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

District Court No. A-18-767242-T

PETITIONERS' APPENDIX TO PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

(VOLUME 2 OF 5)

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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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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' 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** Hearing Date: August 29, 2018 Hearing Time: 1:30 p.m.

Respondents Lawrence Canarelli ("Larry") and Heidi Canarelli ("Heidi") (collectively "the Canarellis"), and Frank Martin, Special Administrator of the Estate of Edward C. Lubbers ("Lubbers"), as former Family Trustees of the Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998 (the "SCIT"), by and through undersigned counsel, hereby submit their Opposition to Petitioner Scott Canarelli's 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. This Opposition and Countermotion 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.

DATED this 10th day of August, 2018.

CAMPBELL & WILLIAMS

By **/s/ *J. Colby Williams***
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POINTS AND AUTHORITIES

I. INTRODUCTION

Scott's Motion challenging Respondents' assertion of attorney-client privilege and work product protection over certain notes prepared by Lubbers in October and December, 2013 is gravely flawed both procedurally and substantively. Graver still is the threat to the judicial process and public confidence in the legal system if a recalcitrant party is permitted to don the judge's robe, crack the gavel, and declare the opposing party's privileged documents fair game for use in the litigation. Unfortunately, that is exactly what has happened here.

Beginning with its substantive defects, Scott's Motion is premised on a multitude of incorrect legal theories. First, Scott contends that he is entitled to Lubbers' actual notes because they contain "facts," which are not protected by the attorney-client privilege or the work product doctrine. Respondents dispute this characterization of the notes as they clearly reflect Lubbers' mental processes and, thus, constitute independently-protected "opinion" work product. Regardless, where the purported "facts" are contained within an attorney-client privileged communication, the communication itself (*i.e.*, the notes) remains protected from disclosure. And while "ordinary" work product can sometimes be obtained based on a showing of "substantial need," Scott has failed to meet the heightened burden required to overcome the near absolute protection that attaches to the type of "opinion" work product contained in Lubbers' notes.

Next, Scott argues that Respondents have waived any privilege or work product protection because (i) Lubbers created some of the notes in the presence of Larry Canarelli and Bob Evans, and (ii) the notes were ultimately provided to the offices of The American West Home Building Group after being (inadvertently) produced in this action. In so doing, Scott ignores that, under NRS 49.095, Lubbers and the Canarellis share a common interest defending this action as the conduct of all of the former Family Trustees was (and is) at issue in Scott's various petitions. Scott

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likewise ignores that work product protected materials can be provided to certain third parties without risk of waiver.

Third, Scott claims the subject notes cannot be work product protected because they were not prepared at the direction of an attorney. But Scott's reliance on a distinguishable, three-decade old case to support this proposition is at odds with more recent Nevada Supreme Court precedent, the plain language of NRCP 26(b)(3), and abundant case law interpreting the same.

Finally, Scott posits that no work product protection can apply to the Lubbers notes created in 2013 because Scott's initial petition was "neutral" and asserted no claims against Lubbers. The test, however, for what constitutes litigation that can be anticipated for work product purposes centers on whether the proceedings are "adversarial." A simple reading of Scott's initial petition and the totality of surrounding circumstances quickly dispels any notion that his initial filing was "neutral."

From a procedural standpoint, Petitioner has improperly used Lubbers' disputed notes affirmatively to support the claims asserted in his recently-filed Supplemental Petition, to challenge Respondents' claim that the notes are privileged and protected, and to defend against Respondents' pending Motion to Dismiss the Supplemental Petition. Scott, moreover, has publicly disclosed the contents of Lubbers' notes and has refused to remove them from the public record pending resolution of this dispute. Such conduct violates the express terms of the parties' ESI Protocol, the parties' Confidentiality Agreement, and the Nevada Rules of Professional Conduct governing the ethical proscriptions with which counsel must comply after learning they may be in possession of an adversary's protected information. Respondents have filed a Countermotion asking the Commissioner to prevent further harm caused by Petitioner's actions through the entry of an order directing removal of the protected communications from the Court's files, among other relief.

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II. FACTUAL BACKGROUND

A. The Adversarial Nature of the Initial Petition and Related Communications Between the Parties.

1. On or about September 30, 2013, Petitioner Scott Canarelli ("Petitioner" or "Scott") filed his Petition to Assume Jurisdiction over the Scott Lyle Graves Canarelli Irrevocable Trust; to Confirm Edward C. Lubbers as Family and Independent Trustee; for an Inventory and Accounting; to Compel an Independent Valuation of the Trust Assets Subject to the Purchase Agreement, dated May 31, 2013; and to Authorize and Direct the Trustee to Provide Settlor/Beneficiary with any and all Information and Documents Concerning the Sale of the Trust's Assets Under Such Purchase Agreement (the "Initial Petition").[1]

2. As indicated in the Initial Petition, *see* ¶¶ A.13-A.14, Petitioner had retained the law firm Solomon Dwiggins & Freer in or about May 2012 to assist him in resuming distributions from the SCIT, which Scott alleged had been stopped due to "hostility" on the part of his parents, Larry and Heidi. *See id.*

3. By November 2012, the "hostility" between Scott and his parents, who were Family Trustees of the SCIT at that time, and Lubbers, who was then Independent Trustee of the SCIT, had reached a boiling point. Indeed, Scott's counsel, Mark Solomon, Esq., sent a letter to Lubbers on November 14, 2012 wherein he characterized the Trustees' handling of distributions to Scott as "*per se* bad faith."[2] Mr. Solomon further threatened that he had "been authorized by Scott to file a petition to assume jurisdiction over the trusts to redress the present Trustees' unreasonable

[1] A true and correct copy of the Initial Petition in this case, without exhibits, is attached hereto as Exhibit 1. Petitioner likewise filed two other petitions the same day related to two different trusts of which he is the beneficiary. *See* Case Nos. P-13-078913-T; P-13-078919-T.

[2] A true and correct copy of the November 14, 2012 letter, which has been produced in this action as Bates Nos. RESP0094288-0094289, is attached hereto as Exhibit 2.

interpretation of the HEMS standard, to remove the Trustees, and to demand accountings for both trusts." *See* Ex. 2. Finally, Mr. Solomon made a demand for multiple thousands of dollars in distributions from the SCIT, which were "non-negotiable." *Id.*

4. The very next day, on November 15, 2012, Lubbers prepared and sent an Agenda for one of the Friday meetings that were regularly conducted with Larry and Bob Evans ("Evans") at the offices of The American West Home Building Group ("AWG").[3] The Agenda reflects a bullet point item styled as: "5. ***Scott – lawsuit threatened***."[4]

5. On May 31, 2013, Lubbers, as Family Trustee of the SCIT, entered into a Purchase Agreement (the "Purchase Agreement") with three irrevocable trusts that had previously been formed by Scott's siblings (the "Siblings Trusts") and an entity named SJA Acquisitions, LLC ("SJA"). The Siblings Trusts purchased the minority interests in certain corporations held by the SCIT, and SJA purchased the minority interests in certain limited liability companies held by the SCIT (collectively the "Purchased Entities").

6. The lawsuit threatened by Scott's counsel in November 2012 ultimately came in the form of the Initial Petition filed on September 30, 2013. Despite Petitioner's retroactive attempts to downplay the Initial Petition as "neutral" because there was purportedly "no actual dispute

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[3] As the Court knows from prior motion practice, AWG is a home building business. Larry is the founder of AWG, and Mr. Evans is its Senior Vice President of Finance. The SCIT formerly held minority interests in various corporations and limited liability companies that comprised a portion of AWG's homebuilding operations. *See* Opp'n to Motion to Compel Lawrence and Heidi Canarelli's Responses to Scott Canarelli's Request for Production of Documents dated May 29, 2018 (on file). Though not a party herein, Respondents agreed to search and produce responsive ESI from Mr. Evans on the theory that he acted as an agent of the former Family Trustees in connection with the SCIT. *See id.* at Ex. 7. A true and correct copy of the e-mail exchange between counsel on this subject is being reproduced as Exhibit 3 hereto.

[4] A true and correct copy of the forwarding e-mail and attached Agenda, which have been produced in this action as Bates Nos. RESP0094294-0094295, are attached hereto as aggregate Exhibit 4 (emphasis added).

between the Parties" and "absolutely no allegations of wrongful conduct or claims were asserted against either Lubbers or the Canarellis," *see* Mot. at 7:12-17; 17:15-18, a plain reading of the Initial Petition tells a very different story.

7. Here are several excerpts demonstrating the adversarial nature of the allegations contained in the Initial Petition:

- "Since the Irrevocable Trust's creation fifteen years ago, ***Petitioner has never received an inventory of the Irrevocable Trust's assets or an annual accounting as specifically provided thereunder, despite requests for the same***." Ex. 1 ¶ A.10 (emphasis added); *see also id*. ¶ C.5 (same);

- "Indeed, Petitioner has never been provided with a copy of the Credit Agreement, despite the collateralization of the Irrevocable Trust's interest in the LLCs and Corporations in conjunction therewith." *Id.* ¶ A.12;

- "In or about May 2012, ***the Family Trustees became hostile toward Petitioner and stopped making distributions to Petitioner and/or his family***, despite Petitioner's dependence on such distributions for his and his family's health, maintenance, support and general welfare. The cessation of distributions followed receipt by Petitioner of a letter from Larry and Heidi that read that Larry and Heidi were '***not willing to continue financing [Petitioner's] existence' because 'it is against everything that [Larry and Heidi] think is good for [Petitioner]***.'" Petitioner is informed and believes that ***the hostility*** stemmed from his decision to become a stay at home father after his wife returned to the workplace." *Id.* ¶ A.13 (emphasis added);

- "At the onset of SDF's representation of petitioner, Petitioner requested an accounting and an inventory of trust assets from the trustees. However, the Independent Trustee informed Petitioner that ***Larry would not authorize the provision of an accounting and/or an inventory of the Irrevocable Trust or its assets***. Further, ***the Independent Trustee admitted to Petitioner that he had little or no personal knowledge of the Irrevocable Trust's management or its assets, despite serving as Independent Trustee since 2005***." *Id.* ¶ A.15 (emphasis added);

- "At the time the Purchase Agreement was entered, Larry was on both sides of the transaction. Thus, ***Larry had a conflict as both Co-Family Trustee of the Irrevocable Trust, on one hand, and Trustee of the Siblings Trust [sic] and manager of SJA***." *Id.* ¶ A.20 (emphasis added);

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- "***Accordingly, the Family Trustee violated the fiduciary obligations due and owing to Petitioner by failing to provide Petitioner with an inventory of the Irrevocable Trust's assets or render a fiduciary accounting as required by law***. Thus, this Court should enter an Order compelling Lubbers to provide Petitioner with an inventory of the Irrevocable Trust's assets and a complete accounting of the Irrevocable Trust's activities from February 24, 1998, the date of the Irrevocable Trust's creation, through the present date." *Id.* ¶ C.6 (emphasis added);

- "***Here, the Family Trustees had a duty to provide Petitioner with the Information and documents necessary to keep him apprised of the nature, value and transactions of the Irrevocable Trust. Instead***, the trustees sold the Irrevocable Trust's interests in the LLC's and the Corporations to SJA and the Siblings Trusts without Petitioner's knowledge or consent ***following a falling out between Petitioner and his parents***." *Id.* ¶ D.5 (emphasis added);

- "Petitioner lacks any way of verifying whether this sale was prudent . . . ***or designed to punish him or otherwise harm his financial interests***. ***Indeed, the sale effectively strips the Irrevocable Trust of all of its assets by disposing all of its interests in the LLCs and Corporations in favor of trusts and entities established by Larry for his other three children***." *Id.* ¶ D.6 (emphasis added); and

- "Moreover, at the time the Family Trustees conducted the sale, the purchasers, SJA and the Siblings Trusts, were managed by Larry ***thereby creating a conflict as both the buyer and seller***." *Id.* ¶ D.7 (emphasis added).

B. Lubbers Retains Counsel to Respond to the Initial Petition and Prepares Notes Related to the Litigation.

8. Less than two weeks after Petitioner's service by mail 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).[5] The contemporaneous billing records from LHLGB reflect that attorneys David Lee and Charlene

[5] Declaration of David S. Lee, Esq. ("Lee Decl.") ¶ 4; Declaration of Charlene N. Renwick, Esq. ("Renwick Decl.") ¶ 4.

