only reflect facts. I understand that. But I would
13 respectfully submit that they haven't shown a substantial need to get
14 these notes if they're just ordinary work product.

15 DISCOVERY COMMISSIONER: Well, the substantial --

16 MR. WILLIAMS: Because I --

17 DISCOVERY COMMISSIONER: -- need is Mr. Lubbers isn't
18 here.

19 MR. WILLIAMS: I understand.

20 DISCOVERY COMMISSIONER: And he's the only one that
21 could have documented what he did document.

22 MR. WILLIAMS: But -- but substantial need never justifies the
23 disclosure of attorney/client privilege communications is all I'm saying.

24 DISCOVERY COMMISSIONER: But it can be waived.

25 MR. WILLIAMS: Well --

1 DISCOVERY COMMISSIONER: And -- and then the issue,
2 then we get back to full circle on the inadvertent disclosure and what
3 efforts were made to ensure that the documents were not, in fact,
4 produced. I understand you have an ESI protocol, but you also have
5 responsibility with a clawback provision to make sure you're timely
6 reviewing to make sure that things have not been rushed, you know,
7 within 30 days. I -- I don't know all the different provisions they have in
8 Federal Court. And -- and by the way, if you haven't looked, we've --
9 we've somewhat proposed adopting the Federal Court standards on this.
10 So, you know, this is important. These are really important issues.

11 MR. WILLIAMS: Your Honor, I could not agree more.

12 DISCOVERY COMMISSIONER: But again, I -- I do not
13 believe -- I -- I struggle to know when Document 13288 was created.
14 Maybe it was created contemporaneously with the call. There's no date
15 on the document. All I have is a page. It seems to be notes about the
16 trust. I think if it's attorney/client, I think this is the perfect document for
17 the trustee exception to apply, because it's talking about an accounting.
18 Not other litigation.

19 And number two, if it's work product, there's no other way to
20 get to the information.

21 Then that leaves me only with page 13284 and 13285. 13284
22 does appear to be a note contemporaneous with the date of the
23 telephone call, the fact that the lawyer is referenced. I think that there
24 may -- the argument that would extend the trustee exception to this note
25 exists, because it's in 2013 before the actual petition that was filed

1 against Mr. Lubbers individually was filed.

2 But I also agree that if we look at the work product aspect of it,
3 certainly someone in Mr. Lubbers' position could have anticipated
4 litigation. And I -- I do understand that.

5 But I think we've got two different privileges going on. So if we
6 say yes, anticipating litigation under work product, we still have this
7 concept of is there any way to get to this information other than these
8 notes. I don't see any opinion information there that would give me
9 concern. I see the fact of certain things being documented. And a
10 question mark that really is not that persuasive to me as a reason to
11 protect this, because it's factual in nature, not opinion.

12 So --

13 MR. WILLIAMS: That's related to the work product analysis,
14 right, Your Honor?

15 DISCOVERY COMMISSIONER: Right. Correct. Under the
16 attorney/client. Again, let me just make it very clear, I can't tell the
17 document 132888 would be protected by attorney/client. And that would
18 be true of 13287 as well, but it doesn't really matter, because I think
19 those two trust documents we're taking out, because they're not related.
20 So 13288 I can't tell when that was done. I can't tell if that's part of
21 attorney/client communication. I think it's better analyzed as work
22 product and there's no other way to get it, so I'm going to allow 13288,
23 because it's Mr. Lubbers' notes.

24 13284 I think it probably is attorney/client. I'm going to go
25 ahead and apply the trustee exception here utilizing Subsection 5

1 of 49.115. And again, I'm looking at the year, 2013, the petition that was
2 in place, and it deals, again, with accounting of that trust, which I think is
3 ultimately for the benefit of the beneficiary. And I think in this particular
4 situation, the beneficiary, Scott Canarelli and Ed Lubbers stand in the
5 same position.

6 MS. DWIGGINS: And your --

7 DISCOVERY COMMISSIONER: On this particular document.

8 MS. DWIGGINS: And, Your Honor, we had also raised the
9 concept of waiver that the information was provided to America West
10 Development, Inc., and third parties.

11 DISCOVERY COMMISSIONER: I'm going to talk about that
12 in a minute, because that's the *Kotter* case.

13 MS. DWIGGINS: But before we go onto the tight [phonetic]
14 memo, if -- if I could briefly -- because I know you're holding work
15 product as to some of those documents that we just went over, but I
16 don't believe the anticipation of litigation applies as it relates --

17 DISCOVERY COMMISSIONER: And I disagree with you.

18 MS. DWIGGINS: -- to Lubbers. And if I could explain that to
19 Your Honor, and why I believe that, I think it's pretty clear that it does to
20 relate to Lubbers. It relates maybe to the Canarellis or it does relate to
21 the Canarellis, but they're not one and the same.

22 And if I may, I have a chart for you. It won't take very long to
23 go over. But I've divided the timeline and everything they've raised
24 between the Canarellis and the Lubbers side. And what all our
25 allegations have been all along, even before the petition, is May in 2012,

1 the family trustees who are the Canarellis, not Ed, became hostile and
2 stopped making distributions. Scott had hired our firm in 2012 of June in
3 connection with the Canarellis' decision to stop withhold -- or withholding
4 distributions.

5 In November 2012, Scott did authorize us to file a petition and
6 we communicated that by way of letter. But it was as a result of the
7 Canarellis' decision as family trustee, because Ed was not family trustee
8 at this time, remember.

9 MR. WILLIAMS: But didn't -- didn't he work with the
10 Canarellis? I mean --

11 MS. DWIGGINS: Okay. Well, what hat is he wearing?

12 DISCOVERY COMMISSIONER: Well --

13 MS. DWIGGINS: There's no threat in litigation against him.
14 He's not even a trustee that could potentially be liable.

15 DISCOVERY COMMISSIONER: We have been going for
16 almost an hour and a half. I need to give my staff and myself a break. I
17 think we all need a break. And --

18 MS. DWIGGINS: I'm fine. But I would like the opportunity to
19 go through this really quickly, because I think it's very important,
20 especially in the context --

21 DISCOVERY COMMISSIONER: Okay. Ms. Dwiggins --

22 MS. DWIGGINS: -- of the --

23 DISCOVERY COMMISSIONER: -- I will give you that
24 opportunity. Just let my staff have a break, please. And myself. Okay?
25 And we'll be back. We promise. We'll be back.

1 Thank you.

2 MR. WILLIAMS: Thank you, Your Honor.

3 [Court recessed at 3:21 p.m., until 3:32 p.m.]

4 DISCOVERY COMMISSIONER: All right. So we're back on
5 the record.

6 Ms. Dwiggins.

7 MS. DWIGGINS: Thank you, Your Honor.

8 I guess just going back to the chart. In November 2012, when
9 correspondence was sent and it's attached to the opposition Exhibit 2, it
10 was disclosed in the correspondence that Scott was authorizing a
11 petition to redress the Canarellis withholding of distribution based upon
12 their interpretation of HEMS. I know they reference an agenda in 2012
13 November of Scott lawsuit threaten. I think it's clear based upon the one
14 right above it, it was against the Canarellis, they were the only family
15 trustees at the time.

16 Obviously, I have the date they resigned, the date the
17 purchase agreement was. You've already addressed what the petition
18 sought as it related to the trust, namely an accounting and the appraisal
19 pursuant to the terms of the agreement. And on the -- the left here, and
20 they reference this in their opposition repeatedly, everything they
21 reference is where it either says Larry or the family trustees that -- it --
22 specifically, it says Larry will not authorize an accounting, Larry will not
23 authorize an inventory, Larry is in a conflict, he was on both sides of the
24 transaction, he violated his fiduciary duties, he entered the sale to
25 punish Scott and harm the interest.

1 Every single one of those allegations are against Larry only on
2 the --

3 DISCOVERY COMMISSIONER: What was the relationship
4 between Mr. Lubbers and the Canarellis?

5 MS. DWIGGINS: Well, it depends. He was wearing multiple
6 hats.

7 DISCOVERY COMMISSIONER: Right.

8 MS. DWIGGINS: He was our trustee at the time, he was the
9 attorney for them, he was -- I don't know if he was a manager, but he
10 can't serve two masters at one time. He is our trustee. And the only
11 statements made against him is Lubbers admitted having no knowledge
12 of the assets of the trust. He admitted having no knowledge of the
13 management of the trust. There was not one allegation of wrongdoing
14 against him and Lubbers was only named because he was the acting
15 trustee at the time and that's who has to be named.

16 And then if you just go down, Your Honor, obviously, we talk
17 about the call and -- and the notes and whatnot. But Scott reserved his
18 right to unwind the sale in December '13, because he didn't have
19 sufficient information. We didn't have the appraisal. In fact, we hadn't
20 met with Nicolatus at that point in time, which is the next one.

