

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,

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT
COURT, in and for the County of Clark,
State of Nevada, 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 Electronically Filed
Jun 06 2019 10:12 a.m.
Elizabeth A. Brown
District Court No. 308912-7 Clerk of Supreme Court

**SCOTT CANARELLI'S
OPPOSITION TO
EMERGENCY MOTION TO
STAY DISTRICT COURT
PROCEEDINGS PENDING
WRIT PETITION PURSUANT
TO NRAP 8(c) AND NRAP
27(e)**

Real Party in Interest Scott Canarelli ("Scott") opposes a *complete* stay of the District Court proceedings while Petitioners' Writ Petition is pending before this Court. The District Court properly carved out a limited stay to protect the documents at issue in the Writ Petition (the "Disputed Documents") which largely paralleled the Discovery Commissioner's EDCR 2.34(e) relief that had been in place for nine months. There is no discernable need to implement a complete stay of this action other than to intentionally delay the entire proceeding.

BACKGROUND

This matter concerns the administration of The Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998 (the “Trust”). The Trust previously held certain interests in the family-owned business, American West Group (“AWG”), that Lawrence Canarelli, Scott’s father and Former Trustee, sold to Scott’s siblings’ trusts in May 2013 without notice to Scott. Following a tolling agreement, Scott initiated this action in June 2017 against Petitioners as Former Trustees, concerning Petitioners’ conduct in entering into the sale and subsequent thereto, the valuation of those interests, the timing of the sale and an accounting of the Trust.

On December 15, 2017, Petitioners served NRCP 16.1 disclosures which contained a portion of the Disputed Documents. On May 16, 2018, Scott filed a supplement to the initial petition (the “Supplemental Petition”) and attached an excerpt of the Disputed Documents (the “Typed Notes”) as an exhibit. Three (3) weeks later, Petitioners claimed that the Typed Notes were protected by the attorney-client privilege and the work product doctrine and attempted to claw back the same. Contrary to Petitioners’ inferences that Scott’s actions were wrongful, both the Discovery Commissioner and the District Court noted that there was nothing contained within the Disputed Documents to indicate they were potentially

privileged.¹ Nevertheless, the Discovery Commissioner granted EDCR 2.34(e) relief at the August 29, 2018 hearing, and the Parties thereafter stipulated to seal any filing that referenced the Disputed Documents and to refile redacted versions.²

Petitioners have filed the Writ Petition disputing the District Court’s findings with respect to the Disputed Documents. They initially sought to stay the entire action before the District Court and Scott opposed it to the extent it sought a stay beyond prohibiting the use of the Disputed Documents while the Writ Petition is pending. Indeed, the District Court even noted that Scott’s counsel was willing to “go further [than EDCR 2.34(e)] and agree on what kind of depositions could be taken.”³ Consequently, the District Court ultimately determined that a complete stay of the action was not warranted, stating that “the scope of a stay should be...narrowly tailored,” *id.* at p. 45:2-3, that the Disputed Documents seem “to be a pretty specific thing...that we could compartmentalize,” *id.* at p. 47:15-16, that “there are certain things that can go forward,” *id.* at p. 49:5-7, and that it did not “want to delay it any more than is absolutely necessary.” *Id.* at p. 54:1-2.

¹ See Excerpt of the August 29, 2018 hearing transcript attached hereto as **Exhibit A**, at p. 48:8-10; *see also* Excerpt of the April 11, 2019 hearing transcript attached hereto as **Exhibit B**, pp. 116:9-12, 119:8-12.

² See Stipulation and Order to Seal Document Previously Filed with the Court, filed September 26, 2018, attached hereto as **Exhibit C**.

³ See Excerpt of the May 9, 2019 hearing transcript attached hereto as **Exhibit D**, at p. 47:7-8.

As a result, the District Court ordered that any discovery relying on the Disputed Documents and to the Supplemental Petition be stayed; provided, however that Scott “may continue to engage in discovery regarding subjects unrelated to the Disputed Documents,” identifying valuation and accounting issues as examples.⁴ Petitioners are dissatisfied with such limited scope and now seek a stay of this entire case before this Court.

ARGUMENT

NRAP 8(c) enunciates four (4) factors this Court must consider when deciding whether to issue a stay. As stated in greater detail below, these factors weigh against a complete stay of the underlying action.

A. NRAP 8(c) Factor #1: Whether the Object of the Writ Petition Will Be Defeated if the Stay is Denied.

The first factor does not weigh “heavily in favor of a complete stay,” *see* Motion, at p. 4, for a number of reasons. First, if Petitioners intent was truly “to prevent further disclosure and use of Lubbers’ privileged notes,” *id.*, that has been and will continue to be achieved through the District Court’s limited stay, *see* Stay Order *supra* note 4, the Parties’ prior efforts to protect the records, *see e.g.* **Exhibit C**, and Scott’s representation that he would forego discovery that relied on the

⁴ *See* Order Granting In Part Respondents’ Motion to Stay Proceedings (“Stay Order”) attached as Exhibit 2 to Petitioners’ Emergency Motion to Stay District Court Proceedings Pending Writ Petition Pursuant to NRAP 8(c) and NRAP 27(e) (the “Motion”), filed June 3, 2019, pp. 2:1-5, 2:16-19.