Renwick conducted a conference call with Lubbers on October 14, 2013 that lasted approximately a half hour.[6] The general subject matter of the call was regarding "responses to petition." *Id.*

9. In anticipation of the call with attorneys Lee and Renwick, Lubbers prepared type-written notes. 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.[7] 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* Mot., Ex. 1. Finally, the notes reflect Lubbers' assessment of certain legal issues. *Id.* The notes, in other words, reflect Lubbers' request for legal advice and his mental impressions about pending litigation and, thus, are a quintessential example of attorney-client privileged and work-product protected material.

10. Attorneys Lee and Renwick have confirmed that, during the October 14, 2013 call, Lubbers asked them several questions about his potential responses to the petitions, and further stated his views about several matters related to the petitions and potential strategies for defending against certain of the allegations contained therein.[8] Both attorneys had similar discussions with Lubbers on different occasions throughout the representation. *See id.*

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[6] A true and correct copy of the LHLGB billing records for October 2013 for the "Canarelli Trust" matters is attached hereto as Exhibit 5. *See* Lee Decl. ¶ 6. The records have been redacted to protect attorney work-product and attorney-client communications. *Id.*

[7] *See* Mot., Ex. 1 (*in camera* submission). Unlike Petitioner, who has improperly made affirmative use of Lubbers' notes (despite Respondents' privilege claims) and publicly quoted them (despite the notes being designated "Confidential") in his Supplemental Petition filed May 18, 2018, *see id.* at 18:24-19:8, in the instant Motion filed July 13, 2018, *see id.* at 7:5-8, and in his Opposition to Motion to Dismiss Petitioner's Supplemental Petition filed August 1, 2018, *see id.* at 27:19-20, Respondents will only describe the notes in general terms so as to avoid further harm from the improper use and unauthorized disclosure of this attorney-client privileged and work-product protected material.

[8] *See* Lee Decl. ¶ 8; Renwick Decl. ¶ 7.

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11. In or about mid-November 2013, the law firm Campbell & Williams substituted into this action on behalf of Respondents in the place and stead of LHLGB as Ms. Renwick was taking maternity leave.[9]

12. On or about December 2, 2013, a revised stipulation was entered in this action regarding the appointment of Stephen Nicolatus to conduct a valuation of the SCIT assets sold pursuant to the May 31, 2013 Purchase Agreement.[10] While the Parties had agreed to the appointment of Mr. Nicolatus, Scott expressly reserved his rights to seek redress for the conduct of the Trustees as it related to the Purchase Agreement. *Id.* at 3:26-4:6.

13. On or about December 6, 2013, Petitioner's counsel, Mr. Solomon, sent a letter to Respondents' new counsel at Campbell & Williams reaffirming Scott's reservation of rights to challenge the Purchase Agreement: "***Scott was never told about the sale of the trust assets until after the fact, and we still have questions about the appropriateness of the sale in the first instance. . . . Scott is being careful not to agree or do anything that would estop him from seeking to unwind the sale if we determine that is appropriate***."[11]

14. On or about December 19, 2013, the parties and their respective counsel met with Mr. Nicolatus to discuss the materials he would need to conduct the valuation. Mr. Lubbers took notes during the meeting, which reflect the information he believed was important to memorialize.[12]

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[9] *See* Lee Decl. ¶ 9; Renwick Decl. ¶ 8.

[10] *See* Stipulation and Order Appointing Valuation Expert and Clarifying Order dated 12/2/13, a true and correct copy of which is attached hereto as Exhibit 6.

[11] *See* Letter from M. Solomon to C. Williams dated 12/6/13, a true and correct copy of which is attached hereto as Exhibit 7.

[12] *See* Mot., Ex. 2 (*in camera* submission).

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15. In or about late-2014/early-2015, Lubbers retained Dan Gerety to assist with preparation of the 2014 Accounting for the SCIT.[13] On or about November 18, 2015, Lubbers signed a "Consent" authorizing Gerety to disclose certain information regarding the 2014 Accounting to Petitioner's counsel at Solomon Dwiggins & Freer [redacted][14] As of November 2015, the only "litigation" pending regarding the SCIT was the Initial Petition filed on September 30, 2013.

16. Despite Petitioner's revisionist claim in the present Motion that "[i]t was not until late 2015, when Petitioner provided Respondents' counsel with a DRAFT copy of the Surcharge Petition that the potential of any claim against Lubbers was anticipated," *see* Mot. at 10:21-22, Petitioner's counsel has recently admitted elsewhere that "[a]t the time Lubbers retained Gerety to prepare the 2014 accounting, ***there were several unanswered questions raised by Petitioner through Gerety that potentially could result in litigation***."[15] Again, Lubbers provided notice of his intent to retain Gerety to perform the 2014 accounting back in December 2014.[16]

C. Respondents Inadvertently Produce Attorney-Client Privileged and Work Product Protected Documents, and Seek to Claw Them Back.

17. Scott filed his Petition to Surcharge on June 27, 2017.

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[13] *See* letters exchanged between A. Freer and C. Williams dated 12/9/14 and 12/12/14, true and correct copies of which are attached hereto as aggregate Exhibit 8. The content of these letters leaves no ambiguity that Petitioner's counsel viewed the parties as being in "litigation" at the time. *See id.* ("In a last effort to resolve the accounting and information request issues ***without further litigation*** . . . .") (emphasis added).

[14] *See* Consent to Use of Tax Return Information, a true and correct copy of which is attached hereto as Exhibit 9.

[15] *See* Petitioner's Response to Respondents' Objections to the Discovery Commissioner's April 20, 2018 Report and Recommendation dated 7/12/18 at 17:16-18 (emphasis added), a true and correct excerpt of which is attached hereto as Exhibit 10.

[16] *See* Ex. 8.

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18. Respondents served their Initial Disclosures of Witnesses and Documents Pursuant to NRCP 16.1 on December 15, 2017. As part of their Initial Disclosures, Respondents inadvertently produced a set of handwritten and typed notes from Lubbers' hard files as Bates Nos. RESP0013284-RESP0013288.

19. Respondents served their First Supplement to Initial Disclosures of Witnesses and Documents Pursuant to NRCP 16.1 on April 6, 2018. As part of their First Supplemental Disclosures, Respondents inadvertently produced a set of handwritten notes from Lubbers' hard copy files unofficially referred to as Bates Nos. RESP0078884-RESP0078932.[17]

(i) ***Lubbers' October 2013 Notes (Bates Nos. RESP0013284-RESP0013288)***

20. On May 18, 2018, Petitioner filed his 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 Attorney Fees, Accountant Fees & Costs (the "Supplemental Petition") (on file).

21. With no forewarning, Petitioner unilaterally included Lubbers' notes (Bates Nos. RESP0013284-RESP0013288) as Exhibit 4 to the Supplemental Petition. While the Exhibit itself was submitted "*in camera*," Petitioner nonetheless quoted substantial portions of the type-written notes (Bates No. RESP0013285) in the publicly-filed body of the Supplemental Petition as constituting an alleged admission that Respondents breached their fiduciary duties. *See* Supp. Pet. at 18:24-19:8. In addition to failing to provide Respondents' counsel with notice that Petitioner's counsel was in possession of a potentially privileged document, Petitioner exacerbated the situation by (i) making affirmative use of the document to support his claims, and (ii) publicly

[17] The subject notes were not actually marked with Bates Stamps as they were inadvertently produced in native format to Petitioner's counsel. Nonetheless, the unofficial Bates Nos. can be derived from the gap in Bates Stamp numbering that exists in those documents properly produced as part of Respondents' First Supplement.

quoting the document even though it was designated "Confidential" under the parties' Confidentiality Agreement. Notably, other portions of the same pages of the Supplemental Petition were redacted, thus negating the possibility of a potential oversight by Petitioner. *See* Supp. Pet. at 18-19.

22. On June 5, 2018, Respondents counsel sent written notice to Petitioner's counsel demanding that Petitioner return/destroy Lubbers' notes and agree to redact all public references to the same in the Supplemental Petition. *See* Mot., Ex. 4. One week later, on June 12, Petitioner's counsel responded, claimed that "these records are not 'clearly' privileged," and refused to redact Petitioner's public quotation of the notes notwithstanding their designation as "Confidential." *See* Mot., Ex. 5.

23. The same day, Respondents' counsel again demanded return/destruction of the documents, explained the privileged nature of the notes, cited counsel's failure to comply with the Nevada Rules of Professional Conduct and the terms of the parties' ESI Protocol, and requested a meet and confer. *See* Mot., Ex. 6. Six days later, on June 18, Petitioner's counsel responded, claimed that any protection that applied to the notes had been "waived" (on some unspecified basis), but ostensibly agreed to sequester the documents while the parties conducted a meet and confer in accordance with the provisions of the ESI Protocol. *See* Mot., Ex. 7.

24. After an unsuccessful meet and confer on June 25, 2018, Petitioner filed the instant Motion for Determination of Privilege on July 13, 2018. Rather than sequester the document as required by the parties' ESI Protocol, Petitioner's counsel again made affirmative use of the content of the notes to argue why they are not privileged or otherwise protected. This is in direct violation of the express terms of the ESI Protocol, which states in relevant part:

> The Receiving Party hereby agrees to promptly return, sequester, or destroy any Privileged Information disclosed or produced by Disclosing or Producing Party upon request by Disclosing or Producing Party ***regardless of whether the***

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> ***Receiving Party disputes the designation of Privileged Information***. . . . In the event that the parties do not resolve their dispute, the Objecting Party may bring a motion for determination of whether a privilege applies within ten (10) court days of the meet and confer session, but may only contest the asserted privileges on ground [sic] other than the inadvertent production of such document(s). ***In making such a motion, the Objecting Party shall not disclose the content of the document(s) at issue***, but may refer to the information contained on the privilege log.

See Mot., Ex. 3 ¶ 21 (emphasis added). Not only did Petitioner's counsel argue the substance of the notes to contest any privilege or protection that applied thereto, they again quoted directly from Lubbers' type-written notes in the publicly-filed Motion. *See* Mot. at 7:1-9.

25. On August 1, 2018, Petitioner filed his Opposition to Motion to Dismiss Petitioner's Supplemental Petition (on file). For the *third* time, and despite Petitioner's repeated demands to remove any public references to Lubbers' protected notes—which, at a bare minimum, were designated "Confidential" under the parties' Confidentiality Agreement—Petitioner again publicly quoted from the disputed notes in an effort to save his supplemental fraud and breach of fiduciary duty claims from dismissal. *See id.* at 27:19-20.

(ii) *Lubbers' December 2013 Notes (Bates Nos. RESP0078899-RESP0078900)*

26. In marked contrast to the way they handled the set of Lubbers' notes addressed above, Petitioner's counsel notified Respondents' counsel on or about June 14, 2018 that they were in possession of a set of different, potentially privileged/protected documents that may have been inadvertently produced by Respondents' counsel (*i.e.*, RESP0078884-RESP0078932). *See* Mot., Ex. 8. The parties thereafter exchanged a series of letters and conducted a series of meet and confers, which ultimately narrowed the parties' dispute in this batch of documents to just two pages of notes prepared by Lubbers at a meeting with the parties, their respective counsel and Mr. Nicolatus on December 19, 2013 (*i.e.*, Bates Nos. RESP078899-RESP078900). *See* Mot., Ex. 2. That is how the ESI Protocol is supposed to operate.

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III. ARGUMENT

A. Governing Principles.

1. Attorney-Client Privilege

The attorney-client privilege, embodied in NRS 49.095, protects communications between the client and the attorney. *See Wardleigh v. Second Jud. Dist. Ct.*, 111 Nev. 345, 352, 891 P.2d 1180-1184-85 (1995). Specifically, "a client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications: (1) between the client or the client's representative and the client's lawyer or the representative of the client's lawyer; (2) between the client's lawyer and the lawyer's representative; (3) made for the purpose of facilitating the rendition of professional legal services to the client, by the client or the client's lawyer to a lawyer representing another in a matter of common interest." NRS 49.095. The person asserting the privilege has the burden of establishing that it exists. *See Ralls v. United States*, 52 F.3d 223, 225 (9th Cir. 1995).

2. Attorney Work Product Protection

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

litigation." *Id.* To determine whether the "because of" test is met, the Court is to consider "the totality of the circumstances." *Id.* The person asserting work product protection has the burden of establishing its applicability. *See Diamond State Ins. Co. v. Rebel Oil Co.*, 157 F.R.D. 691, 699 (D. Nev. 1994).