21 In 2015 in November, Lubbers signs the consent with Gary
22 authorizing him to speak with us and then I think probably most
23 importantly, Your Honor, is even in December 2015, on the 30th, we had
24 prepared a draft petition and sent it to them to try and facilitate
25 settlement and have a discussion. And we specifically stated in writing

1 that Scott was fond of Lubbers and had no present intention to proceed
2 against him. And that -- I mean, based upon that, there's no way there
3 was any anticipated litigation against Lubbers as our trustee.

4 And as long as he's serving as our trustee, he can't serve as
5 their attorney at the same time and say litigation might have been
6 expected against them and therefore it extends to me.

7 And -- and I think what also demonstrates this during this
8 period of time is Ed was repeatedly meeting with Scott on almost a
9 weekly basis. From 2002 -- '12 forward. And when we filed the petition
10 in June of '17, Ed terminated these meetings and specifically told Scott, I
11 could not sit across the table from a man that is suing me. That is the
12 first time he did it, because it was in June when we ultimately filed the
13 petition, the decision was made to proceed against him based on
14 information we had.

15 But up until that point and even as late as December '15, there
16 was absolutely no anticipation of litigation against Lubbers as our
17 trustee.

18 DISCOVERY COMMISSIONER: From your perspective, I
19 believe that to be true. But that is not the test. The test is what
20 Mr. Lubbers thought.

21 MR. WILLIAMS: Right.

22 DISCOVERY COMMISSIONER: And unfortunately, we don't
23 know all of it, but I suspect he was concerned -- I think the work product
24 privilege does apply. I think it wasn't just anticipated. There was actual
25 litigation. There was a petition filed, that's how you start litigation in this

1 particular setting. So I think it's disingenuous to say there wasn't
2 litigation. There was. I think the test is what Lubbers perceived. I think
3 he perceived that there was potentially a problem here or there,
4 otherwise we wouldn't have page 13285.

5 And candidly, I think as it relates just to the petition, I do think
6 the trustee exception applies to the attorney/client privilege. But
7 this 13285, I don't know who typed this document. I think the notes on it
8 appear to be Lubbers'. I'm not a handwriting expert, but they do appear
9 to be his. I don't know if he is actually responding to something that was
10 sent to him. It says Scott analysis, so I don't know who's doing the
11 analysis. I don't know if he's doing this analysis as a lawyer, if he in fact
12 typed the notes. Does anyone really know the answer to that question
13 of who typed this document? Do we know?

14 MR. WILLIAMS: Well, Your Honor, as I sit here, we produced
15 those out of Lubbers' hard file. And it is our position that they are
16 Lubbers' notes. Now, whether a secretary typed them for him or
17 whether he typed them himself, I can't answer that question for you.

18 DISCOVERY COMMISSIONER: Okay.

19 MR. WILLIAMS: But I'd like to go back, because I think Her
20 Honor is right, and just a couple of things to respond to Ms. Dwiggins.
21 I'm not going to take long at all.

22 I'd like this marked as -- as Court's Exhibit 1, if that's possible.
23 Or Court's Exhibit -- however you would do it. I just want this in the
24 record.

25 DISCOVERY COMMISSIONER: Want me to see if we have

1 our exhibits down, because we don't do this very often.

2 MR. WILLIAMS: I definitely want this in the record.

3 DISCOVERY COMMISSIONER: Okay.

4 MR. WILLIAMS: Next, let's talk about the petition, and let's
5 talk -- I mean, theirs is no ambiguity whatsoever that this petition,
6 Exhibit 1 to our opposition that Ms. Dwiggins just went through,
7 absolutely alleges allegations of wrongdoing against both the Canarellis
8 and Mr. Lubbers. And their original position in their motion was it made
9 absolutely no wrongful allegations either one of them. And we came
10 back and said, Look at all of these. And I said, well, maybe they are
11 against the -- the Canarellis.

12 DISCOVERY COMMISSIONER: Mr. Williams, you're
13 welcome to make your record, but I agree with you.

14 MR. WILLIAMS: Okay.

15 DISCOVERY COMMISSIONER: Okay? I -- I agree that when
16 the petition was filed, anticipation of litigation, including litigation of
17 Mr. Lubbers, had to be considered. I agree with you.

18 MR. WILLIAMS: Thank you. So that -- and I'll make it very
19 short then. Please review when the Court -- if the Court is so inclined,
20 paragraph C6. That is directed against the family trustee, singular, who
21 was Mr. Lubbers at the time, and it claims he breached his fiduciary
22 obligations to the beneficiary. It doesn't get any clearer than that.

23 Exhibit 2 that they say was directed only against the
24 Canarellis, Your Honor, Mr. Solomon writes directly to Ed Lubbers and
25 says:

1 I am also informed that you, Ed, are demanding all of the
2 original receipts that Scott saved for purchases made in the month of
3 October before you make any further decisions concerning
4 distributions. Such a burdensome --

5 I'm skipping a sentence.

6 -- such a burdensome and unilateral imposition is per se bad
7 faith.

8 That's not against the Canarellis. That's against the Lubbers.

9 DISCOVERY COMMISSIONER: What is the date of the
10 document you read it from?

11 MR. WILLIAMS: That's November 14, 2012.

12 MS. DWIGGINS: He wasn't even a family trustee with
13 authority to make distributions.

14 MR. WILLIAMS: Well, then Mr. Solomon got it wrong. I -- it's
15 not my -- it's not my -- I can't go back and tell you what Mr. Solomon did
16 or didn't do.

17 MS. DWIGGINS: He was the liaison between us.

18 MR. WILLIAMS: What would Mr. Lubbers expect?

19 DISCOVERY COMMISSIONER: Ms. Dwiggins, it's not what
20 you believed. You may -- and your client may well have had not an
21 intention at that point of bringing a lawsuit directly against Mr. Lubbers,
22 but it's what Mr. Lubbers believed. And based on this typewritten
23 document, 13285 dated 10/14/13, it appears to me that certainly there
24 were considerations of -- of concern. I'll say that. Considerations of
25 concern.

1 Is that vague enough, Mr. Williams?

2 But having said that, we get back to the same analysis.

3 Attorney/client? Yeah, I think this one probably is. Asking for opinions,
4 asking for consideration of certain issues? Yes.

5 Now we get to the trustee exception. In this case, it appears
6 to go far beyond just dealing with the trust accounting.

7 MS. DWIGGINS: Your Honor, may I interject just one
8 second?

9 DISCOVERY COMMISSIONER: Yes.

10 MS. DWIGGINS: Because according to Mr. Williams'
11 declaration, this memo was prepared by Mr. Lubbers before he retained
12 or before he participated in the call. So --

13 DISCOVERY COMMISSIONER: Okay. So --

14 MS. DWIGGINS: So in order for it to be attorney/client
15 privilege, there has to be a communication of that with the lawyer.

16 DISCOVERY COMMISSIONER: And we don't know, because
17 we don't know what took place during the call.

18 MR. WILLIAMS: Your Honor, the -- the declarations from
19 Mr. Lee and Ms. Renwick to the extent that they can get into this, have
20 generally described the subject matters that were discussed with
21 Mr. Lubbers on October 14th, 2013, and thereafter. And they are
22 entirely consistent with the content of what you see in these notes,
23 particularly the first three lines pose questions, okay. I'm not getting into
24 the content. But they are consistent with what the lawyers say was
25 discussed.

1 DISCOVERY COMMISSIONER: And then they talked about
2 future legal proceedings.

3 MR. WILLIAMS: Well, it -- it's the epitome of work product
4 and attorney/client, Your Honor. It's basically assessing here's where
5 we're strong, here's where we're weak. Here's what we should probably
6 do from a strategy standpoint. It doesn't get any more quintessential
7 work product, opinion work product, and the fact that it's being shared
8 with lawyers, attorney/client privilege.

9 MS. DWIGGINS: There is absolutely no indication that that
10 was shared with lawyers. And --

11 DISCOVERY COMMISSIONER: Yeah. I can't -- I -- it looks
12 like something that would -- let me say it that way. Whether it actually
13 was paragraph per paragraph, question per question, we don't know,
14 because we don't know what happened during the discussion. And the
15 real problem we have, and this is the reality and we've said it again and
16 again, you don't have and we don't have Mr. Lubbers here to tell us.

17 MS. DWIGGINS: Well -- well --

18 DISCOVERY COMMISSIONER: Not that he could. He would
19 have to assert a privilege and -- and maintain it.

20 MS. DWIGGINS: Well, I'm not sure. Because I think part of it
21 is factual, which I'm sure we're going to go through. But I just want to
22 point out the fact that -- that when the billing statements in part talk
23 about legal defenses, if you noticed, there's also redactions there. We
24 don't know if perhaps Ed was being advised by the attorneys that he has
25 a potential claim against the Canarellis.

1 MR. WILLIAMS: Well, Your Honor, now --

2 DISCOVERY COMMISSIONER: Well, I -- I am not
3 speculating.

4 MR. WILLIAMS: -- they're just speculating.

5 DISCOVERY COMMISSIONER: I am trying so hard to get the
6 lawyers to talk about facts and not believe assumptions or speculations.
7 We have to look at the facts of what we have.