Disputed Documents. There is *de minimus* risk that Disputed Documents will be disseminated any more than beyond Petitioners' "inadvertent disclosure."

Second, the procedural history of this case indicates that there is a low probability the parties will engage in any "ongoing disputes" about the scope of the stay previously ordered by the District Court. *See* Motion *supra* note 4 at p. 4. While Scott concedes that there was some disagreement as to the wording and possible interpretation of the proposed order as a result of a miscommunication, the Parties resolved the dispute without judicial intervention. The Parties were eventually able to come to an agreement prior to the May 31, 2019 hearing and the order was filed thereafter. *See* Stay Order *supra* note 4. It is indisputable that since the Discovery Commissioner granted EDCR 2.34(e) relief prior to the District Court hearing, *over nine (9) months ago*, there has been no instance where Scott has sought any discovery related to the Disputed Documents or any dispute has arisen relating to the same. As such, Petitioners' contention is disingenuous.

Further, both Parties can easily compartmentalize the Disputed Documents from the rest of the case. Scott's claims are not dependent on the Disputed Documents because these records have not altered Scott's theory of the case or claims since the inception of the case (i.e. the sale was consummated when the real estate market was coming out of recession and his father did not want Scott to benefit from the appreciation of the assets). While Scott cited a portion of the Typed

Notes in the supplement and believes the Disputed Documents will assist in ultimately proving his case, his claims do not hinge solely on these records. Indeed, Scott has delayed in amending the Supplemental Petition pending resolution of the admissibility of the Disputed Documents and believes he will be able to prove his claims without the Disputed Documents. Accordingly, the assertion that Scott's fraud claims are "expressly premised on the notes," *see* Motion *supra* note 4 at p. 2, is misleading.

In addition, issues relating to whether Petitioners are liable for breach of fiduciary duty have little or no connection with the other complex issues for which discovery can continue; e.g. the disclosure of additional financial records and the calculation of damages, including valuation at the time of the sale, appreciation damages, and the accounting for the Trust. In short, there is a significant amount of additional discovery to be done that is unrelated to the Disputed Documents.

B. NRAP 8(c) Factor #2: Whether Petitioners Will Suffer Irreparable or Serious Injury if the Stay is Denied.

Petitioners cite to *Club Vista Fin. Servs. v. Dist. Ct.*, 128 Nev. 224, 276 P.3d 246 (2012) in support of the second factor. While *Club Vista* provides that writ relief is available when a discovery order "is likely to cause irreparable harm," *id.* at 228, 276 P.3d at 249, it does not actually enunciate what constitutes "irreparable harm" to warrant a stay. Contrary to *Club Vista*, this is not an instance where the District Court has ordered production of privileged information; rather, Petitioners

produced the Disputed Documents on two (2) separate occasions (the second being in June 2018, after they sought to claw it back the first time) and now seek to claw the same back. Any prior reference to the Disputed Documents in public filings has been sealed from public access and Scott has continued to honor the EDCR 2.34(e) relief and even suggested a broader stay to the District Court that would only limit discovery to financial information, valuation and damages.

Petitioners further argued before the District Court and now allude to this Court that Scott's counsel may be disqualified if the writ is granted, citing *Zalewski* and *Brown*, disqualification of counsel cases. Despite the claw back request occurring a year ago and Petitioners raising this issue only recently, the factors under *Merits Incentives, LLC v. Eighth Jud. Dist. Ct.*, 127 Nev. 689, 262 P.3d 720 (2011) do not weigh in favor of disqualification. As such, the remote chance of disqualification should not tip this factor in Petitioners' favor.

Moreover, Petitioners' own conduct to date demonstrates that actual concern for irreparable harm is only a recent development. Between the Discovery Commissioner's decision on the Disputed Documents on August 29, 2018, through the District Court's affirmance on April 11, 2019, the Parties have appeared on hearings at least six (6) times on matters unrelated to the Disputed Documents. *See Exhibit D*, at p. 31:15-19. At no point during this time did Petitioners request protection beyond the Discovery Commissioner's EDCR 2.34(e) relief. Petitioners'

sudden concern of irreparable harm is only to achieve the intended effect of indefinitely stalling this action.

C. NRAP 8(c) Factor #3: Whether the Real Party in Interest Will Suffer Irreparable or Serious Injury if the Stay is Granted.

Scott does not dispute that “litigation costs, even if potentially substantial” and “a mere delay in pursuing discovery and litigation” do not constitute irreparable harm.⁵ However, Scott has valid concerns about the *loss* of discovery, not the mere *delay*, if the underlying matter is stayed in its entirety.