B. Lubbers' October 2013 Notes (Bates Nos. RESP0013284-RESP0013288) Are Clearly Protected by the Attorney-Client Privilege and the Work Product Doctrine.

There cannot be any genuine argument that the notes Lubbers prepared in October 2013 shortly after the Initial Petition was filed, particularly the type-written notes found at Bates Nos. RESP0013285, reflect attorney-client privileged and work product protected material.

Starting with the attorney-client privilege, the type-written notes begin with three questions seeking legal advice regarding various aspects of responding to the Initial Petition. *See* Mot., Ex. 1. The notes bear a hand-written date of October 14, 2013, which is the same date Lubbers participated in a half-hour telephone conference with attorneys Lee and Renwick at LHLGB wherein Lubbers' response to the Initial Petition was discussed. *See* Ex. 4 (LHLGB Billing Records). Attorneys Lee and Renwick have likewise provided a general description of the subject matters discussed during the October 14, 2013 conference call that is entirely consistent with the topics set forth in Lubbers' notes. *See* Point II(B), *supra*. These facts clearly fall within the statutory elements of the attorney-client privilege embodied in NRS 49.095 as they reflect confidential communications between a client and the client's attorney for purposes of rendering legal services.

The work product doctrine also protects the notes from disclosure. After the initial questions described above, the notes go on to reflect Lubbers "beliefs" regarding various subjects, including defense strategies, as well as Lubbers' assessment of certain legal requirements. The notes, stated differently, reflect Lubbers' opinions and mental processes related to the Initial

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Petition. "At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *Wynn Resorts,* 399 P.3d at 347 (quoting *United States v. Nobles*, 422 U.S. 225, 238 (1975)). As one federal court has noted, "[t]he primary purpose of the rule is to prevent exploitation of another party's efforts in preparing for the litigation." *Diamond State*, 157 F.R.D. at 699.[18]

By unilaterally attaching Lubbers' October 2013 notes to his Supplemental Petition to provide substantive support for his (baseless) allegations of fraud and breach of fiduciary duty, Petitioner is engaging in the precise type of exploitation of another party's efforts in preparing for litigation that the work product doctrine is designed to prevent. Scott apparently believes he is free to engage in such exploitation because: (i) the notes purportedly contain "facts" that cannot be shielded by the attorney-client privilege; (ii) Lubbers waived any privilege or protection because the notes reflect that Larry and Bob Evans were present during Lubbers' call with attorneys Lee and Renwick, and the notes were subsequently provided to the offices of AWG; (iii) Lubbers did not prepare his notes at the direction of an attorney; and (iv) Lubbers could not have reasonably anticipated litigation until December 2015 when he was presented with a draft of Scott's Petition to Surcharge. We address each of these baseless contentions in reverse order.

1. The Initial Petition Was Adversarial Litigation that Respondents Reasonably Anticipated Months Prior to Its Filing.

In an effort to remove Lubbers' October 2013 notes and December 2013 notes from being work-product protected, Petitioner engages in pure fantasy when characterizing the Initial Petition

[18] It is Respondents' position that Lubbers' October 2013 notes produced as RESP0013284-RESP0013288 are both attorney-client privileged (as they reflect communications between a client and his counsel) and work product protected (as they were created primarily because of the prospect of litigation). Respondents contend that Lubbers' December 2013 notes (Bates Nos. RESP0078899-RESP0078900) are only work product protected (as they were prepared primarily because of the prospect of litigation).

as a "neutral" pleading because there was purportedly "no actual dispute between the Parties" and "absolutely no allegations of wrongful conduct or claims were asserted against either Lubbers or the Canarellis." *See* Mot. at 7:12-17; 17:15-18. After erecting this false premise, Petitioner then argues that Lubbers could not have reasonably anticipated litigation when he prepared his notes in October and December 2013 because no claims were anticipated against Lubbers until late 2015 when Petitioner provided Respondents' counsel with a copy of his draft Petition to Surcharge. *Id.* at 10:21-22. Setting aside the salient question of how Scott is qualified to make the omniscient determination of when Respondents anticipated litigation, the plain language of the Initial Petition and the totality of the circumstances demonstrate that Lubbers unquestionably prepared his notes because of actual litigation.

A petition filed in Probate Court to initiate a trust proceeding is tantamount to a complaint filed in district court. *Compare* NRS 132.270 and NRS 164.010 with NRCP 3; *see also*, A. Freer and J. Luszeck, *Probate "Pro-Tip" Primer* (Nev. Lawyer Jan. 2018) ("Instead of filing a complaint, an estate or trust proceeding is initiated by filing a petition."). Except as otherwise provided, the Nevada Rules of Civil Procedure apply to trust proceedings, *see* NRS 155.180, including the right to conduct discovery. *See* NRS 155.170(1) (interested person in trust proceeding "[m]ay obtain discovery, perpetuate testimony ***or conduct examinations in any manner authorized by law or the Nevada Rules of Civil Procedure***[.]") (emphasis added); *see also* NRS 47.020 (Nevada Rules of Evidence embodied in NRS Title 4 "govern[] proceedings in courts of this State[.]").

"Litigation," for purposes of determining whether work product protection applies, "includes a proceeding in a court or administrative tribunal in which the parties have the right to cross-examine witnesses or to subject an opposing party's presentation of proof to equivalent disputation." *Fru-Con Const. Corp. v. Sacramento Mun. Util. Dist.*, 2006 WL 2050999, at *4 (E.D.

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Cal. July 20, 2006) (quoting *U.S. v. American Tel. & Tel. Co.,* 86 F.R.D. 603, 627 (D.D.C. 1979)). "The determining factor in the analysis is whether the parties have a right to cross-examine witnesses and therefore introduce evidence. If so, the proceedings are adversarial in nature." *Id.* Respondents, as "interested persons" in this trust proceeding since the time Scott filed his Initial Petition, have had the right to cross-examine witnesses under the Nevada Rules of Civil Procedure and the Nevada Rules of Evidence. The Initial Petition, thus, certainly qualifies as litigation that Respondents reasonably anticipated for work product purposes.

Even if the test for determining whether a proceeding is "adversarial" for work product purposes turns on whether "claims" have been asserted (and Petitioner has cited no authority for this proposition) there can be no legitimate debate that the Initial Petition asserted allegations of wrongful conduct against both Lubbers and the Canarellis. The Initial Petition alleges, for example, that the Canarellis wrongfully stopped making distributions from the SCIT because they were "hostile" to Scott, that Respondents had failed to comply with their disclosure obligations to Scott during the lifetime of the SCIT and, thus, violated their fiduciary duties, that Larry had a conflict of interest in connection with the Purchase Agreement, and that the Purchase Agreement may have been entered to "punish" Scott and harm his financial interests. *See* Point II(A), *supra*.

The Initial Petition, moreover, came after a letter from Petitioner's counsel claiming that Respondents were acting in "bad faith" and threatening to file a petition against them. *See* Ex. 2. The threatened lawsuit was significant enough in the eyes of Respondents to be placed on their weekly agenda for discussion in November 2012. *See* Ex. 4. After filing the Initial Petition, Scott likewise made clear through counsel that he was reserving his right to "unwind the sale" and seek redress for Respondents' conduct in connection therewith. *See* Exs. 6-7. Scott's counsel also threatened back in 2014 that the parties' ongoing dispute over the accountings may result in

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"***further*** litigation." *See* Ex. 8 (emphasis added).[19] It is axiomatic that there can only be "further" litigation if litigation is already underway, which was precisely the situation as a result of Scott filing his Initial Petition.

In short, the totality of the circumstances plainly establishes that Lubbers prepared his notes because of the Initial Petition. This litigation was not merely anticipated, but had already been commenced two weeks prior to Lubbers' creation of his notes dated October 14, 2013 and two and a half months prior to the creation of his December 2013 notes. The notes would not—indeed, *could not* have—have been prepared in substantially similar form absent the threshold filing of the Initial Petition as they expressly address issues raised by the Initial Petition itself or matters that were subsequently ordered as a result of the Initial Petition being filed. Lubbers, moreover, promptly retained litigation counsel to represent him in responding to the Initial Petition at or about the same time he created his October 2013 notes.

2. Notes Made by a Party "Because of" Ongoing Litigation Constitute Work Product Even if They Were Not Made at the Direction of an Attorney.

Petitioner twice cites *Ballard v. Eighth Jud. Dist. Ct.*, 106 Nev. 83, 85, 787 P.2d 406, 407 (1990) to support the proposition that Lubbers' notes are not protected work product because "they

[19] The "because of" test "contains both an objective and subjective component, requiring the party seeking to avoid disclosure to 1) establish a subjective belief that litigation was a real possibility and 2) demonstrate that such belief was objectively reasonable." *South Fifth Towers, LLC v. Aspen Ins. UK, Ltd.*, 2016 WL 6594082, at *4-5 (W.D. Ky. Nov. 4, 2016). Courts routinely find letters like those sent by Petitioner's counsel are sufficient to trigger a party's a reasonable anticipation of litigation. *See, e.g., id.* (letter warning that opposing party would be in breach of its insurance policy was sufficient to create a reasonable anticipation of litigation); *Greater Birmingham Ministries v. Merrill*, 2017 WL 2903197, at *5-6 (N.D. Ala. July 7, 2017) (letter threatening Governor with "immediate legal action" and public cries that budget cuts be "fought in court" created reasonable anticipation of litigation); *Handsome, Inc. v. Town of Monroe*, 2014 WL 348196, at *4 (D. Conn. Jan. 31, 2014) (parties' history of litigation, letter to zoning commission from plaintiff's counsel stating it could not impose any new conditions on permit, and commission's subsequent retention of counsel all demonstrated that subsequently prepared notes were prepared in anticipation of litigation).

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were not created at the request of an attorney." *See* Mot. at 17:8-9 and n.33; 20:21-21:2 and n.39. With due respect to *Ballard*, this nearly 30-year old, 2-page opinion is limited to the factual setting of an insurance company investigation. The Nevada Supreme Court has recognized as much. *See Mega Mfg., Inc. v. Eighth Jud. Dist. Ct.*, 2014 WL 2527226, at *2 (Nev. May 30, 2014) (unpublished) ("This holding, however, is constrained to the specific facts of *Ballard*."). The *Mega Mfg.* court correctly observed that "NRCP 26(b)(3) also protects materials ***not created at the request of attorneys***." *Id.* (emphasis added). Though *Mega Mfg.* is an unpublished opinion, the principles it endorses are well recognized by abundant other authorities.

To begin, the plain language of Rule 26(b)(3) provides for work product protection for materials created "by . . . another party." The advisory committee notes to the amendment adopting this language explain that the rule applies "not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial ***by or for a party*** or any representative acting on his behalf." FRCP 26 advisory committee notes to 1970 amendment (emphasis added); *see also* NRCP 26 comments (noting that the Nevada rule was "[r]evised in 1971 in accordance with the federal amendments, effective July 1, 1970").

The legal authorities interpreting Rule 26 are in accord. "Materials produced by or for a party in anticipation of litigation may constitute work product despite the fact that the materials were not created at the direction of an attorney." *Moore v. Plains All Am. GP, LLC*, 2015 WL 5545306, at *4-5 (E.D. Pa. Sept. 18, 2015); *id.* ("[T]he plain language of the Federal Rules of Civil Procedure anticipate that materials created 'by or for another party or its representative' may be protected by the work product doctrine, so long as they were created in anticipation of litigation."); *see also Wultz v. Bank of China Ltd.*, 304 F.R.D. 384, 393-94 (S.D.N.Y. 2015) ("Finally, all cases of which the Court is aware that have specifically addressed this question afford protection to materials gathered by non-attorneys even where there was no involvement by an attorney."). A

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requirement that "the document for which protection is sought must be either made or required by an attorney to be protected . . . would be contrary to the text of Rule 26(b)(3) and the stated intent of its drafters." *Goff v. Harrah's Operating Co.*, 240 F.R.D. 659, 661 (D. Nev. 2007).[20]

In *Wultz v. Bank of China, Ltd.*, the New York federal district court discussed the "because of" test adopted in *Wynn Resorts, supra,* and cited *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998), on which the Nevada Supreme Court also relied. The district court explained that "[n]otwithstanding the common description of the doctrine as the 'attorney' work product doctrine, as a doctrine 'intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy,' . . . and as applying to 'materials prepared by or at the behest of counsel,' . . . it is not in fact necessary that the material be prepared by or at the direction of an attorney." 304 F.R.D. at 393-94. Indeed, "it is well-established that the [work product] doctrine protects writings made by a party even without any involvement by counsel." *Szulik v. State St. Bank & Tr. Co.*, 2014 WL 3942934, at *3 (D. Mass. Aug. 11, 2014). Lubbers' notes fall squarely within the principles enunciated above.