8 MR. WILLIAMS: Right.

9 DISCOVERY COMMISSIONER: We have a date on this
10 typewritten memo consistent with the date that he consulted with his
11 lawyers. We have some handwritten notes on it. We have what I would
12 consider to be things that you would talk with your lawyer about. And if
13 we want to say an attorney/client communication, I think this probably
14 more than anything else I've reviewed in camera appears to be that.

15 But there's also information here that is factual, that is not
16 necessarily something that I would say would not be discoverable in
17 some form. And here's what I really struggle. We can call this
18 attorney/client and we can protect it. The problem is that we have a
19 trustee exception that I -- I do believe applies. And so anything that
20 deals with the trust, with Scott's trust, anything that deals with managing
21 that trust or from a factual just, you know, mechanical perspective, I am
22 really reluctant to protect. I -- because it's a fact.

23 Now, under ordinary circumstances, we might be able to glean
24 that fact another way. But we can't. We can't. This gives us insight into
25 what the trustee, if these are, in fact, Mr. Lubbers' notes, which I -- I --

1 we're going to say that they are, that seems to be the weight of the
2 evidence. This is the only way we get to on or about October 2013 what
3 he was considering needed to be done with respect to Scott's trust. This
4 is the only way we get to the sum of that information.

5 And I don't know the reference to NAPT is --

6 MS. DWIGGINS: It's the Asset Protection Trust.

7 MR. WILLIAMS: Asset Protection Trust.

8 DISCOVERY COMMISSIONER: Okay. That's not relevant
9 here, correct?

10 MS. DWIGGINS: It's a different trust. No, Your Honor.

11 DISCOVERY COMMISSIONER: Okay. So we don't have
12 to -- I'm working -- I'm working my way up. I'm starting at the bottom and
13 going in reverse just for fun. Sometimes that's how I think. So here we
14 go.

15 The last paragraph, not relevant, protect it.

16 The two paragraphs above that I'm not so inclined to protect,
17 because they deal with the trust, the ultimate issues regarding the
18 administration of that trust that are at issue now. And I just don't think
19 they should be protected because there is no other way to get to that
20 information. And it's factual.

21 MR. WILLIAMS: Your -- Your Honor --

22 DISCOVERY COMMISSIONER: It is not opinion.

23 MR. WILLIAMS: No, if I -- let's --

24 DISCOVERY COMMISSIONER: Well, belief is not an opinion.

25 MR. WILLIAMS: Your Honor, but starting --

1 DISCOVERY COMMISSIONER: I wish we all could
2 understand that, a belief is not a -- a fact.

3 MR. WILLIAMS: It's not a fact, right.

4 DISCOVERY COMMISSIONER: Right.

5 MR. WILLIAMS: I understand that.

6 DISCOVERY COMMISSIONER: It's not a fact.

7 MR. WILLIAMS: So when you start the second sentence, and
8 I'm not going to read it into the record, Your Honor, but I'm now on third
9 paragraph from the bottom --

10 DISCOVERY COMMISSIONER: Yes.

11 MR. WILLIAMS: -- okay, the second sentence starts, and if
12 you just read from there, I don't think there's any way in the world that
13 someone could find that those are facts. Those are clearly his opinions.
14 Those are his assessments of this case.

15 DISCOVERY COMMISSIONER: As it relates to the
16 administration of the trust.

17 MR. WILLIAMS: No. Most respectfully, we're talking --

18 DISCOVERY COMMISSIONER: What does it relate to then?
19 Because I'm confused.

20 MR. WILLIAMS: The -- the transaction. The sales
21 transaction.

22 DISCOVERY COMMISSIONER: Right. Which is part of the
23 administration of Scott's trust.

24 MR. WILLIAMS: That's -- that's what this entire litigation is
25 about.

1 DISCOVERY COMMISSIONER: That's why -- that's correct.
2 That is correct. And that goes to the administration of the trust. And --
3 and the key issue on this -- on -- that -- the reason why we're here. And
4 there is no other way to know that information that Mr. Lubbers had or
5 his thought about the trust at that time than this note -- than these notes.

6 MR. WILLIAMS: But, Your Honor, so we talked about the
7 initial petition, that it only sought an account.

8 DISCOVERY COMMISSIONER: Uh-huh.

9 MR. WILLIAMS: Okay. And that's where you made some
10 decisions based on the fact that the fiduciary exception would apply.

11 DISCOVERY COMMISSIONER: Right.

12 MR. WILLIAMS: There's then --

13 DISCOVERY COMMISSIONER: Don't you think the
14 accounting deals with the assets and the trust?

15 MR. WILLIAMS: Of course they -- of course an accounting
16 has to do with the assets of the trust, Your Honor.

17 DISCOVERY COMMISSIONER: That's right.

18 MR. WILLIAMS: But they were reserving their rights at this
19 time to unwind the sales transaction and then filed a subsequent petition
20 where we're litigating, as you well know, about the valuation that was
21 employed and the purchase price employed as part of that sales
22 transaction. That's not administration. That's not trust administration,
23 Your Honor.

24 DISCOVERY COMMISSIONER: Really?

25 MR. WILLIAMS: No. Most respectfully, it's not.

1 DISCOVERY COMMISSIONER: Well, what do you -- what do
2 you call it then? It doesn't deal with anything else but Scott's trust.

3 MR. WILLIAMS: It -- Your Honor, everything in this case --

4 DISCOVERY COMMISSIONER: And the assets in the sale.

5 MR. WILLIAMS: -- has to do with Scott's trust.

6 DISCOVERY COMMISSIONER: Not everything.

7 MR. WILLIAMS: Your Honor, everything does.

8 DISCOVERY COMMISSIONER: Not everything.

9 MR. WILLIAMS: Well, Your Honor, the entire -- the entire
10 case is about Mr. Canarelli's trust. I mean, seriously, the purchase
11 transaction --

12 DISCOVERY COMMISSIONER: It talks about the -- the
13 actual trust itself and managing the trust and what they were going to --
14 what they did as it relates to the value of the trust. What -- what their
15 thoughts were on that.

16 MR. WILLIAMS: Right.

17 DISCOVERY COMMISSIONER: Right.

18 MR. WILLIAMS: Their opinions --

19 MS. DWIGGINS: Your Honor, if --

20 MR. WILLIAMS: -- their assessments of where -- you know,
21 I -- I don't want to --

22 DISCOVERY COMMISSIONER: But he's playing the trustee
23 role. He's got his trustee hat on. He's doing this for the benefit of the
24 beneficiary. He's not doing this for his own well being, although I
25 suppose one could argue he is, because he's acting as trustee. But this

1 isn't about litigation against him.

2 MR. WILLIAMS: Sure -- Your Honor --

3 DISCOVERY COMMISSIONER: No. It's about how to
4 manage the trust and the assets of it.

5 MR. WILLIAMS: Your Honor, he's been threatened, he's been
6 alleged to have breached his fiduciary duty in the initial petition. The
7 family trustee. Paragraph C6.

8 DISCOVERY COMMISSIONER: I didn't think there was a
9 breach of fiduciary duty against him in the initial petition.

10 MR. WILLIAMS: Your Honor, I read it.

11 DISCOVERY COMMISSIONER: Did I miss something? I
12 thought it was in 2015.

13 MR. WILLIAMS: Your Honor --

14 MS. DWIGGINS: It was for --

15 MR. WILLIAMS: Your Honor.

16 MS. DWIGGINS: What he just read, singular, was the failure
17 to account.

18 MR. WILLIAMS: Your Honor.

19 MS. DWIGGINS: Only.

20 MR. WILLIAMS: The family trustee, singular, Mr. Lubbers,
21 has violated the fiduciary obligations due and owing to the petitioner.
22 That is in the initial petition.

23 MS. DWIGGINS: Keep reading.

24 By failing to provide Petitioner with an inventory of the trust
25 assets or render an accounting.

1 MR. WILLIAMS: Right. But, Your Honor --

2 MS. DWIGGINS: That's different than the sale.

3 MR. WILLIAMS: Right. That's exactly right, Your Honor. I
4 couldn't have said it any better than Ms. Dwiggins. You have been
5 focused on the fact that an accounting was demanded and that that's
6 administrative, and in his role as trustee, that there may be a fiduciary
7 exception that applies to that. The sale is different. That's the exact
8 point. The sale is different.

9 MS. DWIGGINS: And I think it --

10 MR. WILLIAMS: That's not accounting.

11 MS. DWIGGINS: Sorry.

12 MR. WILLIAMS: That's why they have, at this period of time
13 in 2013, they're specifically reserving their rights to challenge the sale.
14 They then come in and they -- they don't challenge the sale to set it
15 aside, but they challenge the sale to say you didn't sell it for enough.
16 And that's what we're litigating now, Your Honor. That's not trust
17 administration.