Although Petitioner has already sent preservation letters to Petitioners and the entities previously held by the Trust, this alone does not ensure information will be protected. Spoliation is only available as a sanction, not an independent tort,⁶ and such a remedy could only apply where Petitioners have notice that the information is relevant to the litigation.⁷ Given that the Parties and third parties have appeared before the both Discovery Commissioner and District Court over 15 times on discovery and other disputes, it is apparent that there is a fundamental disagreement between what Petitioners and Scott (and the District Court for that

⁵ *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 253, 89 P.3d 36, 39 (2004).

⁶ *Timber Tech Engineered Bldg. Products v. The Home Ins. Co.*, 118 Nev. 630, 633, 55 P.3d 952, 954 (2002).

⁷ *Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d 103 (2006); *see also United States v. \$40,955.00 in U.S. Currency*, 554 F.3d 752, 758 (9th Cir. 2009).

matter) consider to be potentially relevant to the underlying action. In light of this and AWG's recent sale to PulteGroup⁸ (which Petitioners have already contended is not relevant), Scott is apprehensive of Petitioners' and AWG's record retention policies and his ability to recover information through discovery if this matter is entirely stayed.

D. NRAP 8(c) Factor #4: Whether Petitioners Are Likely to Prevail on the Merits in the Writ Petition.

The last factor under NRAP 8(c) is also not met. If a motion to stay is “apparently filed...purely for dilatory purposes, the court should deny the stay.” *Mikohn*, 120 Nev. at 253, 89 P.3d at 40. In this case, Petitioners have discussed at length that they have “a substantial case on the merits” due to “a serious legal question,” concerning the fiduciary exception. *See* Motion at p. 8. However, neither the Discovery Commissioner nor the District Court found that the Typed Notes were subject to disclosure because of the fiduciary exception. Instead, the Discovery Commissioner merely speculated and made assumptions that the Typed Notes were privileged and therefore found that, *to the extent* a privilege *may* apply, there are

⁸ See Eli Segall, *Las Vegas Developer Larry Canarelli Sells Homebuilding Operations*, Las Vegas Review Journal (Apr. 29, 2019), <https://www.reviewjournal.com/business/housing/las-vegas-developer-larry-canarelli-sells-homebuilding-operations-1652379/> (last visited June 4, 2019).

exceptions permitting disclosure.⁹ The District Court went further and found that there is no evidence that the Typed Notes were part of any attorney-client privilege, and therefore not privileged.¹⁰ While the fiduciary exception is one of first impression before this Court, in the event the District Court's findings are affirmed, the Court need not address the fiduciary exception. Consequently, any reference thereto would be mere dicta and Petitioners have failed to meet their burden.

CONCLUSION

For these reasons, Scott Canarelli respectfully requests that the Motion to Stay be denied.

DATED this 6 day of June, 2019.

SOLOMON DWIGGINS & FREER, LTD.



Dana A. Dwiggin (#7049)

Tess E. Johnson (#13511)

9060 West Cheyenne Avenue

Las Vegas, Nevada 89129

Attorneys for Scott Canarelli

⁹ See Excerpt of the Discovery Commissioner's Report and Recommendation attached hereto as **Exhibit E**, p. 5:20-6:4.

¹⁰ See Order on the Parties Objections, attached hereto as **Exhibit F**, p. 2:14-19.

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the law firm of Solomon Dwiggin
& Freer, Ltd., and that on the 6 day of June, 2019, I have caused, pursuant to
NRAP 27(a)(1), a true and correct copy of the foregoing **SCOTT CANARELLI'S
OPPOSITION TO EMERGENCY MOTION TO STAY DISTRICT COURT
PROCEEDINGS PENDING WRIT PETITION PURSUANT TO NRAP 8(c)
AND NRAP 27(e)** to be served electronically to the following parties:

Donald J. Campbell, (#1216)
djc@cwlawlv.com
J. Colby Williams (#5549)
jcw@cwlawlv.com
Philip R. Erwin (#11563)
pre@cwlawlv.com
CAMPBELL & WILLIAMS
700 South Seventh Street
Las Vegas, Nevada 89101
Telephone: (702) 382-5222

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

Liane K. Wakayama (#11313)
lqakayama@maclaw.com
MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711

*Attorneys for Frank Martin, Special Administrator of the Estate of the Estate of
Edward C. Lubbers, Petitioner*

///

I further certify that a copy of this document will be served via U.S. Mail,
postage prepaid, to:

The Honorable Gloria Sturman
Eighth Judicial District Court
Department XXVI
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89155

DATED: June 6th 2019.

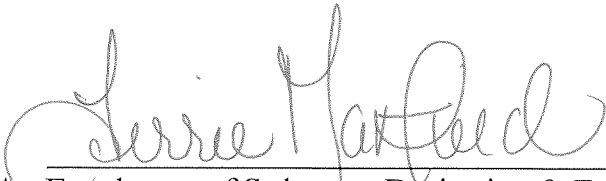

An Employee of Solomon Dwiggins & Freer

EXHIBIT A

EXHIBIT A

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 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 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.