3. Respondents Did Not Waive any Privilege/Protection that Applies to Lubbers' Notes.

Petitioner next claims that any privilege or protection that attached to the Lubbers notes was waived because Lubbers' handwritten notes dated October 14, 2013 (RESP0013284) reflect that his meeting with counsel occurred in the presence of Larry and Bob Evans who are purported third parties that destroy the privilege. *See* Mot. at 14:17-15:15. Petitioner also contends that any

[20] Petitioner's citation to *Goff* is puzzling given that it unequivocally refutes the very proposition Petitioner asks this Court to adopt—*i.e.*, that a document, "by definition," cannot be work product protected unless it was "prepared at the request of an attorney." *See* Mot. at 20:21-21:27-28 and n.39. Of course, just the opposite is true. As Judge Reed aptly observed at the beginning of his analysis: "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.'" *Goff*, 240 F.R.D. at 660 (quotation omitted).

privilege or protection was waived on the additional ground that the notes were subsequently provided to AWG, a non-party not "encompassed in the Lubbers-Renwick attorney-client relationship." *Id.* at 15:17-16:14. Neither contention is persuasive.

As a threshold matter, the Lubbers notes do not state that Larry and Bob Evans were present on the phone call with attorneys Lee and Renwick. The isolated references to "Larry" and "Bob" are corroborative of nothing. Notably, the billing records of Mr. Lee and Ms. Renwick contain no reference to Larry or Bob being present during the October 14, 2013 phone call. Even if these individuals were present during the call, the information reflected in Lubbers' notes is still privileged and/or protected because Lubbers and Larry undisputedly share a common interest in defending against the allegations contained in Scott's various petitions. And Bob Evans has undisputedly been an agent of the former Family Trustees of the SCIT (*i.e.*, Lubbers and Larry) when it comes to accounting matters.

Nevada's attorney-client privilege statute codifies the common interest rule. *See* NRS 49.095(3) (protecting confidential communications "[m]ade for the purpose of facilitating the rendition of professional legal services to the client, by him or his lawyer to a lawyer representing another in a matter of common interest."); *cf. Collins v. State*, 113 Nev. 1177, 1183–84, 946 P.2d 1055, 1060 (1997) (NRS 49.095 protects "communications made in the course of an on-going and joint effort to set up a common defense strategy.") (citation omitted).[21] The Nevada Supreme

[21] As explained further, "[p]articipants in a joint or common defense or individuals with a community of interest may communicate among themselves and with the separate attorneys on matters of common legal interest, for the purpose of preparing a joint strategy, and the attorney-client privilege will protect those communications to the same extent as it would communications between each client and his own attorney." *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 578 (N.D. Cal. 2007). The common interest theory applies even if the parties have "some adverse interests." *See Eisenberg v. Gagnon*, 766 F.2d 770, 787-88 (3d Cir. 1985). Moreover, "[i]n order for the joint defense theory to apply, there need not be actual litigation." *Nidec*, 249 F.R.D. at 578.

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Court has additionally recognized the applicability of the common interest rule in the context of claims for work product protection. *See Cotter v. Eighth Jud. Dist. Ct.*, 134 Nev. Adv. Op. 32, 416 P.3d 228, 230 (2018) (adopting "the common interest rule that allows attorneys to share work product with third parties that have common interest in litigation without waiving the work product privilege."). "The rule is ***not*** narrowly limited to co-parties," and "a written agreement is ***not*** required." *Id.* (emphasis added).

Here, Scott's Initial Petition leveled allegations of wrongdoing against all of the Respondents in this action—Larry and Heidi, who were former Family Trustees of the SCIT, and Lubbers who was the current Family Trustee at the time. *See* Point II(A), *supra*. Defending charges asserted by a common party in litigation is the classic example of a common legal interest. *See FSP Stallion 1, LLC v. Luce*, 2010 WL 3895914, at *16 (D. Nev. 2010) ("The joint defense privilege has been extended to civil co-defendants because '[t]he need to protect the free flow of information to attorney logically exists whenever multiple clients share a common interest about a legal matter.'"). Indeed, the clarified stipulation and order that emanated out of the hearings triggered by the Initial Petition required Lubbers to work with Larry and Heidi to provide the Court-ordered information to Scott and his counsel. *See* Ex. 6.

Nor did Bob Evans' alleged participation in the conference call with Lubbers and his attorneys destroy any privileged communications. It is undisputed that Mr. Evans acted as an agent for Larry and Lubbers in their capacities as Family Trustees related to accounting matters for the SCIT, and personally assisted in production of the documents to Scott ordered by the Court in response to the Initial Petition.[22] Indeed, Petitioner has claimed that Respondents were obligated to search and produce responsive ESI from Evans' own files even though he is not a party in this

[22] *See* Objection to Pet. to Surcharge Trustee and for Additional Relief dated 8/9/17 (on file) at Ex. A (Declaration of Robert Evans).

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action given his role as an agent for the Trustees—and Respondents agreed to do so. *See* Ex. 3 ("we will search Bob Evans' and Teresa O'Malley's ESI on the theory that they acted as agents of the former trustees in connection with the SCIT.").

Assuming *arguendo* that Mr. Evans participated on the phone call with Lubbers and attorneys Lee and Renwick, it would have been perfectly appropriate for him to do so an agent of the now former Trustees given that one of the central issues raised in the Initial Petition was the Trustees' alleged failure to provide Scott with accountings. *See* NRS 49.095 (protecting confidential communications between a "client's representative" and the client's lawyer to facilitate the rendition of legal services); NRS 49.075 (client's representative is one "having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client"). Evans similarly had a common legal interest with Lubbers in defending the Trustees' actions related to the SCIT. *See RKF Holdings, LLC v. Tropicana Las Vegas, Inc.,* 2017 WL 2292818, at *3 (D. Nev. May 5, 2017) ("common interest doctrine is not limited to joint litigation efforts[,] [i]t is applicable whenever parties with common interests join forces for the purpose of obtaining more effective legal assistance.").

The same reasoning applies regarding the subsequent production of certain Lubbers' files to AWG for safekeeping after Lubbers' death. Again, Petitioner has cited no evidence that Lubbers' privileged and work-product protected notes were actually provided to AWG. He instead cites an e-mail referencing an entirely different, non-privileged directive from Lubbers addressing the deferral of principal payments under the Purchase Agreement. *See* Mot. at 15:16-16:14. Regardless, Larry and Mr. Evans are AWG executives, the Purchased Entities formerly owned by the SCIT comprised part of AWG's homebuilding operations, and Petitioner has subpoenaed several entities within the AWG for records and is presently pursuing a motion to compel documents from one of those entities, American West Development, Inc., regarding its finances

just as he has filed similar motions to compel against all of the Respondents herein. AWG, hence, shares a common legal interest with Respondents such that the alleged disclosure of privileged documents to the corporation would not waive the privilege. *See Wynn Resorts*, 399 P.3d at 341 ("communications may be disclosed to other persons within a corporation or legal team in order to facilitate the rendition of legal advice without losing confidentiality."). Nor would such disclosure waive any work product protection as it is well settled that the disclosure of work product to some, but not others is permitted, *see Cotter*, 416 P.3d at 232, so long as the material is not purposefully disclosed to an adversary. *See id.* (quoting *Wynn Resorts*, 399 P.3d at 349). There has been no waiver here.

4. Facts Contained Within a Privileged Communication Are Not Subject to Production.

(i) *Lubbers' notes reflect mental impressions, not "facts"*

Petitioner contends that the attorney-client privilege does not apply to Lubbers' type-written notes (RESP0013285) because they contain "facts," and there is no evidence that Lubbers provided the notes to his attorney or shared the contents of the notes with his counsel. *See* Mot. 13:3-14:16. While Petitioner correctly recognizes that "[m]ere facts are not privileged, but communications about facts in order to obtain legal advice are," *id.* at 13:6-7 (citing *Wynn Resorts*, 399 P.3d at 341), his application of this principle quickly goes awry.

Again, it is improper for Petitioner to be arguing the actual content of the notes themselves to try and defeat the privilege. *See* Mot., Ex. 3 (ESI protocol) § 21. Nevertheless, even Petitioner recognizes 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. But even if a portion of the notes are deemed to contain "facts," which is not the case, they are still contained in a

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communication with counsel that should remain privileged. *See Wardleigh*, 111 Nev. at 352, 891 P.2d at 1184 ("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.").

Lubbers' attorneys have confirmed that they conducted a lengthy telephone conference with Lubbers on October 14, 2013 regarding his response to the petitions filed by Scott just two weeks earlier. The attorneys' recollection of the general subject matter discussed during the telephone conference is wholly consistent with the contents of Lubbers' type-written notes. Given that the subject communications with counsel took place by phone, it is entirely logical that Lubbers would have used the type-written notes as an aid to guide the topics he wished to discuss with counsel whereas the handwritten notes from the same date (RESP0013284) reflect additional information Lubbers recorded during the call.

(ii) ***"Substantial need" is insufficient to obtain "opinion" work product***

Finally, Petitioner contends that even if Lubbers' notes are work product protected, he has demonstrated a "substantial need" for them in light of Lubbers' death. *See* Mot. 18:11-21:10. Petitioner's analysis, however, fails to address the distinction between "ordinary" work product and "opinion" work product, each of which is subject to different standards for discovery:

> 'Ordinary' work product includes raw factual information while 'opinion' work product includes mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representatives concerning the litigation. Ordinary work

> product may be discovered if the party seeking the discovery demonstrates a substantial need for the materials and there is no other means for obtaining that information without undue hardship. ***In contrast, opinion work product enjoys stronger protection, and it may be discovered only when mental impressions are at issue in a case and the need for the material is compelling. A party seeking opinion work product must make a showing beyond the substantial need/undue hardship test required under Rule 26(b)(3) for non-opinion work product***.

Hooke v. Foss Maritime Co., 2014 WL 1457582, at *2 (N.D. Cal. Apr. 10, 2014) (emphasis added) (citations and quotations omitted); *accord* NRCP 26(b)(3); *Upjohn Co.*, 449 U.S. at 402, 101 S. Ct. at 688 (attorney's mental processes "cannot be disclosed simply on a showing of substantial need and an inability to obtain the equivalent without undue hardship.").

"Opinion 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.

Scott has acknowledged that Lubbers' type-written notes reflect his "beliefs," which are not facts. Indeed, a cursory reading of the notes makes plain they contain Lubbers' mental impressions about case strategy and the strengths and weaknesses of the instant litigation. This is the epitome of "opinion" work product. Even if the notes can be said to contain some "facts," which Respondents dispute, they are inextricably intertwined with Lubbers' opinions and mental

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processes such that they should not 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."). Petitioner has failed to overcome the near absolute immunity applicable to "opinion" work product.[23]

COUNTERMOTION FOR REMEDIATION OF IMPROPERLY DISCLOSED ATTORNEY-CLIENT PRIVILEGED AND WORK PRODUCT PROTECTED MATERIALS

I. INTRODUCTION

This Court has the inherent authority to regulate the conduct of attorneys acting before it. Here, Petitioner's counsel (i) failed to comply with the requirements of NRPC 4.4(b) after discovering they may be in possession of Respondents' inadvertently produced attorney-client privileged and/or work product protected material, (ii) violated the parties' ESI Protocol when seeking to challenge Respondents' assertions of privilege/protection, and (iii) violated the parties' Confidentiality Agreement by quoting portions of the subject documents in *three* different public filings despite the documents' designation as "Confidential" and Respondents' repeated demands to remove the content of the documents from the public record.

Her Honor has a duty to protect against unauthorized disclosures of attorney-client communications in the context of motion practice. Failure to do so threatens the public's confidence in the legal system and the integrity of the judicial process. This is true even if the disclosure was inadvertent, let alone purposeful as is the case here. The Court should remedy these

[23] Nor can Petitioner satisfy the "substantial need" standard required to obtain any facts contained in Lubbers' December 2013 notes (RESP0078899-RESP0078900). That is because Petitioner has other ways to obtain evidence of what occurred at the December 19, 2013 meeting. After all, Petitioner and his counsel were in attendance. *See In re Western States Wholesale Natural Gas Antitrust Litig.*, 2016 WL 2593916, at *8 (D. Nev. May 5, 2016) (denying access to work product materials where party could obtain the substantial equivalent without undue hardship).