18 So when Mr. Lubbers is talking about risks and what he thinks
19 are strong points --

20 DISCOVERY COMMISSIONER: If you -- you don't think
21 managing the assets of Scott's trust is trust administration?

22 MR. WILLIAMS: Of -- yes, Your Honor. That's -- I'm not
23 saying that managing the trusts aren't. But the issue is this transaction.
24 The transaction where his --

25 DISCOVERY COMMISSIONER: And that was part of

1 administering the trust.

2 MS. DWIGGINS: And it was in a sense that he had to make --
3 when he made the decision to sell, it was guided by whether or not it
4 was in the best interests.

5 DISCOVERY COMMISSIONER: It had to be, because he is
6 trustee.

7 MS. DWIGGINS: And that is an administrative function. And
8 when he's talking about potentially defending any claim to unwind, which
9 never even has occurred, it's -- it would -- he would have to be arguing
10 what his decision was, why it was made, and that it was in the best
11 interests. Which --

12 MR. WILLIAMS: Because --

13 MS. DWIGGINS: -- which I guess goes to the other part,
14 which -- which I think is the most critical, is -- is where it says:

15 First there was resistance --

16 DISCOVERY COMMISSIONER: Don't read it into the record.

17 MS. DWIGGINS: Oh, sorry. That -- the part right above it that
18 starts, and then the first line of that paragraph we were just looking at it.
19 I don't see how that's anything but factual in nature. And I think the
20 ultimate question is if I asked him those questions during a deposition,
21 ultimately, why decisions were certain -- why certain decisions were
22 made, who they were discussed with, what was discussed, I would
23 ultimately get those answers if he was telling the truth under oath. There
24 is no way that those would be protected as to the reason why certain
25 decisions were made to allow distributions, not allow distributions, and

1 ultimately sell.

2 MR. WILLIAMS: Look at the line that precedes all of it, Your
3 Honor.

4 MS. DWIGGINS: And -- and that doesn't matter, because A,
5 that's what his belief is, which is it doesn't matter what he says the belief,
6 because the part right under it is he confirms that that is what happened
7 or essentially what happened, which are facts. And again, I go back to
8 the simple point if I ask question during a deposition as to why decisions
9 were made, and he was being truthful, would I get those answers?

10 DISCOVERY COMMISSIONER: So, Mr. Williams, I guess my
11 question is to you.

12 MR. WILLIAMS: Uh-huh.

13 DISCOVERY COMMISSIONER: If I protect -- the last
14 paragraph isn't relevant. And if I -- if I allow the two paragraphs above
15 that, but then protect the rest of the document, how do we know -- how
16 do we have the confirmation that's independent of the petitioner as to
17 what happened here? Who do we get that information from?

18 MR. WILLIAMS: With respect to which sections, Your Honor?

19 DISCOVERY COMMISSIONER: The -- the paragraph right in
20 the middle of the page.

21 MR. WILLIAMS: The one with the four lines?

22 DISCOVERY COMMISSIONER: I believe. That starts, I
23 believe.

24 MR. WILLIAMS: Right.

25 DISCOVERY COMMISSIONER: And everything underneath

1 it.

2 MR. WILLIAMS: Ask Larry Canarelli.

3 DISCOVERY COMMISSIONER: Where do we get --

4 MR. WILLIAMS: Ask Larry Canarelli. He was the family
5 trustee through the majority of this period of time, Your Honor. Take his
6 deposition. They're going to.

7 DISCOVERY COMMISSIONER: But what if it's different than
8 what's in this document?

9 MR. WILLIAMS: Well, Your Honor, but that's not -- whether a
10 person testifies consistent with what's in a document or not --

11 DISCOVERY COMMISSIONER: But the -- but -- but this is
12 not his document he's testifying to.

13 MR. WILLIAMS: Right.

14 DISCOVERY COMMISSIONER: The person who could --

15 MR. WILLIAMS: I'm -- this document --

16 DISCOVERY COMMISSIONER: -- testify to it is no longer
17 with us.

18 MR. WILLIAMS: Your Honor, this document theoretically
19 should never be in evidence. It shouldn't be the subject of examination.

20 DISCOVERY COMMISSIONER: Well, then, maybe it should
21 have --

22 MR. WILLIAMS: If Mr. Lubbers --

23 DISCOVERY COMMISSIONER: -- been more carefully
24 culled --

25 MR. WILLIAMS: Your Honor.

1 DISCOVERY COMMISSIONER: -- before being produced.

2 MR. WILLIAMS: If Mr. Lubbers was here today and
3 Ms. Dwiggins went to ask him, Can you tell me in this period of time
4 were certain distributions being made, and if -- you know, he could -- of
5 course, she can ask that. And he could say no, that period of time they
6 weren't. I'm -- I'm making this up, I'm not agreeing with this set of facts.
7 But, you know, or, you know, did they resume at some point? Of course,
8 you can ask those types of things.

9 MS. DWIGGINS: And I could ask the follow-up that says
10 why? And he -- and that's not protected.

11 DISCOVERY COMMISSIONER: Yeah. I think --

12 MS. DWIGGINS: His --

13 DISCOVERY COMMISSIONER: -- we have to have
14 resolution on the trustee exception. I think we have to have some
15 resolution on that.

16 MS. DWIGGINS: I don't even think --

17 DISCOVERY COMMISSIONER: I'm giving you my --

18 MS. DWIGGINS: -- we even get there because of this.

19 DISCOVERY COMMISSIONER: -- recommendation.

20 MS. DWIGGINS: I think these are facts, they're admissions of
21 a party opponent.

22 DISCOVERY COMMISSIONER: Right.

23 MS. DWIGGINS: And they go to the credibility of Larry.

24 DISCOVERY COMMISSIONER: But facts in a contained in
25 an attorney/client privileged communication, to make that

1 communication remain privileged.

2 MS. DWIGGINS: And the Court has the ability under the law
3 to redact the document so as to protect anything other than facts. And I
4 think the --

5 DISCOVERY COMMISSIONER: How would you recommend
6 I redact this document?

7 MS. DWIGGINS: From the part that says the word, First,
8 down to where it says, Happened, in the next paragraph, I -- I think is all
9 factual in nature, because I believe if I ask the questions during the
10 deposition, he would answer accordingly as to the -- what was done,
11 when it was done, why distribution stopped, why they were resumed,
12 when discussions were first being talked about the sale, who they were
13 talked about. I mean, I could go into probably 100 questions just about
14 this alone.

15 And if he was being truthful, I would ultimately get those
16 answers and they wouldn't be protected.

17 DISCOVERY COMMISSIONER: Mr. Williams --

18 MS. DWIGGINS: What would be a basis of privilege to say
19 that we acquiesced and the --

20 DISCOVERY COMMISSIONER: Don't read anymore into the
21 record.

22 MS. DWIGGINS: -- what the purpose was. I'm not --

23 DISCOVERY COMMISSIONER: And if you --

24 MS. DWIGGINS: -- just saying --

25 DISCOVERY COMMISSIONER: I'm serious.

1 MS. DWIGGINS: -- what the purpose was.

2 DISCOVERY COMMISSIONER: Mr. Williams, how would you
3 redact the document?

4 MR. WILLIAMS: I wouldn't. I mean, Your Honor, and I'm not
5 saying that to be flip.

6 DISCOVERY COMMISSIONER: Yeah, all right.

7 MR. WILLIAMS: But -- no, no, no. No. Let me tell you what
8 my position is and I understand the court will rule.

9 DISCOVERY COMMISSIONER: I think you need to put your
10 lawyer hat on right now. Okay?

11 MR. WILLIAMS: Right.

12 DISCOVERY COMMISSIONER: And help me out here.

13 MR. WILLIAMS: Okay. So --

14 DISCOVERY COMMISSIONER: Because some of this is
15 factual.

16 MR. WILLIAMS: Here's -- here's what I would say. Okay.
17 This is my position and then let me -- Your Honor, my position is the
18 entire document is protected as attorney/client privilege. My position is
19 the entire document is protected because of work product. My -- I'll --
20 third position would be that even to the extent that there are facts
21 contained within this document, they are inextricably intertwined with
22 mental impressions and attorney/client privilege communications such
23 that there can't be an effective redaction.

24 So what I don't -- I'm not trying to be disrespectful, Your
25 Honor, all I'm saying --

1 DISCOVERY COMMISSIONER: No, I know that.

2 MR. WILLIAMS: All I'm saying is that I don't want to be in a
3 position of telling you how a document can be redacted and then have
4 that used against me if we are, in fact, at a higher court arguing about
5 fiduciary exceptions or whatever the case may be. That's all I'm saying,
6 Your Honor.

7 DISCOVERY COMMISSIONER: All right.

8 MS. DWIGGINS: And I think the substantial need applies in
9 the fact that he has passed, let alone we haven't even talked about the
10 waiver yet.