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Shawna Ortega, CET*562

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EXHIBIT B

EXHIBIT B

1 RTRAN

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5 DISTRICT COURT

6 CLARK COUNTY, NEVADA

7)
8 IN THE MATTER OF THE TRUST)
9 OF:)

CASE#: P-13-078912-T

10 THE SCOTT LYLE GRAVES)
11 CANARELLI IRREVOCABLE TRUST)
12 DATED FEBRUARY 24, 1998,)
_____)

DEPT. XXVI

13 BEFORE THE HONORABLE GLORIA STURMAN,
14 DISTRICT COURT JUDGE
THURSDAY, APRIL 11, 2019

15 **RECORDER'S TRANSCRIPT OF PENDING MOTIONS**

16
17 APPEARANCES:

18 For the Petitioner:

CRAIG D. FRIEDEL, ESQ.
DANA A. DWIGGINS, ESQ.
TESS E. JOHNSON, ESQ.

19
20 For Respondent:

JON C. WILLIAMS, ESQ.
PHILIP R. ERWIN, ESQ.

21 For Other:

JENNIFER L. BASTER, ESQ.

22 For Special Administrator:

LIANE K. WAKAYAMA, ESQ.

23
24
25 RECORDED BY: KERRY ESPARZA, COURT RECORDER

1 guess we -- we have to start with the -- the typed page. It has the
2 handwritten date on it, and then the Commissioner makes an
3 assumption that that handwritten date was written by Mr. Lubbers. I --
4 and I guess my question is, how do we know that the handwritten date
5 was written for anything other than just a reminder to him that this -- this
6 should be filed along with the notes from that telephone conversation?

7 I mean, why are we assuming that? It says it's an analysis,
8 which to me seems to be that this is the trustee analyzing a petition that
9 he has received. Did he do it before or after? I don't know. And I think I
10 probably agree with Mr. Williams that I don't know that it matters. But I
11 don't know why we're assuming that it's part of an attorney-client
12 communication at all. There was nothing to indicate that it is. I mean, it
13 doesn't say, here are my things I want to talk to the attorneys about, or,
14 here's what I talked to the attorneys about. It doesn't say any of that. It
15 just says it's an analysis.

16 And so, for that reason, that's why I'm struggling to say
17 whether I think the fiduciary privilege applies or not, because I just -- I
18 think this is just the trustee's work product. And he's not doing this work
19 product as an attorney; he's doing this as a trustee, who, in his role as
20 trustee, is just to receive service of a petition. And he's trying to figure
21 out what he needs to do next.

22 I'm -- so I'm not sure we should assume it is part of an
23 attorney-client communication. That's an assumption we're making.
24 And nobody can tell us that, because Mr. Lubbers isn't here to say, yes, I
25 wrote that down so that I would have a checklist of things I wanted to ask

1 of a better term, what's called the fiduciary exception. But really the only
2 -- there's only the one line that has anything to do with it.

3 So, if that's her analysis, then I'm not understanding why the
4 rest of the information was disclosed. So that would be my only
5 comment with respect to where I think the Respondent's request to have
6 that page clawed back or information on that page clawed back would be
7 supportable.

8 I -- I just view this page, 13284 -- 285 totally different from
9 really how everybody else does. It's just -- to me, there's just a lot of
10 assumptions being made here that I don't think there's any evidence for.
11 I have -- there's nothing that tells me this -- why this would be privileged
12 at all. So, I guess that's -- starting from that, I don't think she's wrong in
13 her analysis that would protect starting from the word "Scott." It seems
14 to be related to attorney-client communications. I understand that. But it
15 doesn't seem to be adversarial.

16 The one thing that leads me to think it might be questions he
17 wrote before a conversation with an attorney is that he asks a rhetorical
18 question starting with the line "could" and ending with "filed question
19 mark." That has a handwritten notation next to it, the word being
20 response. That to me seems to indicate he had a question that
21 somebody answered for him and told him how -- gave him an answer to
22 that question. But that's how you would deal with his question.

23 So, that seems to be an indication that these notes were
24 more likely prepared in advance of a conversation with an attorney. And
25 whether he asked them of the attorneys or not or just gathered the

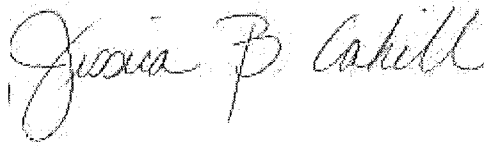
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MR. WILLIAMS: See you. Thank you.

MR. IRWIN: Thank you.

[Proceedings concluded at 5:14 p.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above entitled case to the best of my ability.

A handwritten signature in cursive script, reading "Jessica B. Cahill". The signature is written in dark ink and is positioned above a horizontal line.