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violations by ordering counsel to destroy the notes at issue herein, certify that they have done so, and notify any other person that may have received them to do the same. The Court should additionally strike and order removed from the public record all references to the subject notes found at 18:24-19:8 of the Supplemental Petition, 7:4-9 of the Motion for Determination of Privilege, and 27:19-20 of the Opposition to Motion to Dismiss Petitioner's Supplemental Petition. Finally, the Court should order that Exhibit 4 to the Supplemental Petition be removed from that filing altogether so that Lubbers' attorney-client privileged and work product protected notes do not taint the District Court Judge's consideration of the Supplemental Petition, the pending Motion to Dismiss that pleading, or any other aspect of this case.

II. ARGUMENT[24]

A. Petitioner's Counsel Failed to Comply with NRPC 4.4(b).

Nevada Rule of Professional Conduct 4.4(b) provides that "[a] lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender." *See also, Merits Incentives, LLC v. Eighth Jud. Dist. Ct.*, 127 Nev. 689, 697 262 P.3d 720, 725 (2011) (extending prompt notification requirement where attorney receives potentially privileged or protected documents from an anonymous source or a third party unrelated to the litigation).

Upon receipt of Lubbers' notes Bates Stamped RESP0013284-RESP013288, Petitioner's counsel did not notify Respondents' counsel about the potential inadvertent production. Petitioner's counsel instead decided, unilaterally, to make affirmative use of the documents by attaching them as an exhibit to Petitioner's Supplemental Petition alleging new (or expanded)

[24] Respondents incorporate the factual background set forth above.

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claims for fraud and breach of fiduciary. *See* Point II(C)*, supra*. Petitioner's counsel also quoted from the notes in the body of the publicly-filed Supplemental Petition despite the fact that they were, at a minimum, designated "Confidential." *See id*.

It was not for Petitioner's attorneys to arrogate to themselves the decision as to whether the Lubbers notes were protected by the attorney-client privilege and/or work product doctrine. That is the province of the Court. The parties agreed to a protocol for presenting such matters to the Court, which Petitioner likewise violated. We address that issue next.[25]

B. Petitioner's Counsel Violated the Parties' ESI Protocol.

The parties entered an ESI Protocol agreement to govern the very issue presently before the Court, *i.e.*, one party inadvertently produces an asserted attorney-client privileged and/or work product protected document, and the opposing party wishes to contest the assertion of privilege/protection. Such protocols are both routine and necessary in today's age of electronic discovery where inadvertent productions of protected documents are inevitable.[26]

The ESI Protocol in this case states in relevant part as follows:

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[25] As set forth above, *see* Point II(C)(ii), *supra*, Petitioner's counsel did comply with NRPC 4.4(b) and the parties' ESI Protocol when it came to the second set of disputed Lubbers' notes (*i.e.*, RESP0078884-RESP078932). Through a series of letters and meet and confers, the parties were able to narrow their dispute to two documents, *see id.*, which is an example of how the process is supposed to work.

[26] *See, e.g., Ardon v. City of Los Angeles*, 366 P.3d 996, 1003 (Cal. 2016) (recognizing "[e]ven apart from the inadvertent disclosure problem, the party responding to a request for mass production must engage in a laborious, time consuming process. If the document producer is confronted with the additional prospect that any privileged documents inadvertently produced will become fair game for the opposition, the minute screening and re-screening that inevitably would follow not only would add enormously to that burden but would slow the pace of discovery to a degree sharply at odds with the general goal of expediting litigation."); *BNP Paribas Mort. Corp. v. Bank of America, N.A.*, 2013 WL 2322678, at *8 (S.D.N.Y. May 21, 2013) (same).

> **21. <u>Effect of Disclosure of Privileged Information</u>**. The Receiving Party hereby ***agrees to promptly return, sequester, or destroy*** any Privileged Information disclosed or produced by Disclosing or Producing Party upon request by Disclosing or Producing Party ***regardless of whether the Receiving Party disputes the designation of Privileged Information***. The Receiving Party may sequester (rather than return or destroy) such Privileged Information only if it contends that the information itself is not privileged or otherwise protected, and it challenges the privilege designation, in which case it may only sequester the information until the claim of privilege or other protection is resolved. . . . In the event that the parties do not resolve their dispute, the Objecting Party may bring a motion for determination of whether a privilege applies within ten (10) court days of the meet and confer session, but may only contest the asserted privileges on ground [sic] other than the inadvertent production of such document(s). ***In making such a motion, the Objecting Party shall not disclose the content of the document(s) at issue***, but may refer to the information contained on the privilege log. ***Nothing herein shall relieve counsel from abiding by applicable ethical rules regarding inadvertent disclosure and discovery of inadvertently disclosed privileged or otherwise protected information***.

See Mot., Ex. 3 ¶ 21 (emphasis added).

Petitioner's counsel violated the ESI Protocol in at least three ways. First, a Receiving Party (here, Petitioner) is required to promptly return, sequester or destroy asserted privileged or protected information when requested to do so by a Disclosing Party (here, Respondents). The Receiving Party is obligated to do so even if it disagrees with the assertion of privilege/protection. Yet, when Respondents sent written notice clawing back Lubbers' notes attached to the Supplemental Petition and demanding that the public references to the notes be redacted, Petitioner's counsel instead argued that the notes were not privileged and refused to redact their public filings. *See* Point II(C)(ii)*, supra*. It was only after the exchange of further letters and the passage of another week that Petitioner's counsel ostensibly agreed to sequester the notes pending the meet and confer process. *Id.*

The second violation occurred when Petitioner filed the instant Motion. Notwithstanding the express terms of the ESI Protocol stating that the "Objecting Party shall not disclose the content of the documents(s) at issue," Petitioner's counsel did exactly that by—again—publicly quoting

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portions of the notes in the body of the Motion. Additionally, rather than "sequester" the notes, Petitioner's counsel again made affirmative use of their substance, this time to argue why they are not privileged or protected in the first instance.[27] The ESI Protocol makes clear that a party should not have to debate publicly the content of privileged or protected communications in order to defend its claim of privilege or protection. The Nevada Supreme Court has recognized the same principle in a different context. *See Robbins v. Gillock,* 109 Nev. 1015, 1018, 862 P.2d 1195, 1197 (1993) ("the moving party is not required to divulge the confidences actually communicated, nor should a court inquire into whether an attorney actually acquired confidential information in the prior representation."); *Brown v. Eighth Jud. Dist. Ct.*, 116 Nev. 1200, 1205, 14 P.3d 1266, 1270 (2000) (party has a "right to be free from the risk of even inadvertent disclosure of confidential information" on a motion to disqualify).

Third, the ESI Protocol provides that the parties' entry into this agreement does not dispense with their obligations to comply with the Nevada Rules of Professional Conduct. One of those rules, of course, is NRPC 4.4(b) requiring prompt notification when an attorney knows ***or should know*** he or she is in possession of inadvertently produced information. It is undisputed that Petitioner's counsel failed to provide such notice, and instead opted to make affirmative use of Lubbers' notes to support Petitioner's substantive claims in this action without awaiting a ruling from the Court.

C. Petitioner's Counsel Violated the Parties' Confidentiality Agreement.

Setting aside the parties' debate over the privileged/protected nature of Lubbers' notes, there can be no debate that the parties entered into a Confidentiality Agreement to govern the production

[27] "Sequester" means "[t]o separate or isolate from other people or things; to remove or seclude." Black's Law Dictionary (10th ed. 2014). It's hard to imagine conduct more inconsistent with this definition than publicly quoting a "sequestered" document and then publicly arguing why it's not privileged or protected.

of sensitive documents during discovery.[28] The Lubbers notes produced as RESP0013284-RESP0013288 were all designated "Confidential" pursuant to the terms of the Confidentiality Agreement. *See* Mot, Ex. 1. Notwithstanding this fact, Petitioner's counsel has quoted from RESP0013285 in three different public filings. *See* Point II(C)(i)*, supra*. Two of those documents were filed after Respondents' notified Petitioner of this issue and demanded that all public references to the notes be removed. Petitioner has flatly refused to comply with the terms of the parties' agreements, thereby necessitating judicial intervention.

CONCLUSION

Based on the foregoing, Respondents respectfully request that:

(1) Petitioner's Motion for Determination be denied based on a finding that Lubbers' notes are attorney-client privileged and/or work product protected;

(2) Respondents' Countermotion for Remediation be granted, and the Court (i) order Petitioner's counsel to destroy the notes at issue herein, certify that they have done so, and notify any other person that may have received them to do the same; (ii) strike and order removed from the public record all references to the subject notes found at 18:24-19:8 of the Supplemental Petition, 7:4-9 of the Motion for Determination of Privilege, and 27:19-20 of the Opposition to Motion to Dismiss Petitioner's Supplemental Petition; and (iii) order Exhibit 4 to the Supplemental Petition be removed from that filing altogether so that Lubbers' attorney-client privileged and work product protected notes do not taint the District Court Judge's consideration of the Supplemental Petition, the pending Motion to Dismiss that pleading, or any other aspect of this case; and

[28] A true and correct copy of the parties' Confidentiality Agreement is attached hereto as Exhibit 11.

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(3) For such other and further relief the Court deems just and appropriate.

DATED this 10th day of August, 2018.

CAMPBELL & WILLIAMS

By: **/s/ *J. Colby Williams***
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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of August, 2018, I caused a true and correct copy of the foregoing **Opposition to Petitioner Scott Canarelli's 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** to be served through the Eighth Judicial District Court's electronic filing system, to the following parties:

Dana Dwiggins, Esq.
Alexander LeVeque, Esq.
Tess Johnson, Esq.
SOLOMON DWIGGINS & FREER, LTD
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129

Counsel for Scott Canarelli

/s/ John Y. Chong
An Employee of Campbell & Williams

DECLARATION OF J. COLBY WILLIAMS

DECLARATION OF J. COLBY WILLIAMS, ESQ.

I, J. COLBY WILLIAMS, ESQ., declare as follows:

1. I am a resident of Clark County, Nevada, over the age of eighteen (18), and competent to make this Declaration.

2. I am a licensed attorney in the State of Nevada, Bar Number 5549, and a partner in the law firm Campbell & Williams. I am one of the attorneys representing Lawrence Canarelli ("Larry") and Heidi Canarelli ("Heidi") (collectively the "Canarellis") and Frank Martin, Special Administrator of the Estate of Edward C. Lubbers ("Lubbers"), who have been sued in their capacity as former Family Trustees of The Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998 (the "SCIT"). I submit this declaration in support of Respondents' Opposition to Petitioner Scott Canarelli's Motion for Determination of Privilege Designation of RESP013284-13288 and RESP78899-78900 and Countermotion for Remediation of Improperly Disclosed Attorney-Client and Work Product Protected Materials.

3. Based upon my review of the files, records, and communications in this case, I have personal knowledge of the facts set forth in this Declaration unless otherwise so stated. If called upon to testify, I would testify as set forth herein.

A. The Adversarial Nature of the Initial Petition and Related Communications Between the Parties.

4. On or about September 30, 2013, Petitioner Scott Canarelli ("Petitioner" or "Scott") filed his Petition to Assume Jurisdiction over the Scott Lyle Graves Canarelli Irrevocable Trust; to Confirm Edward C. Lubbers as Family and Independent Trustee; for an Inventory and Accounting; to Compel an Independent Valuation of the Trust Assets Subject to the Purchase Agreement, dated May 31, 2013; and to Authorize and Direct the Trustee to Provide

Settlor/Beneficiary with any and all Information and Documents Concerning the Sale of the Trust's Assets Under Such Purchase Agreement (the "Initial Petition").[1]

5. As indicated in the Initial Petition, *see* ¶¶ A.13-A.14, Petitioner had retained the law firm Solomon Dwiggins & Freer in or about May 2012 to assist him in resuming distributions from the SCIT, which Scott alleged had been stopped due to "hostility" on the part of his parents, Larry and Heidi. *See id.*

6. By November 2012, the "hostility" between Scott and his parents, who were Family Trustees of the SCIT at that time, and Lubbers, who was then Independent Trustee of the SCIT, had reached a boiling point. Indeed, Scott's counsel, Mark Solomon, Esq., sent a letter to Lubbers on November 14, 2012 wherein he characterized the Trustees' handling of distributions to Scott as "*per se* bad faith."[2] Mr. Solomon further threatened that he had "been authorized by Scott to file a petition to assume jurisdiction over the trusts to redress the present Trustees' unreasonable interpretation of the HEMS standard, to remove the Trustees, and to demand accountings for both trusts." *See* Ex. 2. Finally, Mr. Solomon made a demand for multiple thousands of dollars in distributions from the SCIT, which were "non-negotiable." *Id.*

7. The very next day, on November 15, 2012, Lubbers prepared and sent an Agenda for one of the Friday meetings that were regularly conducted with Larry and Bob Evans ("Evans")

[1] A true and correct copy of the Initial Petition in this case, without exhibits, is attached hereto as Exhibit 1. Petitioner likewise filed two other petitions the same day related to two different trusts of which he is the beneficiary. *See* Case Nos. P-13-078913-T; P-13-078919-T.