11 DISCOVERY COMMISSIONER: Well, I'm going to address
12 the waiver just briefly, because I don't want to spend a lot of time on it. I
13 actually have two other motions of yours I have to address.

14 MR. WILLIAMS: Right.

15 DISCOVERY COMMISSIONER: Which is if you send the
16 documents to America West, and this is where I think there -- there is a
17 very -- American West, I'm sorry -- I think that there is a very -- this is a
18 very complicated and difficult issue, because there is no question in my
19 mind that Mr. Lubbers stood in relationship with the Canarellis and that
20 they were on the same side for some of these particular issues. And
21 frankly, that's in part why we have the petition.

22 So having said that, I think the *Kotter* case says you don't
23 have to have a written agreement, you can share work product, in
24 particular, attorney/client privileged information without it acting as a
25 waiver. And that's the *Kotter* decision.

1 MS. DWIGGINS: I understand --

2 DISCOVERY COMMISSIONER: I can't distinguish what
3 happened here from that.

4 MS. DWIGGINS: Okay. Well, there's a difference between
5 that information being shared with them versus the entire entity. How
6 were these documents protected? Who were they accessible to?
7 There's not the common interest with the entity AWDI. You're talking
8 about Larry and Bob possibly alone. So why were they even brought to
9 America West? Why were individuals --

10 DISCOVERY COMMISSIONER: Well, I'm not sure --

11 MS. DWIGGINS: -- going through them? Which I
12 demonstrated by the e-mail --

13 DISCOVERY COMMISSIONER: Ms. Dwiggins, can you just
14 give me a break for a minute, please?

15 Mr. Williams, who went through the documents?

16 MR. WILLIAMS: Your Honor, I can't tell you who went
17 through -- they -- they cited -- Tina Goode, is has assisted Ed and Bob
18 Evans and everyone in this case in helping getting documents produced,
19 Your Honor. There -- there are a number of responses to this on waiver.
20 AW -- you are exactly right. It doesn't matter if I gave work product
21 protected materials to everyone at AWDI, as long as they didn't turn it
22 over to my adversary.

23 DISCOVERY COMMISSIONER: It was not a smart move, by
24 the way.

25 MR. WILLIAMS: Well, Your Honor, Mr. Lubbers at the time,

1 when he was alive, was operating out of those offices. Your Honor,
2 that's where he was.

3 DISCOVERY COMMISSIONER: Well, that cuts against you
4 too.

5 MR. WILLIAMS: I don't -- I don't know that -- but my point is
6 this: Giving the documents to AWDI and whether it was only Ms. Goode
7 or whether Bob Evans or -- Your Honor, you can give work product to a
8 third party. What you can't do is give it to your adversary. That's *Kotter*,
9 you are exactly right on that.

10 With respect to common interest under the attorney/client
11 privilege, because we're not just talking about common interest privilege
12 on work product, which is the *Kotter* case, the NRS, the attorney/client
13 privilege statute, Subsection 3 of 49.095 codifies it and recognizes that
14 common interest applies not -- you don't even have to be in litigation,
15 Your Honor. You don't have to be a coparty with someone, like the
16 argument was made that AWDI is not a party and can't be a party in this
17 case, so there can be no common interest with Mr. Lubbers. Your
18 Honor, that's not true. Because --

19 DISCOVERY COMMISSIONER: I'm not going to find there
20 was a waiver.

21 MR. WILLIAMS: Okay. I'm -- I'll shut up, Your Honor. You've
22 been very patient with us and I'm -- I'm not going to belabor it.

23 DISCOVERY COMMISSIONER: I wish -- I probably should
24 have been more patient and I apologize if I haven't been.

25 MR. WILLIAMS: No, you're --

1 DISCOVERY COMMISSIONER: These are very difficult
2 issues, and unfortunately the one person who could address a lot of
3 these issues is not with us. I do think that the most problematic
4 document we have in this grouping is this 285 document. I think it is
5 attorney/client. But to the extent that it deals with the administration of
6 the trust, and I use that phrase broadly, I do not think that it can remain
7 privileged.

8 And what that really means, according to case law that I have
9 looked at, is that Scott could have come in at any time and said, I want
10 to see your lawyer's files. I want to see what's in there, to Mr. Lubbers. I
11 want to see what you all talked about. I mean, that's really what that
12 exception applies to.

13 I understand that he was concerned, Mr. Lubbers was
14 concerned, and he should have been. He wore a number of different
15 hats. I'm sure he anticipated litigation. But that goes with the work
16 product privilege.

17 With regard to the attorney/client privilege, you can waive that
18 and there can be an exception to it.

19 With respect to the work product, I can work on protecting the
20 opinions that may arguably be contained herein, knowing -- knowing and
21 understanding that Mr. Lubbers was a lawyer. But it would be my
22 recommendation to the district court that with respect to
23 Document 13285, that everything that is in the 1, 2, 3 -- let's see,
24 everything starting at the top of the page, including the handwritten
25 notes to the number first in the indent would be protected and clawed

1 back as opinion work product.

2 And potentially, attorney/client privilege without an exception,
3 because it doesn't deal with the common interest with the trust. Scott's
4 trust, which is the ultimate issue and why we're here.

5 Starting with the indented paragraph that starts with the
6 number first, up through and including the second-to-the-last paragraph
7 that ends with the word so, I'm going to maintain it as confidential, but it
8 will not be clawed back and it will not be deemed privileged based on
9 both the exception to the attorney/client, because this information is
10 factual and deals with the administration of Scott's trust, including the
11 assets of the trust. And in terms of the work product, it's -- it's factual to
12 the extent there may be some slight opinion -- I -- I really don't think
13 there's what I would consider to be legal opinion in there. I think it's
14 more matter of fact opinion regarding his view as a trustee. There's no
15 other way to get to this information. There's an extraordinary need to
16 have it disclosed. And that would be my recommendation.

17 And then the last paragraph I'm going to allow them to claw it
18 back, because it's not relevant.

19 So 13285 will be redacted in part. It will be confidential. I'm
20 going to make and give the respondent 2.34(e) relief, so you can make
21 your objection to the district court judge. And until such time, this
22 document will remain privileged and cannot be used or attached to any
23 other document filed with the court or used for any other purpose.

24 With respect to it already being used, it's my understanding
25 that the document itself was submitted for in camera to the judge, am I

1 right on that?

2 MR. WILLIAMS: Only to you, Your Honor.

3 DISCOVERY COMMISSIONER: Only to me. What
4 happened -- so it's --

5 MS. DWIGGINS: It's referenced in our surcharge petition.

6 DISCOVERY COMMISSIONER: So you'll have to,
7 Mr. Williams, bring your Motion to Seal. I can't seal. I'm -- I don't have
8 that ability. I can strike a document. I can't strike Judge Sturman's
9 documents. I can strike my own.

10 MR. WILLIAMS: Uh-huh.

11 DISCOVERY COMMISSIONER: I would ask you to make
12 your Motion to Seal.

13 MS. DWIGGINS: I would be willing to stipulate to just extract
14 that exhibit or redact that portion. We've done it with other documents in
15 the case.

16 DISCOVERY COMMISSIONER: All right. The document
17 itself would have to be redacted and the exhibits would have to be
18 removed. If you want to make that agreement on the record pending
19 further resolution by the Court, you're welcome to do that.

20 MS. DWIGGINS: I think it would be a --

21 DISCOVERY COMMISSIONER: And that would save you a
22 motion, Mr. Williams.

23 MS. DWIGGINS: I think it would be agreeing to redact that
24 portion of the brief where it's referenced, and I otherwise think it's --

25 DISCOVERY COMMISSIONER: I would request you do a stip

1 and order and have Judge Sturman sign it, and then you can take her
2 order to the district court and have them redact and -- and pull the
3 document.

4 MR. WILLIAMS: Understood, Your Honor. I'll work with
5 Ms. Dwiggins on this. And -- because I'm sensitive to this document
6 being reviewed by the district court as part of the motion that we filed to
7 dismiss the petition, because -- and I'm not going to reargue anything,
8 but I will deal with it. I understand what the Court is saying and we will
9 deal with it appropriately. And I appreciate what both the Court's order
10 is -- or recommendation.

11 DISCOVERY COMMISSIONER: If I have something further I
12 could offer you, I would. I just don't. But I will give you the time under
13 EDCR 2.34 to make your proper objection. And that would include until
14 final resolution by a higher court.

15 MR. WILLIAMS: Thank you, Your Honor. And -- and for
16 clarity, that applies only to 13285?

17 DISCOVERY COMMISSIONER: Correct.

18 MR. WILLIAMS: Understood. Okay.

19 DISCOVERY COMMISSIONER: And then everything else I
20 think I -- did I deal with everything else? I hope.

21 MS. DWIGGINS: I believe so. And just so Your Honor is
22 aware, there has been -- I guess the order hasn't been entered yet. But
23 there has been a modification to the confidentiality agreement. So
24 there's really only limited things that are now considered confidential and
25 they really relate to just the personal finances of the siblings trust, Scott,

1 and the Canarellis. But understanding that you want these to mean
2 confidential, we'll just make sure they're within the scope of that modified
3 order.