Maukele Transcribers, LLC
Jessica B. Cahill, Transcriber, CER/CET-708

EXHIBIT C

EXHIBIT C



1 **SAO**

2 Dana A. Dwiggins (#7049)
3 Jeffrey P. Luszeck (#9619)
4 Tess E. Johnson (#13511)
5 SOLOMON DWIGGINS & FREER, LTD.
6 9060 West Cheyenne Avenue
7 Las Vegas, Nevada 89129
8 Telephone: (702) 853-5483
9 Facsimile: (702) 853-5485
10 ddwiggins@sdfnvlaw.com
11 jluszeck@sdfnvlaw.com
12 tjohnson@sdfnvlaw.com

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

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNLAW.COM



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

2 DATED this 21 day of September, 2018.

DATED this 20th day of September,
2018.

3 By: Tess Johnson
4 Dana A. Dwiggins, Esq., Bar No. 7049
5 Jeffrey P. Luszeck, Esq., Bar No. 9619
6 Tess E. Johnson, Esq., Bar No. 13511
7 SOLOMON DWIGGINS & FREER, LTD.
8 9060 West Cheyenne Avenue
9 Las Vegas, Nevada 89129
10 Telephone No: (702) 853-5483

By: J. Colby Williams
J. Colby Williams, Esq., Bar No. 5549
Philip R. Erwin, Esq., Bar No. 11563
CAMPBELL & WILLIAMS
700 South Seventh Street
Las Vegas, Nevada 89101

11 *Counsel for Petitioner Scott Canarelli*

and

Elizabeth Brickfield, Esq., Bar No.
6326
Joel Z. Schwarz, Esq., Bar No. 9181
Var E. Lordahl, Esq., Bar No. 12028
DICKINSON WRIGHT, PLLC
8363 W. Sunset Road, Suite 200
Las Vegas, NV 89113

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

18 ORDER

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

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

23 **IT IS FURTHER HEREBY ORDERED** that the Motion for Determination filed on July
24 13, 2018 shall be SEALED.

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

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

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

IT IS FURTHER HEREBY ORDERED that the Reply to Motion for Determination shall be SEALED.

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

Dated this 26 day of September, 2018.

DISTRICT COURT JUDGE

Respectfully Submitted By:

SOLOMON DWIGGINS & FREER, LTD.

By:

Dana A. Duggins, Esq., Bar No. 7049
Jeffrey P. Luszeck, Esq., Bar No. 9619
Tess E. Johnson, Esq., Bar No. 13511
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone No: (702) 853-5483

Counsel for Petitioner Scott Canarelli

EXHIBIT D

EXHIBIT D

1 RTRAN

2
3
4
5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7
8 IN THE MATTER OF THE TRUST
9 OF:

CASE#: P-13-078912-T

DEPT. XXVI

9 THE SCOTT LYLE GRAVES
10 CANARELLI IRREVOCABLE TRUST
11 DATED FEBRUARY 24, 1998

12
13 BEFORE THE HONORABLE GLORIA STURMAN,
14 DISTRICT COURT JUDGE
15 THURSDAY, MAY 9, 2019

16
17 **RECORDER'S TRANSCRIPT OF STATUS CONFERENCE**

18 APPEARANCES:

19 For the Petitioner:

CRAIG D. FRIEDEL, ESQ.
DANA A. DWIGGINS, ESQ.
TESS E. JOHNSON, ESQ.

20 For the Respondent:

JON C. WILLIAMS, ESQ.
PHILIP R. ERWIN, ESQ.

21 For Protection Trust:

JENNIFER L. BRASTER, ESQ.

22 For Special Administrator:

LIANE K. WAKAYAMA, ESQ.

23
24 RECORDED BY: KERRY ESPARZA, COURT RECORDER
25

1 I'm going to -- if you just give me a little leeway, I'm going to
2 try and address your points, and in specific responses to some of the
3 things Mr. Williams said.

4 First of all, I want to point out by saying that this motion, as it
5 related to the privilege, was initially heard by the Discovery
6 Commissioner at the end of August last year. Eight-and-a-half months
7 ago. She granted the 2.34 relief until it was heard by Your Honor. And
8 during that period of time, we complied with that order and agreed
9 amongst ourselves that we would not engage in any fact depositions
10 that would potentially elicit testimony surrounding any of the
11 information contained within those documents that were subject to the
12 motion.

13 So I would start off by saying that that same exact relief
14 could move forward until the Supreme Court decides whether or not it's
15 going to take the writ. And if it does, how it ultimately determines it.
16 Because since the end of August and today, we've appeared before
17 either Your Honor or the Discovery Commissioner at last six times on
18 motions as it related to financial records and business plans and other
19 items. There was absolutely no prejudice to the Respondents in that
20 regard. They didn't seek to stay the entire action at that time. There was
21 no irreparable harm.

22 And so I would submit that we can proceed doing the same
23 exact thing forward. And as there was no irreparable harm the last
24 eight-and-a-half months, there is going to be no irreparable harm going
25 forward.