[2] A true and correct copy of the November 14, 2012 letter, which has been produced in this action as Bates Nos. RESP0094288-0094289, is attached hereto as Exhibit 2.

at the offices of The American West Home Building Group ("AWG").[3] The Agenda reflects a bullet point item styled as: "5. ***Scott – lawsuit threatened.***"[4]

8. On May 31, 2013, Lubbers, as Family Trustee of the SCIT, entered into a Purchase Agreement (the "Purchase Agreement") with three irrevocable trusts similar to the SCIT that had previously been formed by Scott's siblings (the "Siblings Trusts") and an entity named SJA Acquisitions, LLC ("SJA"). The Siblings Trusts purchased the minority interests in certain corporations held by the SCIT, and SJA purchased the minority interests in certain limited liability companies held by the SCIT (collectively the "Purchased Entities").

9. The lawsuit threatened by Scott's counsel in November 2012 ultimately came in the form of the Initial Petition filed on September 30, 2013. Despite Petitioner's retroactive attempts to downplay the Initial Petition as "neutral" because there was purportedly "no actual dispute between the Parties" and "absolutely no allegations of wrongful conduct or claims were asserted against either Lubbers or the Canarellis," *see* Mot. at 7:12-17; 17:15-18, a plain reading of the Initial Petition tells a very different story.

10. Here are several excerpts demonstrating the adversarial nature of the allegations contained in the Initial Petition:

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[3] As the Court knows from prior motion practice, AWG is a home building business. Larry is the founder of AWG, and Mr. Evans is its Senior Vice President of Finance. The SCIT formerly held minority interests in various corporations and limited liability companies that comprised a portion of AWG's homebuilding operations. *See* Opp'n to Motion to Compel Lawrence and Heidi Canarelli's Responses to Scott Canarelli's Request for Production of Documents dated May 29, 2018 (on file). Though not a party herein, Respondents agreed to search and produce responsive ESI from Mr. Evans on the theory that he acted as an agent of the former Family Trustees in connection with the SCIT. *See id.* at Ex. 7. A true and correct copy of the e-mail exchange between counsel on this subject is being reproduced as Exhibit 3 hereto.

[4] A true and correct copy of the forwarding e-mail and attached Agenda, which have been produced in this action as Bates Nos. RESP0094294-0094295, are attached hereto as aggregate Exhibit 4 (emphasis added).

- "Since the Irrevocable Trust's creation fifteen years ago, ***Petitioner has never received an inventory of the Irrevocable Trust's assets or an annual accounting as specifically provided thereunder, despite requests for the same.***" Ex. 1 ¶ A.10 (emphasis added); *see also id.* ¶ C.5 (same);

- "Indeed, Petitioner has never been provided with a copy of the Credit Agreement, despite the collateralization of the Irrevocable Trust's interest in the LLCs and Corporations in conjunction therewith." *Id.* ¶ A.12;

- "In or about May 2012, ***the Family Trustees became hostile toward Petitioner and stopped making distributions to Petitioner and/or his family***, despite Petitioner's dependence on such distributions for his and his family's health, maintenance, support and general welfare. The cessation of distributions followed receipt by Petitioner of a letter from Larry and Heidi that read that Larry and Heidi were '***not willing to continue financing [Petitioner's] existence' because 'it is against everything that [Larry and Heidi] think is good for [Petitioner].***'" Petitioner is informed and believes that ***the hostility*** stemmed from his decision to become a stay at home father after his wife returned to the workplace." *Id.* ¶ A.13 (emphasis added);

- "At the onset of SDF's representation of petitioner, Petitioner requested an accounting and an inventory of trust assets from the trustees. However, the Independent Trustee informed Petitioner that ***Larry would not authorize the provision of an accounting and/or an inventory of the Irrevocable Trust or its assets***. Further, ***the Independent Trustee admitted to Petitioner that he had little or no personal knowledge of the Irrevocable Trust's management or its assets, despite serving as Independent Trustee since 2005.***" *Id.* ¶ A.15 (emphasis added);

- "At the time the Purchase Agreement was entered, Larry was on both sides of the transaction. Thus, ***Larry had a conflict as both Co-Family Trustee of the Irrevocable Trust, on one hand, and Trustee of the Siblings Trust [sic] and manager of SJA.***" *Id.* ¶ A.20 (emphasis added);

- "***Accordingly, the Family Trustee violated the fiduciary obligations due and owing to Petitioner by failing to provide Petitioner with an inventory of the Irrevocable Trust's assets or render a fiduciary accounting as required by law.*** Thus, this Court should enter an Order compelling Lubbers to provide Petitioner with an inventory of the Irrevocable Trust's assets and a complete accounting of the Irrevocable Trust's activities from February 24, 1998, the date of the Irrevocable Trust's creation, through the present date." *Id.* ¶ C.6 (emphasis added);

- "***Here, the Family Trustees had a duty to provide Petitioner with the Information and documents necessary to keep him apprised of the nature, value and transactions of the Irrevocable Trust. Instead***, the trustees sold the Irrevocable Trust's interests in the LLC's and the Corporations to SJA and the Siblings Trusts without Petitioner's knowledge or consent ***following a falling out between Petitioner and his parents***." *Id.* ¶ D.5 (emphasis added);

- "Petitioner lacks any way of verifying whether this sale was prudent . . . ***or designed to punish him or otherwise harm his financial interests. Indeed, the sale effectively strips the Irrevocable Trust of all of its assets by disposing all of its interests in the LLCs and Corporations in favor of trusts and entities established by Larry for his other three children***." *Id.* ¶ D.6 (emphasis added); and

- "Moreover, at the time the Family Trustees conducted the sale, the purchasers, SJA and the Siblings Trusts, were managed by Larry ***thereby creating a conflict as both the buyer and seller***." *Id.* ¶ D.7 (emphasis added).

B. Lubbers Retains Counsel to Respond to the Initial Petition and Prepares Notes Related to the Litigation.

11. Less than two weeks after Petitioner's service by mail 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).[5] The contemporaneous billing records from LHLGB reflect that attorneys David Lee and Charlene Renwick conducted a conference call with Lubbers on October 14, 2013 that lasted approximately a half hour.[6] The general subject matter of the call was regarding "responses to petition." *Id.*

[5] Declaration of David S. Lee, Esq. ("Lee Decl.") ¶ 4; Declaration of Charlene N. Renwick, Esq. ("Renwick Decl.") ¶ 4.

[6] A true and correct copy of the LHLGB billing records for October 2013 for the "Canarelli Trust" matters is attached hereto as Exhibit 5. *See* Lee Decl. ¶ 6. The records have been redacted to protect attorney work-product and attorney-client communications. *Id.*

12. In anticipation of the call with attorneys Lee and Renwick, Lubbers prepared type-written notes. 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.[7] 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* Mot., Ex. 1. Finally, the notes reflect Lubbers' assessment of certain legal issues. *Id.* The notes, in other words, reflect Lubbers' request for legal advice and his mental impressions about pending litigation and, thus, are a quintessential example of attorney-client privileged and work-product protected material.

13. Attorneys Lee and Renwick have confirmed that, during the October 14, 2013 call, Lubbers asked them several questions about his potential responses to the petitions, and further stated his views about several matters related to the petitions and potential strategies for defending against certain of the allegations contained therein.[8] Both attorneys had similar discussions with Lubbers on different occasions throughout the representation. *See id.*

14. In or about mid-November 2013, the law firm Campbell & Williams substituted into this action on behalf of Respondents in the place and stead of LHLGB as Ms. Renwick was taking maternity leave.[9]

15. On or about December 2, 2013, a revised stipulation was entered in this action regarding the appointment of Stephen Nicolatus to conduct a valuation of the SCIT assets sold pursuant to the May 31, 2013 Purchase Agreement.[10] While the Parties had agreed to the

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[7] *See* Mot., Ex. 1 (*in camera* submission).

[8] *See* Lee Decl. ¶ 8; Renwick Decl. ¶ 7.

[9] *See* Lee Decl. ¶ 9; Renwick Decl. ¶ 8.

[10] *See* Stipulation and Order Appointing Valuation Expert and Clarifying Order dated 12/2/13, a true and correct copy of which is attached hereto as Exhibit 6.

appointment of Mr. Nicolatus, Scott expressly reserved his rights to seek redress for the conduct of the Trustees as it related to the Purchase Agreement. *Id.* at 3:26-4:6.

16. On or about December 6, 2013, Petitioner's counsel, Mr. Solomon, sent a letter to Respondents' new counsel at Campbell & Williams reaffirming Scott's reservation of rights to challenge the Purchase Agreement: "***Scott was never told about the sale of the trust assets until after the fact, and we still have questions about the appropriateness of the sale in the first instance. . . . Scott is being careful not to agree or do anything that would estop him from seeking to unwind the sale if we determine that is appropriate.***"[11]

17. On or about December 19, 2013, the parties and their respective counsel met with Mr. Nicolatus to discuss the materials he would need to conduct the valuation. Mr. Lubbers took notes during the meeting, which reflect the information he believed was important to memorialize.[12]

18. In or about late-2014/early-2015, Lubbers retained Dan Gerety to assist with preparation of the 2014 Accounting for the SCIT.[13] On or about November 18, 2015, Lubbers signed a "Consent" authorizing Gerety to disclose certain information regarding the 2014 Accounting to Petitioner's counsel at Solomon Dwiggins & Freer [redacted]

[11] *See* Letter from M. Solomon to C. Williams dated 12/6/13, a true and correct copy of which is attached hereto as Exhibit 7.

[12] *See* Mot., Ex. 2 (in camera submission).

[13] *See* letters exchanged between A. Freer and C. Williams dated 12/9/14 and 12/12/14, true and correct copies of which are attached hereto as aggregate Exhibit 8. The content of these letters leaves no ambiguity that Petitioner's counsel viewed the parties as being in "litigation" at the time. *See id.* ("In a last effort to resolve the accounting and information request issues ***without further litigation*** . . . .") (emphasis added).

[redacted][14] As of November 2015, the only "litigation" pending regarding the SCIT was the Initial Petition filed on September 30, 2013.

19. Despite Petitioner's revisionist claim in the present Motion that "[i]t was not until late 2015, when Petitioner provided Respondents' counsel with a DRAFT copy of the Surcharge Petition that the potential of any claim against Lubbers was anticipated," *see* Mot. at 10:21-22, Petitioner's counsel has recently admitted elsewhere that "[a]t the time Lubbers retained Gerety to prepare the 2014 accounting, ***there were several unanswered questions raised by Petitioner through Gerety that potentially could result in litigation.***"[15] Again, Lubbers provided notice of his intent to retain Gerety to perform the 2014 accounting back in December 2014.[16]

C. Respondents Inadvertently Produce Attorney-Client Privileged and Work Product Protected Documents, and Seek to Claw Them Back.

20. Scott filed his Petition to Surcharge on June 27, 2017.

21. Respondents served their Initial Disclosures of Witnesses and Documents Pursuant to NRCP 16.1 on December 15, 2017. As part of their Initial Disclosures, Respondents inadvertently produced a set of handwritten and typed notes from Lubbers' hard files as Bates Nos. RESP0013284-RESP0013288.

22. Respondents served their First Supplement to Initial Disclosures of Witnesses and Documents Pursuant to NRCP 16.1 on April 6, 2018. As part of their First Supplemental

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[14] *See* Consent to Use of Tax Return Information, a true and correct copy of which is attached hereto as Exhibit 9.

[15] *See* Petitioner's Response to Respondents' Objections to the Discovery Commissioner's April 20, 2018 Report and Recommendation dated 7/12/18 at 17:16-18 (emphasis added), a true and correct excerpt of which is attached hereto as Exhibit 10.

[16] *See* Ex. 8.