4 DISCOVERY COMMISSIONER: I did put confidentiality on
5 the others. I didn't ask you if you wanted 2.43(e) relief on the other set
6 of documents.

7 MR. WILLIAMS: Your Honor, my position, for the record,
8 would be that I do. And if the Court's willing to give me 2.34(e) relief for
9 the other documents --

10 DISCOVERY COMMISSIONER: I'll give you the relief on
11 those sets.

12 MR. WILLIAMS: Thank you.

13 DISCOVERY COMMISSIONER: Sure. All right.

14 One thing I've learned the hard way is it's very difficult to the
15 put the cat back in the bag. And I think this case and this motion work is
16 case in point on that. So before it gets any worse, I'll give you 2.34
17 relief. But I will -- but I will say that I did spend a considerable amount of
18 time thinking about this. I don't want you to think that I didn't. I did. And
19 I made the best decisions I could. But you are welcome to object. I
20 have no problem with that. We'll maintain these as privileged until such
21 time as the objection is ruled on by the district court judge. And in which
22 case I would just say within five business days after the Court rules on
23 the objection, that the documents will be treated as -- as I've indicated.

24 MR. WILLIAMS: Setting aside, I mean, any attempt to seek
25 further relief from the supreme court or whatever.

1 DISCOVERY COMMISSIONER: Right. An order --
2 MR. WILLIAMS: If the -- if the district court, for example, were
3 to give us a stay, it would -- it would still maintain that protection.
4 DISCOVERY COMMISSIONER: Exactly.
5 MR. WILLIAMS: Understood.
6 DISCOVERY COMMISSIONER: Until the resolution of the
7 confidentiality or the privileged nature of the documents has been -- has
8 been fully resolved, including any appeals.
9 MS. DWIGGINS: I understand, Your Honor.
10 MR. WILLIAMS: Very good. Thank you, Your Honor.
11 DISCOVERY COMMISSIONER: All right.
12 And, Ms. Dwiggins, can you prepare the report and
13 recommendation on this one.
14 MS. DWIGGINS: Of course.
15 DISCOVERY COMMISSIONER: Sorry.
16 MS. DWIGGINS: No, that's fine.
17 DISCOVERY COMMISSIONER: You do such a good job
18 though. It's why I keep asking you.
19 MS. DWIGGINS: She's taking good notes back here. I hear
20 her typing.
21 DISCOVERY COMMISSIONER: I know. She does a great
22 job.
23 MS. DWIGGINS: She told me her fingers hurt.
24 MR. WILLIAMS: And, Your Honor, was this -- did this get
25 marked?

1 you've had to review, more importantly.

2 MR. SCHWARZ: Thank you to your staff.

3 DISCOVERY COMMISSIONER: Thank you.

4 [Proceedings concluded at 4:57 p.m.]

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17 ATTEST: I do hereby certify that I have truly and correctly transcribed the
18 audio/video proceedings in the above-entitled case to the best of my
19 ability.

20 

21 _____
22 Shawna Ortega, CET*562
23
24
25

EXHIBIT 2

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DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of

THE SCOTT LYLE GRAVES
CANARELLI IRREVOCABLE TRUST,
dated February 24, 1998.

Case No.: P-13-078912-T
Dept. No.: XXVI/Probate

**DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS ON (1) THE
MOTION FOR DETERMINATION OF PRIVILEGE DESIGNATION, (2) THE
SUPPLEMENTAL BRIEFING ON APPRECIATION DAMAGES.**

Hearing Date: August 29, 2018

Hearing Time: ^{1:30}
~~2:00~~ p.m.

Attorneys for Petitioner: Dana A Dwiggin
Jeffrey P. Luszeck
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Attorneys for Respondents: J. Colby Williams
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Attorneys for (1) Lawrence Canarelli and Heidi Canarelli, as trustees of the Stacia Leigh Lemke Irrevocable Trust; (2) Lawrence Canarelli and Heidi Canarelli, as trustees of the Jeffrey Lawrence Graves Canarelli Irrevocable Trust; (3) Lawrence Canarelli and Heidi Canarelli, as trustees of the

1 Alyssa Lawren Graves Canarelli Irrevocable Trust; and (4) American West Development, Inc.:

2 Jennifer L. Braster
3 Andrew J. Sharples

4 Attorney for the Special Administrator for the Estate of Edward C. Lubbers: Liane K. Wakayama¹

5 **I.**
6 **FINDINGS**

7 **A. *Motion for Determination of Privilege Designation***

8 THE COMMISSIONER HEREBY FINDS that Respondents have asserted the
9 attorney/client privilege and/or the work product doctrine on the documents Bates Numbered
10 RESP0013284-13288 (which appear to have been drafted in or around October 2013) and
11 RESP0078899-78900 (which appear to have been drafted on December 19, 2013) (collectively the
12 “Disputed Documents”). *See* Hr’g Tr. dated Aug. 29, 2018 at 29:7-8; 31:7-8; 32:16-21.

13 THE COMMISSIONER FURTHER HEREBY FINDS that the Disputed Documents appear
14 to be Edward C. Lubbers’ (“Lubbers”) handwritten and/or typewritten notes. *Id.* at 32:16-21.

15 **1. Attorney/Client Privilege**

16 THE COMMISSIONER FURTHER HEREBY FINDS that, as detailed further below,
17 certain of the Disputed Documents are protected by the attorney-client privilege.

18 THE COMMISSIONER FURTHER HEREBY FINDS that, as detailed further below, even
19 if the Disputed Documents are protected by the attorney-client privilege certain of them (or portions
20 thereof) are subject to disclosure under the “fiduciary exception” to the extent that said documents
21 pertain to the administration of The Scott Lyle Graves Canarelli Irrevocable Trust (the “SCIT”). *Id.*
22 at 31:19-32:3

23 THE COMMISSIONER FURTHER HEREBY FINDS that although the “fiduciary
24 exception” has not yet been determined by the Nevada Supreme Court, *id.* at 30:4-5, 30:22-23, NRS
25 49.115(5) creates an exception to the attorney/client privilege as to communications relevant to

26
27 ¹ Because Ms. Wakayama departed the hearing prior to the Discovery Commissioner addressing the
28 matters that are the subject of this Report and Recommendation, her signature is not included below
as a reviewing attorney.

1 matters of common interest between two or more clients when the communication was made by
2 any of them to a lawyer retained or consulted in common when offered in an action between any of
3 the clients. *Id.* at 30:5-10.

4 THE COMMISSIONER FURTHER HEREBY FINDS that the petition filed on September
5 30, 2013 (“Initial Petition”) sought, among other things, an accounting for the SCIT, an irrevocable
6 trust of which Scott is a beneficiary. *Id.* at 30:18-20, 83:1-5.

7 THE COMMISSIONER FURTHER HEREBY FINDS that Lubbers was the Family Trustee
8 at the time the Initial Petition was filed. So, the actions he was taking were for the benefit of the
9 SCIT, arguably triggering application of the fiduciary exception. *Id.* at 30:20-21.

10 THE COMMISSIONER FURTHER HEREBY FINDS that Petitioner’s request for an
11 accounting in the Initial Petition did not automatically create an adversarial relationship between
12 Petitioner and Lubbers. *Id.* at 32:13-15. However, Mr. Lubbers, being a lawyer, was sophisticated
13 enough to know he could have some potential exposure and was concerned the parties may be
14 headed toward litigation. *Id.* at 30:14-17; 90:19-25.

15 **2. Attorney Work Product**

16 THE COMMISSIONER FURTHER HEREBY FINDS that the attorney work product
17 doctrine does not provide absolute protection, but is qualified in nature. *Id.* at 52:10-17.

18 THE COMMISSIONER FURTHER HEREBY FINDS that Lubbers was not acting as an
19 attorney when he prepared the Disputed Documents. *Id.* at 35:8-13.

20 THE COMMISSIONER FURTHER HEREBY FINDS that non-attorneys can prepare
21 protected work product. *Id.* at 38:3-39:17. However, NRCP 26(b)(3) only references opinion work
22 product in connection with “an attorney or other representative of a party[.]”. *Id.* at 54:11-18.

23 THE COMMISSIONER FURTHER HEREBY FINDS that Lubbers anticipated litigation
24 at the time the Initial Petition was filed and at the time the Disputed Documents were prepared. *Id.*
25 at 89:4-90:25.

26 THE COMMISSIONER FURTHER HEREBY FINDS that as a result of Lubbers’ passing
27 on April 2, 2018, he is unavailable to be deposed regarding any factual matter related to the creation
28

1 and factual content of the Disputed Documents. *Id.* at 55:17-22, 65:7-11, 71:2-5, 79:4-7, 80:15-21,
2 82:6-8, 93:23-94:4.