1 THE COURT: -- and who's on first, what judges are hearing
2 these things, where these cases are. So I -- you know, the scope of a
3 stay should be I think narrowly tailored --

4 MR. WILLIAMS: Uh-huh.

5 THE COURT: -- and that's why I'm not sure I agree that it
6 needs -- I mean, Ms. Dwiggins has proposed some terms. She's
7 conceded that maybe some additional narrowing would be appropriate,
8 such as staying the supplemental pleading, so -- to sort of expand on
9 what the commissioner had already put in place -- because the
10 commissioner recognized that this would be a problem.

11 MR. WILLIAMS: Right.

12 THE COURT: But staying the entirety of the District Court
13 litigation, because I'm not sure what -- how many cases you're left with
14 here.

15 MR. WILLIAMS: Judge, if I can try and clarify that.

16 THE COURT: Uh-huh.

17 MR. WILLIAMS: For what we're here on today -- I realize
18 there are other issues with all these new filings --

19 THE COURT: Sure.

20 MR. WILLIAMS: -- and I'm not looking to have the Court put
21 in the unfair position of having to make a snap judgment --

22 THE COURT: Uh-huh.

23 MR. WILLIAMS: -- about how this impacts those other cases.
24 I don't think that's fair to the Court, and I'm not here to do that to
25 opposing counsel. What our motion is based on is P-13-078912-T.

1 you know, leave any traces of this in the record. That staying the whole
2 case is a pretty extreme remedy when this is just one aspect of it.
3 Staying the supplemental pleading, I have no problem with. And staying
4 the discovery and extending whatever it is, the 20 -- 2.34(e) relief that the
5 Commissioner put place, continuing that in place, very reasonable. I
6 think that -- Ms. Dwiggins even indicated she'd be willing to, you know,
7 go further and come to some sort of agreement on what kind of
8 depositions could be taken.

9 I just -- I don't know what other discovery there is to be done
10 out there and how it might even come anywhere close to the edges of
11 the information that you're seeking to protect. And so I guess that's part
12 of the problem here, is to just say, we've got to stay the whole case
13 because we have to protect the whole case from getting infected with
14 this, well, I don't know that that's even a possibility.

15 This seems to be a pretty specific thing that it seems that we
16 could compartmentalize it in some way, that we could, you know,
17 continue that umbrella of protection that the Commissioner put in place,
18 extend it to those things. And as you pointed out, if they file a whole
19 supplemental pleading, well, then, yeah, stop the supplemental pleading.
20 That's not going anywhere.

21 MR. WILLIAMS: Right.

22 THE COURT: I agree. Staying the whole litigation is a
23 concern for me because it just seems like, you know, this could just then
24 be dragged out forever. And how does that --

25 MR. WILLIAMS: So, Your Honor, how do you envision if --

1 But Ms. Dwiggin seemed to say that she thinks there are
2 certain things that we could carve out, which are -- for example, if the
3 question is simply valuation of assets, why can't we just continue on
4 that, focus that on, talk to those experts? So maybe that's the other way
5 to go around it is to say, we'll stay with -- we'll stay discovery, but there
6 are certain things that can go forward, because they're not going to all
7 involve this information.

8 MR. WILLIAMS: Uh-huh.

9 THE COURT: And so what are those things? I don't know.
10 You know your case better than I do.

11 MR. WILLIAMS: Right.

12 THE COURT: It seems to me that we need to do something
13 that doesn't just halt us in our tracks, or we're never going to build --
14 because you've built up a little head of steam here, and you know, we're
15 getting somewhere with this. So we're -- if we just stay that and stop in
16 our tracks, other than, you know, going forward with what we have
17 already scheduled for May 31st, it just seems to me that it doesn't do
18 anybody any good to just stop when there may be things that are totally
19 unrelated that really don't involve this, and it can go forward. It could be
20 getting done. Just because that puts us that much closer when the writ
21 is over to finally being able to say, okay, it's lifted. What are we going to
22 do? Yes or no. It's a simple note pleading going forward? We can make
23 those decisions when we know what the outcome of the writ is.

24 MR. WILLIAMS: Right. So to, you know, provide the Court
25 with a little bit of additional information -- and then I'll sit down, and the

1 memories continuing to fade. I just -- I don't want to delay it any more
2 than is absolutely necessary. And the part that I think needs to be just
3 stopped is the supplemental pleading.