Disclosures, Respondents inadvertently produced a set of handwritten notes from Lubbers' hard copy files unofficially referred to as Bates Nos. RESP0078884-RESP0078932.[17]

(i) *Lubbers' October 2013 Notes (Bates Nos. RESP0013284-RESP0013288)*

23. On May 18, 2018, Petitioner filed his 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 Attorney Fees, Accountant Fees & Costs (the "Supplemental Petition") (on file).

24. With no forewarning, Petitioner unilaterally included Lubbers' notes (Bates Nos. RESP0013284-RESP0013288) as Exhibit 4 to the Supplemental Petition. While the Exhibit itself was submitted "*in camera*," Petitioner nonetheless quoted substantial portions of the type-written notes (Bates No. RESP0013285) in the publicly-filed body of the Supplemental Petition as constituting an alleged admission that Respondents breached their fiduciary duties. *See* Supp. Pet. at 18:24-19:8. In addition to failing to provide Respondents' counsel with notice that Petitioner's counsel was in possession of a potentially privileged document, Petitioner exacerbated the situation by (i) making affirmative use of the document to support his claims, and (ii) publicly quoting the document even though it was designated "Confidential" under the parties' Confidentiality Agreement. Notably, other portions of the same pages of the Supplemental Petition were redacted, thus negating the possibility of a potential oversight by Petitioner. *See* Supp. Pet. at 18-19.

25. On June 5, 2018, Respondents counsel sent written notice to Petitioner's counsel demanding that Petitioner return/destroy Lubbers' notes and agree to redact all public references

[17] The subject notes were not actually marked with Bates Stamps as they were inadvertently produced in native format to Petitioner's counsel. Nonetheless, the unofficial Bates Nos. can be derived from the gap in Bates Stamp numbering that exists in those documents properly produced as part of Respondents' First Supplement.

to the same in the Supplemental Petition. *See* Mot., Ex. 4. One week later, on June 12, Petitioner's counsel responded, claimed that "these records are not 'clearly' privileged," and refused to redact Petitioner's public quotation of the notes notwithstanding their designation as "Confidential." *See* Mot., Ex. 5.

26. The same day, Respondents' counsel again demanded return/destruction of the documents, explained the privileged nature of the notes, cited counsel's failure to comply with the Nevada Rules of Professional Conduct and the terms of the parties' ESI Protocol, and requested a meet and confer. *See* Mot., Ex. 6. Six days later, on June 18, Petitioner's counsel responded, claimed that any protection that applied to the notes had been "waived" (on some unspecified basis), but ostensibly agreed to sequester the documents while the parties conducted a meet and confer in accordance with the provisions of the ESI Protocol. *See* Mot., Ex. 7.

27. After an unsuccessful meet and confer on June 25, 2018, Petitioner filed the instant Motion for Determination of Privilege on July 13, 2018. Rather than sequester the document as required by the parties' ESI Protocol, Petitioner's counsel again made affirmative use of the content of the notes to argue why they are not privileged or otherwise protected. This is in direct violation of the express terms of the ESI Protocol, which states in relevant part:

> The Receiving Party hereby agrees to promptly return, sequester, or destroy any Privileged Information disclosed or produced by Disclosing or Producing Party upon request by Disclosing or Producing Party ***regardless of whether the Receiving Party disputes the designation of Privileged Information***. . . . In the event that the parties do not resolve their dispute, the Objecting Party may bring a motion for determination of whether a privilege applies within ten (10) court days of the meet and confer session, but may only contest the asserted privileges on ground [sic] other than the inadvertent production of such document(s). ***In making such a motion, the Objecting Party shall not disclose the content of the document(s) at issue***, but may refer to the information contained on the privilege log.

See Mot., Ex. 3 ¶ 21 (emphasis added). Not only did Petitioner's counsel argue the substance of the notes to contest any privilege or protection that applied thereto, they again quoted directly from Lubbers' type-written notes in the publicly-filed Motion. *See* Mot. at 7:1-9.

28. On August 1, 2018, Petitioner filed his Opposition to Motion to Dismiss Petitioner's Supplemental Petition (on file). For the *third* time, and despite Petitioner's repeated demands to remove any public references to Lubbers' protected notes—which, at a bare minimum, were designated "Confidential" under the parties' Confidentiality Agreement—Petitioner again publicly quoted from the disputed notes in an effort to save his supplemental fraud and breach of fiduciary duty claims from dismissal. *See id.* at 27:19-20.

(ii) *Lubbers' December 2013 Notes (Bates Nos. RESP0078899-RESP0078900)*

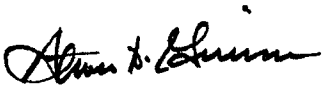
29. In direct contravention to the way they handled the set of Lubbers' notes addressed above, Petitioner's counsel notified Respondents' counsel on or about June 14, 2018 that they were in possession of a set of different, potentially privileged/protected documents that may have been inadvertently produced by Respondents' counsel (*i.e.*, RESP0078884-RESP0078932). *See* Mot., Ex. 8. The parties thereafter exchanged a series of letters and conducted a series of meet and confers, which ultimately narrowed the parties' dispute in this batch of documents to just two pages of notes prepared by Lubbers at a meeting with the parties, their respective counsel and Mr. Nicolatus on December 19, 2013 (*i.e.*, Bates Nos. RESP078899-RESP078900). *See* Mot., Ex. 2.

I declare under penalty of perjury of the laws of the State of Nevada that the foregoing is true and correct.

DATED this 10th day of August, 2018.

J. COLBY WILLIAMS

EXHIBIT 1



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Attorneys for Petitioner, Scott Canarelli

DISTRICT COURT

COUNTY OF CLARK, 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 Hearing Date: 10/18/2013 Hearing Time: 9:30 a.m.

PETITION TO ASSUME JURISDICTION OVER THE SCOTT LYLE GRAVES CANARELLI IRREVOCABLE TRUST; TO CONFIRM EDWARD C. LUBBERS AS FAMILY AND INDEPENDENT TRUSTEE; FOR AN INVENTORY AND ACCOUNTING; TO COMPEL AN INDEPENDENT VALUATION OF THE TRUST ASSETS SUBJECT TO THE PURCHASE AGREEMENT, DATED MAY 31, 2013; AND TO AUTHORIZE AND DIRECT THE TRUSTEE AND FORMER TRUSTEES TO PROVIDE SETTLOR/BENEFICIARY WITH ANY AND ALL INFORMATION AND DOCUMENTS CONCERNING THE SALE OF THE TRUST'S ASSETS UNDER SUCH PURCHASE AGREEMENT

Pursuant to NRS 164.010, 164.015, 153.031 and 164.030, Scott Lyle Graves Canarelli ("Petitioner"), Settlor and Beneficiary of the Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998 (the "Irrevocable Trust"), by and through his attorneys, the law firm of Solomon Dwiggins & Freer, Ltd., hereby petitions this Court to assume jurisdiction over the Irrevocable Trust; to confirm Edward C. Lubbers as the Family and Independent Trustee of the Irrevocable Trust and any and all sub-trusts created thereunder; for an inventory and accounting of the Irrevocable Trust's

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assets;[1] to compel an independent valuation of the Irrevocable Trust's assets subject to a certain purchase agreement, dated May 31, 2013; and to authorize and direct both the trustee and the former trustees to provide Petitioner with any and all information and documents concerning the sale the Irrevocable Trust's assets pursuant to such purchase agreement. In support of his Petition, Petitioner alleges the following:

A.

GENERAL ALLEGATIONS

A.1 On February 24, 1998, Petitioner established the Irrevocable Trust as settlor. Petitioner settled the Irrevocable Trust with assets conveyed or otherwise transferred to him by his parents, Lawrence Canarelli ("Larry") and Heidi Canarelli ("Heidi") for Petitioner's use and benefit and for the benefit of Petitioner's spouse and/or children. A copy of the Irrevocable Trust is attached to this Petition as **Exhibit 1**. Although such assets were "transferred" to Petitioner by his parents, Larry and Heidi provided Petitioner with little or no information concerning the details of the same.

A.2 The Irrevocable Trust is irrevocable; specifically, Petitioner has "no right to whatsoever to alter, amend, revoke or terminate [the Irrevocable Trust] in whole or in part. *Id.* at Art. II.

A.3 Larry and Heidi were appointed as the initial "Family Trustees" of the Irrevocable Trust with Corey Addock as the initial Independent Trustee. *See* Ex. 1 at Art. I. Upon information and belief, Corey Addock resigned as Independent Trustee in or about 2005 and Edward Lubbers ("Lubbers"), Larry and Heidi's attorney, was appointed in his stead. Upon information and belief, Larry and Heidi are Lubbers' primary clients and a substantial portion of his practice is devoted to assisting Larry and Heidi and/or their business entities with their various legal needs.

A.4 The Irrevocable Trust expressly provides that the trustees "shall act as fiduciaries and not as holders of powers for their own benefit" and directs the trustees, in exercising the powers and

[1] Contemporaneously herewith, Petitioner is initiating separate actions concerning the Scott Lyles Graves Canarelli – Secondary Trust, dated October 27, 2006, and the Scott Canarelli Protection Trust wherein Petitioner requests, among other things, an inventory of such trusts and accountings thereof.

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discretions afforded to them under the Irrevocable Trust, to be "guided by the best interests, as a whole and in a broad sense, of the beneficiaries [thereunder], both present and contingent." *Id.* at Art. 8.01.

A.5 Pursuant to its terms, the Irrevocable Trust was created to qualify as an Electing Small Business Trust to hold Petitioner's interest in the stock in an S corporation.[2] *See* Ex. 1 at 4.01. Indeed, the Irrevocable Trust specifically authorizes the Independent Trustee to hold the Irrevocable Trust as two separate trusts, with one such trust to hold all of the shares of S corporation stock (the "ESBT Share") and the other to hold any and all remaining trust assets. *Id.* at 4.02.

A.6 Upon information and belief, the Irrevocable Trust was funded with minority interests in certain limited liability companies (the "LLCs") and corporations (the "Corporations") that comprise or support the Nevada home building operation commonly known as "American West."[3] Petitioner is, however, unaware of whether the Independent Trustee created any sub-trust as provided under Article 4.02 of the Irrevocable Trust or otherwise created the ESBT Share by transferring such minority interests to the same.

A.7 Since the time of its establishment, the Irrevocable Trust has been administered and domiciled in the State of Nevada. Moreover, upon information and belief, the vast majority of the Irrevocable Trust assets are located within this State, including many of the LLCs and Corporations.

A.8 The Irrevocable Trust provides for distributions of income and principal for Petitioner, his spouse and/or children for their health, education, support and maintenance. *Id.* at 5.01. In making such distributions, the Irrevocable Trust mandates that the Family Trustee be "mindful of the fact that

[2] Specifically, Article 4.01 of the Irrevocable Trust specifically defines the Settlor's intent as follows: "The Grantor plans to transfer to the Irrevocable Trustees shares of the stock of an S corporation and intends that this trust shall constitute an Electing Small Business Trust, as defined in § 1361(e) of the Internal Revenue Code of 1986 ("the Code"), for so long as the Irrevocable Trustee shall own any stock of an S corporation. All provisions of this instrument shall be construed consistent with this intent." *See* Ex. 1 at 4.01.

[3] Upon information and belief, as of March 31, 2013, the Irrevocable Trust was funded with interests in or about 37 entities. A list of such entities, along with the percentage owned by the Irrevocable Trust and their purported values as of such date are attached hereto as **Exhibit 2** and incorporated herein by reference.

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the [Petitioner]'s primary concern in establishing [the Irrevocable Trust] is the welfare of the [Petitioner], and that the interest of others are subordinate to the [Petitioner]'s." *Id.*

A.9 The Irrevocable Trust also provides that the Family Trustees shall annually furnish Petitioner, the current income beneficiary, with "a complete inventory of the properties then comprising the trust estate, together with an accounting showing all receipts and disbursements of principal and income of the trust estate." *Id.* at 6.15.

A.10 Since the Irrevocable Trust's creation fifteen years ago, Petitioner has never received an inventory of the Irrevocable Trust's assets or an annual accounting as specifically provided thereunder, despite requests for the same.