3 **3. Documents Bates Numbers RESP0013284-13288**

4 THE COMMISSIONER FURTHER HEREBY FINDS that Respondents produced
5 documents Bates Numbered RESP0013284-13288 on December 15, 2017 as part of their Initial
6 Disclosures.

7 THE COMMISSIONER FURTHER HEREBY FINDS that Respondents clawed back the
8 documents Bates Numbered RESP0013284-13288 on June 5, 2018, less than three weeks after
9 Petitioner attached them as an exhibit to his supplemental Petition filed May 18, 2018. *Id.* at 55:23-
10 25; 57:18-58:25.

11 i. *RESP0013284*

12 THE COMMISSIONER FURTHER HEREBY FINDS that RESP0013284 appears to be
13 handwritten notes that the Commissioner assumes Lubbers made contemporaneous with a
14 teleconference he had with his lawyers on or about October 14, 2013. *Id.* at 76:20-22, 78:3-5,
15 81:21-22.

16 THE COMMISSIONER FURTHER HEREBY FINDS that RESP0013284 is probably
17 protected by the attorney/client privilege, but it nonetheless falls under the “fiduciary exception”
18 and NRS 49.115(5) because it deals with Lubbers’ preparation of an accounting for the SCIT, which
19 is for the benefit of Petitioner. *Id.* at 79:12-16, 81:23-82:1, 82:24-83:5.

20 THE COMMISSIONER FURTHER HEREBY FINDS that, to the extent RESP0013284
21 may be considered work product because it was created in anticipation of litigation, it falls under
22 the exception of substantial need since there is no other reasonable way for Petitioner to obtain the
23 information contained therein from Lubbers. *Id.* at 79:5-7.

24 THE COMMISSIONER FURTHER HEREBY FINDS that RESP0013284 contains fact as
25 opposed to opinion information. *Id.* at 82:8-11.

26 ii. *RESP0013285*

27 THE COMMISSIONER FURTHER HEREBY FINDS that RESP0013285 is a typed
28 document with handwritten notes. The handwritten date is consistent with the date Lubbers

1 consulted with his lawyers, and the notes reflect the types of things one would discuss with his/her
2 attorney. The typed notes, therefore, appear to be an attorney-client communication. *Id.* at 93:9-
3 14.

4 THE COMMISSIONER FURTHER HEREBY FINDS that Respondents produced
5 RESP0013285 from Mr. Lubbers' hard copy files. It is unclear who typed RESP0013285, however
6 the Commissioner believes the handwritten portion was authored by Lubbers. *Id.* at 88:6-17.

7 THE COMMISSIONER FURTHER HEREBY FINDS that from the beginning of
8 RESP0013285, including the handwritten notes, to the indented paragraph starting with the word
9 "1st" is both work product and protected under the attorney-client privilege without an applicable
10 exception. *Id.* at 109:21-110:4.

11 THE COMMISSIONER FURTHER HEREBY FINDS that the indented paragraph starting
12 with the word "1st" on RESP0013285 through and including the first sentence of the following
13 paragraph that starts with "[w]hether" and ends with "happened" are factual in nature (hereinafter
14 the "Factual Statements"). *Id.* at 101:19-24, 103:20-22, 105:14-15, 110:5-16.

15 THE COMMISSIONER FURTHER HEREBY FINDS that while certain portions of
16 RESP0013285 may constitute opinion work product, the Factual Statements constitute ordinary
17 work product. To the extent the Factual Statements are intertwined with opinion work product,
18 there is nonetheless substantial need to have this information disclosed as Petitioner has no other
19 reasonable way to obtain the information referenced in the Factual Statements. *Id.* at 110:11-16.

20 THE COMMISSIONER FURTHER HEREBY FINDS that to the extent the Factual
21 Statements are contained within an attorney-client privileged communication, they nevertheless fall
22 under the "fiduciary exception" and NRS 49.115(5) because the topics are administrative in nature
23 – e.g. management of the SCIT -- and are otherwise factual in nature. *Id.* at p. 93:17-22, 94:18-24,
24 110:7-11.

25 THE COMMISSIONER FURTHER HEREBY FINDS that the second sentence of the
26 paragraph starting with "[w]hether" up through and including the paragraph starting with the word
27 "annual" is subject to disclosure. *Id.* at 110:5-16. Said portion of RESP0013285 is factual in nature,
28 and there is substantial need to have this information disclosed as Petitioner has no other reasonable

1 way for Petitioner to obtain the same. *Id.* at 110:11-16. To the extent this portion of RESP0013285
2 may be protected under the attorney/client privilege, it nonetheless falls under the “fiduciary
3 exception” because the topics are administrative in nature – e.g. management of the SCIT -- and
4 are otherwise factual in nature. *Id.* at 93:17-22, 94:18-24, 110:7-11.

5 THE COMMISSIONER FURTHER HEREBY FINDS that the final paragraph of
6 RESP0013285 is not relevant as it does not relate to the SCIT or the instant matter and, thus, may
7 be clawed back. *Id.* at 94:15, 101:13-14, 110:17-18.

8 iii. *RESP0013286 and RESP0013287*

9 THE COMMISSIONER FURTHER HEREBY FINDS that RESP0013286 and 13287 do
10 not appear to contain factual information related to the SCIT, and as such, should be clawed back.
11 *Id.* at 76:9-13.

12 iv. *RESP0013288*

13 THE COMMISSIONER FURTHER HEREBY FINDS that it is unclear when Lubbers
14 composed the notes labeled RESP0013288 because there is no date on them, *id.* at 77:17-18, 81:12-
15 15, 82:16-21, but they appear to contain facts about the SCIT and the petition for an accounting,
16 not Lubbers’ opinions. *Id.* at 76:22-25, 77:8-9, 77:24.

17 THE COMMISSIONER FURTHER HEREBY FINDS no reason to find RESP0013288
18 protected under the attorney/client privilege because it contains factual information pertaining to
19 the Initial Petition. *Id.* at 77:12-17, 82:20-21. To the extent RESP0013288 is protected by the
20 attorney/client privilege, it nonetheless falls under the “fiduciary exception” because it primarily
21 discusses an accounting for the SCIT. *Id.* at 77:12-23, 81:16-18.

22 THE COMMISSIONER FURTHER HEREBY FINDS that to the extent RESP0013288 is
23 considered work product, it falls under the exception of substantial need and contains facts as
24 opposed to an opinion. *Id.* at 77:24-25, 81:19-20.

25 **4. No Waiver**

26 THE COMMISSIONER FURTHER HEREBY FINDS that under *Cotter v. Eighth Judicial*
27 *District Court in and for County of Clark*, 134 Nev. Adv. Op. 32, 416 P.3d 228 (2018), even if a
28

1 party does not have a written agreement, it can share work product and attorney/client privileged
2 information without it acting as a waiver. *Id.* at 106:22-25.

3 THE COMMISSIONER FURTHER HEREBY FINDS that American West Development,
4 Inc. or any of its affiliates' possession of Lubbers' files does not constitute a waiver of the
5 attorney/client privilege and/or the work product doctrine based on the common interest doctrine.
6 *Id.* at 108:19-20.

7 **5. Documents Bates Numbered RESP0078899-78900**

8 THE COMMISSIONER FURTHER HEREBY FINDS that the documents identified by
9 Bates Numbers RESP0078899-78900 are notes that Lubbers took during a meeting that he had with
10 Stephen Nicolatus, the independent appraiser, Lubbers' counsel, Petitioner and Petitioner's counsel
11 in December 2013. *Id.* at 51:6-12, 64:10-15.

12 THE COMMISSIONER FURTHER HEREBY FINDS that Respondents do not contend the
13 documents Bates Numbered RESP0078899-78900 are protected by the attorney/client privilege.
14 They instead contend the notes are protected by the attorney work product doctrine. *Id.* at 62:20-
15 24, 64:2-18.

16 THE COMMISSIONER FURTHER HEREBY FINDS that RESP0078899-78900 do not
17 contain Lubbers' opinions but rather information that is primarily factual in nature. *Id.* at 51:23-
18 52:2, 64:6-11, 71:1-2.

19 THE COMMISSIONER FURTHER HEREBY FINDS that, even if RESP0078899-78900
20 constitute work product, there is substantial need that the documents not be deemed protected
21 because there is no other way for Petitioner to obtain said information from Lubbers *via* deposition
22 or other means. *Id.* at 55:17-22, 65:7-11, 71:2-5.

23 ***B. Supplemental Briefing on Appreciation Damages.***

24 THE COMMISSIONER FURTHER HEREBY FINDS that, in prior hearings the
25 Commissioner based certain findings and recommendations regarding the production of financial
26 documents post 2013 in terms of contract claims only and damages stemming therefrom and not
27 taking tort claims, including, but not limited to, Petitioner's claims of breach of fiduciary duty
28 against Respondents as the Former Trustees of the SCIT. *Id.* at 141:14-16.