4 So with that, as I said, it's a partial stay. So I don't know if
5 you want to write that order, Mr. Williams, or you want to work with Ms.
6 Dwiggins --

7 MR. WILLIAMS: I'm happy to --

8 THE COURT: -- on agreeing --

9 MR. WILLIAMS: Right. But --

10 THE COURT: -- on some language. I understand you don't
11 agree with it --

12 MR. WILLIAMS: No, no.

13 THE COURT: -- and so I don't want you to say that you're
14 stipulating.

15 MR. WILLIAMS: No, no.

16 THE COURT: And I -- you know, I think that's understood,
17 that when people sign off on orders, they're not agreeing that that -- with
18 what the outcome is, they're just agreeing that's what happened. So I'm
19 just saying if you want to write that or do you -- would you prefer that
20 Ms. Dwiggins --

21 MR. WILLIAMS: I'm happy to take a first shot --

22 THE COURT: Okay.

23 MR. WILLIAMS: -- at it, Judge. That's not a problem. When --
24 we've been able to get orders put together --

25 THE COURT: Okay.

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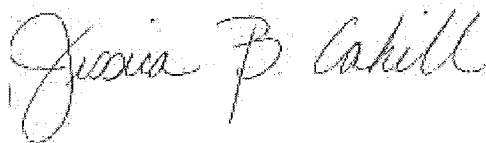
THE COURT: -- give me a call.

MR. WILLIAMS: We know there was a lot of stuff.

THE COURT: Thank you.

[Proceedings concluded at 2:54 p.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above entitled case to the best of my ability.

A handwritten signature in cursive script that reads "Jessica B. Cahill". The signature is written in dark ink and is positioned above a horizontal line.

Maukele Transcribers, LLC
Jessica B. Cahill, Transcriber, CER/CET-708

EXHIBIT E

EXHIBIT E

DCRR

J. Colby Williams, Esq. (5549)
Philip R. Erwin, Esq. (11563)
CAMPBELL & WILLIAMS
700 South Seventh Street
Las Vegas, Nevada 89107

Elizabeth Brickfield (#6236)
Joel Z. Schwarz (#9181)
DICKINSON WRIGHT, PLLC
8363 W. Sunset Road, Suite 200
Las Vegas, Nevada 89113

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

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DO NOT ATTEMPT TO FILE

**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 Dwigins
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 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 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.

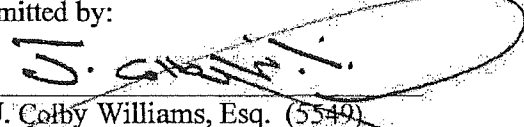
7 IT IS FURTHER RECOMMENDED that the Distribution Records be given a confidential
8 designation under NRCP 26(c), thereby protecting the same from being used or attached in filings
9 or other documents submitted to this Court without redactions or an *in camera* designation. *Id.* at
10 138:13-18.

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
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17 DISCOVERY COMMISSIONER

18 Submitted by:

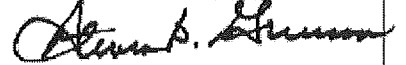
19 By: 
20 J. Colby Williams, Esq. (5549)
21 Philip R. Erwin, Esq. (11563)
22 CAMPBELL & WILLIAMS
23 700 South Seventh Street
24 Las Vegas, Nevada 89107

25 Elizabeth Brickfield (#6236)
26 Joel Z. Schwarz (#9181)
27 DICKINSON WRIGHT, PLLC
28 8363 W. Sunset Road, Suite 200
Las Vegas, Nevada 89113

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

EXHIBIT F

EXHIBIT F



ORDR

CAMPBELL & WILLIAMS
J. Colby Williams, Esq. (5549)
jcw@cwlawlv.com
Philip R. Erwin, Esq. (11563)
pre@cwlawlv.com
700 South Seventh Street
Las Vegas, Nevada 89101
Telephone: (702) 382-5222
Facsimile: (702) 382-0540

DICKINSON WRIGHT, PLLC
Joel Z. Schwarz, Esq. (9181)
jschwarz@dickinsonwright.com
8363 West Sunset Road, Suite 200
Las Vegas, Nevada 89113
Telephone: (702) 550-4400
Facsimile: (844) 670-6009

*Attorneys for Lawrence and
Heidi Canarelli, and Frank Martin,
Special Administrator of the Estate of
Edward C. Lubbers, Former Trustees*

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: XXVI

Date of Hearing: April 11, 2019
Time of Hearing: 1:30 pm

**ORDER ON THE PARTIES' OBJECTIONS TO THE DISCOVERY
COMMISSIONER'S REPORT AND RECOMMENDATION ON THE MOTION FOR
PRIVILEGE DESIGNATION**

On April 11, 2019, this Court held a hearing on Respondents' Objections, in Part, to Discovery Commissioner's Report and Recommendations on Motion for Privilege Determination ("Respondents' Objection"); and 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 ("Petitioner's Objection"). Present at the hearing were: J. Colby Williams and Philip R. Erwin of the law firm Campbell & Williams, on behalf of Respondents; and Dana Dwiggins, Tess E. Johnson and Craig Friedel of the law firm Solomon Dwiggins Freer Ltd., on behalf of Petitioner Scott Canarelli.

1 After considering the papers and pleadings on file herein and the argument of counsel at the
2 time of hearing, the Court hereby finds as follows:

3 **A. RESP013284**

4 1. With the exception of the last line on page RESP013284, the subject note does not
5 involve matters of trust administration but instead appears to be related to the attorney-client
6 relationship between Mr. Lubbers and his attorneys. *See* Hr'g Tr. dated April 11, 2019 at 118:3-
7 119:7. As a result, the Discovery Commissioner's recommendation that RESP013284 be subject to
8 production in its entirety is clearly erroneous. *See id.*; *see also id.* at 132:23-25.

9 2. The portion of RESP013284 starting with "[w]hen" and ending with "?" references
10 fiduciary activities that are purely administrative and would fall within the fiduciary exception. Thus,
11 the Discovery Commissioner's recommendation that this portion of RESP013284 is subject to
12 production is not clearly erroneous. *Id.* at 118:9-16; 118:24-119:2; and 123:4-6.

13 **B. RESP013285**

14 3. Certain of the Discovery Commissioner's findings related to page RESP013285 are
15 based upon assumptions and a lack of evidence that any portion of the document was communicated
16 to counsel and, therefore, potentially protected by the attorney client privilege. Notwithstanding the
17 foregoing, the Court agrees with the Discovery Commissioner's ultimate conclusions regarding
18 RESP013285, albeit for different reasons. *Id.* at 116:1-4; 116:9-12; 116:22-24; 119:8-12; 125:9-11;
19 128:3-4; 128:6-7; 130:2-5; 133:7-9.

20 4. The Discovery Commissioner's finding that the portion of RESP013285 starting with
21 "Scott" up to but not including "1st" may be protected by the attorney client privilege because it
22 appears to contain the kinds of questions a trustee would ask an attorney upon being served with a
23 petition is not clearly erroneous. *Id.* at 127:21-128:4, 128:14-23, 130:2-5, 130:18-24.

24 5. The Discovery Commissioner's finding that the portion of RESP013285 starting with
25 "1st" up to and including the word "happened" is factual is not clearly erroneous. *Id.* at 121:16-17.

26 6. The Discovery Commissioner's findings as to the remaining portions of RESP013285
27 are not clearly erroneous. *Id.* at 123:14-15.

28

1 7. The Discovery Commissioner's recommendation that the final paragraph of
2 RESP013285 is not relevant and may be clawed back is not clearly erroneous. *Id.* at 123:6-13.

3 **C. RESP013286-RESP013287**

4 8. The Discovery Commissioner's finding and recommendation that pages
5 RESP013286-RESP013287 are not related to the Irrevocable Trust and may be clawed back is not
6 clearly erroneous. *Id.* at 117:21-23.

7 **D. RESP013288**

8 9. The Discovery Commissioner's findings and recommendation that page RESP013288
9 is purely factual and would otherwise be discoverable to the beneficiary because it relates to the
10 administration of the Trust is not clearly erroneous. *Id.* at 117:17-20.

11 NOW, THEREFORE, IT IS HEREBY ORDERED:

12 1. Petitioner's Objections to the DCRR are DENIED.

13 2. Respondents' Objections to the DCRR are GRANTED in part, and DENIED in part.
14 The Objections are GRANTED to the extent the Court overrules the Discovery Commissioner's
15 findings and recommendations that the entirety of RESP0013284 is subject to production under the
16 fiduciary exception to the attorney-client privilege. Respondents may claw back Bates No.
17 RESP0013284 with the exception of the last line on the page, which appears to deal with trust
18 administration; the same shall be produced to Petitioner on the basis of the fiduciary exception.

19 3. The remainder of Respondents' Objections are DENIED.

20 4. Except as otherwise provided herein, the Discovery Commissioner's Report and
21 Recommendation on (1) the Motion for Determination of Privilege Designation, and (2) the
22 Supplemental Briefing on Appreciation Damages is AFFIRMED in all other respects.


1 5. The Stipulation and Order Confirming and Setting Discovery Deadlines and Trial Date
2 entered on January 5, 2019 shall be VACATED.

3
4 DATED this 3rd day of May, 2019.

5
6 
7 DISTRICT COURT JUDGE

8 Agreed as to Form:

9 CAMPBELL & WILLIAMS

10 
11 J. Colby Williams, Esq. (5549)
12 Philip R. Erwin, Esq. (11563)
13 700 South Seventh Street
14 Las Vegas, Nevada 89101
15 Telephone: (702) 382-5222
16 Facsimile: (702) 382-0540

17 -and-

18 DICKINSON WRIGHT, PLLC
19 Joel Z. Schwarz, Esq. (NSB #9181)
20 8363 W. Sunset Road, Suite 200
21 Las Vegas, Nevada 89113
22 Tel: (702) 550-4400

23 *Attorneys for Lawrence and*
24 *Heidi Canarelli, and Frank Martin,*
25 *Special Administrator of the Estate of*
26 *Edward C. Lubbers, Former Trustees*

Agreed as to Form:

SOLOMON DWIGGINS & FREER, LTD.

27 
28 Dana A. Dwiggins, Esq., (7049)
Tess E. Johnson, Esq., (13511)
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: (702) 853-5483
ddwiggins@sdfnvlaw.com
tjohnson@sdfnvlaw.com

Attorneys for Petitioner
Scott Canarelli