1 THE COMMISSIONER FURTHER HEREBY FINDS that although appreciation of
2 damages is not applicable under a breach of contract analysis, *id.* at 117:20-22, if the Court finds
3 that there was a breach of fiduciary duty, bad faith and/or fraud, it would likely recognize
4 appreciation of damages as a remedy. *Id.* at 117:1-3, 117:22-24, 141:20-23.

5 THE COMMISSIONER FURTHER HEREBY FINDS that if the Court finds that there was
6 a breach of fiduciary duty, then the amount of any distribution from the Purchased Entities² post
7 March 31, 2013 to the Siblings' Trust is relevant and discoverable. *Id.* at 117:17-19, 138:5-12,
8 141:24-25, 142:3-5.

9 THE COMMISSIONER FURTHER HEREBY FINDS that Counsel for the Purchased
10 Entities and counsel for the Subpoenaed Sold Entities have agreed to produce the audited income
11 statements from 2014 and 2017 and the Commissioner believes it is appropriate for Counsel to do
12 so. *Id.* at p. 130:21-23, 140:12-14.

13
14 **II.**
RECOMMENDATIONS

15 **A. *Motion for Determination of Privilege Designation***

16 IT IS HEREBY RECOMMENDED that RESP0013284 is subject to production. *Id.* at 73:1-
17 4, 82:24-83:5.

18 IT IS FURTHER RECOMMENDED that with respect to RESP0013285:
19
20

21 ² "Purchased Entities" refers to entities sold under the Purchase Agreement, which are as
22 follows: (1) CanFam Holdings; LLC; (2) Colorado Housing Investments, Inc.; (3) Colorado Land
23 Investments, Inc.; (4) Heritage 2, Inc.; (5) Indiana Investments, Inc.; (6) Inverness 2010, LLC; (7)
24 Model Renting Company, Inc.; (8) SJSA Investments, LLC; (9) AWH Ventures, Inc.; (10) Arizona
25 Land Investments, Inc.; (11) Brentwood 1, LLC; (12) Bridgewater 1, LLC; (13) Brookside 1, LLC;
26 (14) Carmel Hills, LLC; (15) Colorado Land Investments 2, Inc.; (16) Fairmont 2, LLC; (17)
27 Highlands Collection 1, LLC; (18) Kensington 2, Inc.; (19) Kingsbridge 2, LLC; (20) Lexington
28 1, LLC; (21) Lexington 2, LLC; (22) Model Renting 2008, LLC; (23) Model Renting 2009, LLC;
(24) Model Renting 2010, LLC; (25) Model Renting 2012, LLC; (26) Newcastle 1, LLC; (27)
Reserve 1, LLC; (28) Reserve 2, LLC; (29) Silverado Springs 2, LLC; (30) Silverado Springs 3,
LLC; (31) Silverado Summit, LLC; (32) SJSA Ventures, LLC; (33) Stonebridge 1, LLC; (34)
Woodbridge 1, Inc.; and (35) Woodbridge 2, LLC.

- 1 (1) from the beginning of RESP0013285, including the handwritten notes, to the
2 indented paragraph starting with the word “1st” shall be redacted, *id.* at 109:21-
3 110:1;
- 4 (2) the indented paragraph starting with the word “1st” through and including the first
5 sentence of the following paragraph that starts with “[w]hether” and ends with
6 “happened” is subject to production, *id.* at 101:19-24, 103:20-22, 104:5-16, 110:5-
7 16;
- 8 (3) the second sentence of the paragraph starting with “[w]hether” up through and
9 including the paragraph starting with the word “annual” is subject to production, *id.*
10 at 110:5-16;
- 11 (4) the final paragraph on RESP0013285 shall be redacted. *Id.* at 94:15.

12 IT IS FURTHER RECOMMENDED that RESP0013286 and 13287 shall be clawed back.
13 *Id.* at 76:9-13, 76:15-19.

14 IT IS FURTHER RECOMMENDED that RESP0013288 is subject to production. *Id.* at
15 77:2-3, 78:1.

16 IT IS FURTHER RECOMMENDED that RESP0078899-78900 are subject to production.
17 *Id.* at 70:22-25, 71:5-6, 72:21-22.

18 IT IS FURTHER RECOMMENDED that Respondents be granted EDCR 2.34(e) relief until
19 the District Court enters the instant Report and Recommendation. *Id.* at 110:19-23, 113:7-11.

20 IT IS FURTHER RECOMMENDED that Petitioner be precluded from referencing or
21 attaching the Disputed Documents in any future filing with this Court or for any other purpose, until
22 a decision is rendered by the District Court. *Id.* at 110:19-23, 113:7-11.

23 ***B. Supplemental Briefing on Appreciation Damages.***

24 IT IS FURTHER RECOMMENDED that the Subpoenaed Sold Entities shall provide their
25 audited income statements for the years 2014 through 2017. *Id.* at 140:12-14.

26 IT IS FURTHER RECOMMENDED that the Siblings’ Trusts shall provide records of all
27 distributions made to the Siblings’ Trusts from the Purchased Entities during the period of January
28 1, 2014 to August 29, 2018, including the name of the entity making the distribution, the date the

1 distribution was made, the name of the trust receiving the distribution and the amount of the
2 distribution. *Id.* at 140:15-18.

3 IT IS FURTHER RECOMMENDED that the Siblings' Trusts and the Subpoenaed Sold
4 Entities be granted relief under EDCR 2.34(e), *id.* at p. 137:14-16, however, within five (5) business
5 days of this Court's entry of the instant Report and Recommendations, the Siblings' Trusts shall
6 provide the records stated in the instant Report and Recommendation. *Id.* at 140:15-18.

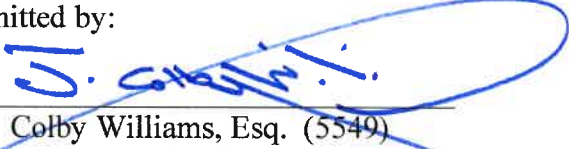
7 IT IS FURTHER RECOMMENDED that the Distribution Records be given a confidential
8 designation under NRCP 26(c), thereby protecting the same from being used or attached in filings
9 or other documents submitted to this Court without redactions or an *in camera* designation. *Id.* at
10 138:13-18.

11 The Discovery Commissioner, met with counsel for the parties, having discussed the issues
12 noted above and having reviewed any material proposed in support thereof, hereby submits the
13 above recommendations.

14 DATED this 5 day of December, 2018.

15
16 
17 DISCOVERY COMMISSIONER

18 Submitted by:

19 By: 
20 J. Colby Williams, Esq. (5549)
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28 *Counsel for Respondents Lawrence
Canarelli, Heidi Canarelli and Edward
Lubbers*

CASE NAME: *In re The Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998.*
CASE NUMBER: P-13-078912-T

Approved as to form and content by:

Approved as to form and content by:

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Counsel for non-parties American West Development, Inc., Lawrence Canarelli and Heidi Canarelli, as trustees of The Alyssa Lawren Graves Canarelli Irrevocable Trust, The Jeffrey Lawrence Graves Canarelli Irrevocable Trust, and The Stacia Leigh Lemke Irrevocable Trust

Attorneys for Petitioner

NOTICE

Pursuant to NRCP 16.1(d)(2), you are hereby notified you have five (5) days from the date you receive this document within which to file written objections.

The Commissioner's Report is deemed received three (3) days after mailing to a party or the party's attorney, or three (3) days after the clerk of the court deposits a copy of the Report in a folder of a party's lawyer in the Clerk's office. E.D.C.R. 2.34(f).

A copy of the foregoing Discovery Commissioner's Report was:

_____ Mailed to Petitioner/Respondents at the following address on the _____ day of _____, 20____:

Dana A. Dwiggin
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_____ Placed in the folder of counsel in the Clerk's office on the _____ day of _____, 20____.

↓ Electronically served counsel on Dec 6, 2018, pursuant to N.E.F.C.R.

Rule 9.

By Natilie Gh
Commissioner Designee

CASE NAME: *In re The Scott Lyle Graves Canarelli*
Irrevocable Trust, dated February 24, 1998.
CASE NUMBER: P-13-078912-T

ORDER

The Court, having reviewed the above report and recommendations prepared by the
Discovery Commissioner and,

_____ The parties having waived the right to object thereto,

_____ No timely objection having been received in the office of the Discovery Commissioner
pursuant to E.D.C.R. 2.34(f),

_____ Having received the objections thereto and the written arguments in support of said
objections, and good cause appearing,

* * *

AND

_____ IT IS HEREBY ORDERED the Discovery Commissioner's Report & Recommendations are
affirmed and adopted.

_____ IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations
are affirmed and adopted as modified in the following manner. (attached hereto)

_____ IT IS HEREBY ORDERED that a hearing on the Discovery Commissioner's Report and
Recommendations is set for _____, 20_____, at ____: ____ a.m.

Dated this _____ day of _____, 20_____.

DISTRICT COURT JUDGE