A.11 Upon information and belief, on December 31, 2009, all or some of the LLCs and Corporations in which the Irrevocable Trust owns a minority interest entered into a Term Loan Credit Agreement ("Credit Agreement") with California Bank & Trust, Wells Fargo Bank, National Association and additional lenders (collectively "Lenders"). Upon further information and belief, the Irrevocable Trust, along with the LLCs and Corporations, are jointly and severally liable for any amounts due and owing the Lenders under the Credit Agreement. Moreover, Petitioner is further informed and believes that the Irrevocable Trust may be precluded from receiving cash distributions from any of the LLCs and Corporations, including any distribution attributable to the Irrevocable Trust's ownership interest therein, until the Lenders are fully paid the amounts due and owing under the Credit Agreement. The Credit Agreement purportedly matures in October, 2013.

A.12 Petitioner is neither aware of the purpose for entering into the Credit Agreement nor the amount of money due and owing to the Lenders by the LLCs and/or the Corporations. Indeed, Petitioner has never been provided with a copy of the Credit Agreement, despite the collateralization of the Irrevocable Trust's interests in the LLCs and Corporations in conjunction therewith.

A.13 In or about May, 2012, the Family Trustees became hostile towards Petitioner and stopped making distributions to Petitioner and/or his family, despite Petitioner's dependence on such

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distributions for his and his family's health, maintenance, support and general welfare. The cessation of distributions followed receipt by the Petitioner of a letter from Larry and Heidi that read that Larry and Heidi were "not willing to continue financing [Petitioner's] existence" because "it is against everything that [Larry and Heidi] think is good for [Petitioner]." Petitioner is informed and believes that the hostility stemmed from his decision to become a stay-at-home father after his wife returned to the workplace.

A.14 Following Petitioner's receipt of the letter, Petitioner engaged the law firm of Solomon Dwiggins & Freer, Ltd. ("SDF"), to assist him in resuming the distributions provided to him under the Irrevocable Trust. After weeks of negotiations with the Independent Trustee, the Irrevocable Trust began directly paying some of Petitioner's living expenses and resumed monthly distributions to Petitioner for Petitioner and his family's maintenance and support.

A.15 At the onset of SDF's representation of Petitioner, Petitioner requested an accounting and an inventory of trust assets from the trustees. However, the Independent Trustee informed Petitioner that Larry would not authorize the provision of an accounting and/or an inventory of the Irrevocable Trust or its assets. Further, the Independent Trustee admitted to Petitioner that he had little or no personal knowledge of the Irrevocable Trust's management or its assets, despite serving as Independent Trustee since 2005.

A.16 Pursuant to Articles 8.02 and 8.04 of the Irrevocable Trust, Larry and Heidi resigned as Co-Family Trustees of the Irrevocable Trust and jointly appointed Lubbers as their successor. *See* Resignation and Appointment of Family Trustee, attached hereto as **Exhibit 3**. Such resignation is undated; however, its purported effective date is May 24, 2013, at 5:00 p.m. ("Effective Date"). *Id.* Thus, as of the Effective Date, Lubbers purportedly began serving and continues to serve as both the Family Trustee and the Independent Trustee of the Irrevocable Trust.

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A.17 Petitioner is informed and believes that, nothwithstanding Larry and Heidi's resignation as Family Trustees, Larry and Heidi still directly or indirectly control the administration of the Irrevocable Trust.

A.18 On or about May 31, 2013, the Family Trustees purportedly entered into an agreement ("Purchase Agreement") without Petitioner's knowledge or consent for the sale of the Irrevocable Trust's interest in the LLCs and the Corporations to (i) SJA Acquisitions, LLC ("SJA"), a Nevada limited liability company established and managed by Larry for benefit of his remaining three children, to wit: Stacia Leigh Lemke, Jeffrey Larry Graves Canarelli and Alyssa Lawren Graves Canarelli and (ii) mirror irrevocable trusts established by Larry and Heidi for the benefit of Petitioner's three siblings, to wit: the Jeffrey Larry Graves Canarelli Irrevocable Trust; the Stacia Leigh Lemke Irrevocable Trust; and the Alyssa Lawren Graves Canarelli Irrevocable Trust (collectively "Sibling Trusts"). A copy of the Purchase Agreement is attached hereto as **Exhibit 4**. Significantly, Larry serves as the family trustee of each of the Sibling Trusts. It is unknown to Petitioner whether Larry and/or Heidi have an ownership interest in SJA or its parent organization(s).

A.19 Although the Purchase Agreement was purportedly executed on May 31, 2013 – after Larry and Heidi's resignation as Family Trustees of the Irrevocable Trust –, the Purchase Agreement's effective date is March 31, 2013, months prior to such resignation.

A.20 At the time the Purchase Agreement was entered, Larry was on both sides of the transaction. Thus, Larry had a conflict as both Co-Family Trustee of the Irrevocable Trust, on one hand, and Trustee of the Siblings Trust and manager of SJA.

A.21 The Purchase Agreement provides, in pertinent part, that the Irrevocable Trust's interests in the LLCs shall be sold to and purchased by SJA (the "LLC Sale Interests") and the Irrevocable Trust's interests in the Corporations shall be purchased by the Sibling Trusts (the "Corporation Sale Interests"). The LLC Sale Interests purchase price is $15,801,913.00 and the Corporation Sale Interests purchase price is $9,454,861.00. Such amounts are based on the Irrevocable Trust's

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purported interest in the LLCs and the Corporations and the purported value thereof as set forth on the schedule attached to the Purchase Agreement as Exhibit A. See Exs. 2 and 4. The Purchase Agreement also provides that the LLC Sale Interests Purchase Price and/or the Corporation Sales Interests Purchase Price "shall be increased, but not decreased, based upon a review of the enterprise value of each LLC and each Corporation by a third party analyst, to be conducted not less than 120 days after the date of this Agreement." *See* Ex. 4 at ¶3.

A.22 The Purchase Agreement provides that the LLC Sale Interests Purchase Price is to be paid by SJA to the Irrevocable Trust with $1,000,000.00 cash down and the balance in the form of an unsecured promissory note ("LLC Note") with an interest rate of or about 3.70% per annum[4] to be repaid monthly in the amount of $45,639.23 over ten (10) years. *See* Ex. 4 at Ex. B ¶¶1-2(A) and (B). The LLC Note provides for the first monthly installment payment to be made on April 1, 2013. *Id.* at ¶2(B). The LLC Note also provides for annual payments of principal in the amount of $1,000,000.00 in semi-annual installments, the first of which shall be paid on October 1, 2013, with subsequent payments to be paid every six months thereafter and any unpaid balance of principal to be due and payable on the date of maturity. *Id.* at ¶2(C).

A.23 Similarly, the Purchase Agreement provides for the Corporation Sale Interests Purchase Price to be paid by the Sibling Trusts to the Irrevocable Trust with $1,000,000.00 cash down with the balance in the form of an unsecured promissory note ("Corporation Note") having an interest rate of or about 3.70% per annum[5] to be repaid monthly in the amount of $26,069.15 over ten (10) years. *See* Ex. 4 at Ex. C ¶¶1-2(A) and (B). The Corporation Note provides for the first monthly installment payment to be made on April 1, 2013. *Id.* at ¶2(B). The Corporation Note also provides for annual payments of principal in the amount of $1,000,000.00 in semi-annual installments, the first of which

[4] The Purchase Agreement provides the interest rate on the notes shall be equal to the interest rate payable by the United States on its 10 Year Bond as in effect as of the date of the agreement plus 200 basis points. *See* Ex. 4 at ¶7.

[5] *See, supra,* n.4.

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shall be paid on October 1, 2013, with subsequent payments to be paid every six months thereafter and any unpaid balance of principal to be due and payable on the date of maturity. *Id.* at ¶2(C).

A.24 As of this date, Petitioner has no knowledge of whether any payments due and owing under either the LLC Note or the Corporation Note have been made to the Irrevocable Trust.

A.25 The Purchase Agreement provides that Larry and Heidi shall personally guarantee the obligations due and owing under the LLC Note and the Corporation Note to the Irrevocable Trust through the execution of a Payment Guaranty in a form substantially similar to that attached as Exhibit D to the Purchase Agreement. *See* Ex. 4 at Ex. D.

A.26 Indeed, Exhibit A of the Purchase Agreement was Petitioner's first real indicia of the value and composition of the Irrevocable Trust in the fifteen years since its establishment. Moreover, to the best of Petitioner's knowledge, an independent valuation of a third party analyst was never conducted following entry into the Agreement as expressly provided thereunder. *See* Ex. 4 at ¶3.

A.29 The names, ages, residences, and relationships of the persons interested in the Irrevocable Trust or this Petition are as follows:

NAME	AGE	RELATIONSHIP	ADDRESS
Scott Canarelli	Adult	Settlor/Beneficiary/ Petitioner	c/o Mark A. Solomon, Esq. Solomon Dwiggins & Freer, Ltd. 9060 W. Cheyenne Avenue Las Vegas, Nevada 89129
Kylie Kristin Canarelli	Adult	Settlor's Wife/ Beneficiary	c/o Mark A. Solomon, Esq. Solomon Dwiggins & Freer, Ltd. 9060 W. Cheyenne Avenue Las Vegas, Nevada 89129
Gage Cole Lyle Canarelli	Minor	Settlor's Son/ Beneficiary	c/o Mark A. Solomon, Esq. Solomon Dwiggins & Freer, Ltd. 9060 W. Cheyenne Avenue Las Vegas, Nevada 89129
Dagon Orian Lyle Canarelli	Minor	Settlor's Son/ Beneficiary	c/o Mark A. Solomon, Esq. Solomon Dwiggins & Freer, Ltd. 9060 W. Cheyenne Avenue Las Vegas, Nevada 89129
Scottlyn Elizabeth Lyle Canarelli	Minor	Settlor's Daughter/ Beneficiary	c/o Mark A. Solomon, Esq. Solomon Dwiggins & Freer, Ltd. 9060 W. Cheyenne Avenue Las Vegas, Nevada 89129

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NAME	AGE	RELATIONSHIP	ADDRESS
Edward Lubbers	Adult	Family Trustee and Independent Trustee	8345 W. Sunset Road, Suite 250 Las Vegas, Nevada 89113
Lawrence and Heidi Canarelli	Adult	Former Family Trustees	1 Dovetail Circle Henderson, Nevada 89014

B.

PETITION TO ASSUME JURISDICTION OVER THE THE SCOTT LYLE GRAVES CANARELLI IRREVOCABLE TRUST AND TO CONFIRM EDWARD LUBBERS AS FAMILY AND INDEPENDENT TRUSTEE

B.1 NRS 164.010(1) provides that "[u]pon petition of a settlor or beneficiary of the trust, the district court of the county in which the trustee resides or conducts business, or which the trust has been domiciled, shall consider the application to confirm the appointment of the trustee and specify the manner in which the trust must qualify. Thereafter the court has jurisdiction of the trust as a proceeding in rem."

B.2 Petitioner is the settlor and primary beneficiary of the Irrevocable Trust which, at all times since its creation, has been domiciled and administered in Clark County, Nevada.

B.3 Upon information and belief, Lubbers, a Nevada resident, has acted as Independent Trustee of the Irrevocable Trust since or about 2005 and as sole Family Trustee since or about May 24, 2013.

B.4 Accordingly, this Court should confirm Lubbers as both Family Trustee and Independent Trustee of the Irrevocable Trust and any and all sub-trusts created thereunder.

B.5 Further, *in rem* jurisdiction over the Irrevocable Trust is proper since the Irrevocable Trust, at all times since its inception, has been administered and domiciled in Nevada and the vast majority of the Irrevocable Trust assets, including a majority of the LLCs and Corporations, are located within this State.

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C.

PETITION TO COMPEL THE PROVISION OF AN INVENTORY AND AN ACCOUNTING OF THE IRREVOCABLE TRUST

C.1 NRS 164.015(1) provides that "[t]he court has exclusive jurisdiction of proceedings initiated by the petition of an interested person concerning the internal affairs of a nontestamentary trust. Proceedings which may be maintained under this section are those concerning the administration and distribution of trusts, . . . including petitions with respect to a nontestamentary trust for any appropriate relief provided with respect to a testamentary trust in NRS 153.031."

C.2 NRS 153.031(1), made applicable to trust proceedings pursuant to NRS164.005, provides that a trustee or beneficiary of a trust may petition the court regarding any aspect of the affairs of the trust, including settling the accounts and reviewing the acts of the trustee, including the exercise of discretionary powers. *See* NRS 153.031(1)(f).

C.3 Article 6.15 of the Irrevocable Trust expressly requires the Family Trustee to provide Petitioner, the Irrevocable Trust's income beneficiary, with "a complete inventory of the properties then comprising the trust estate, together with an accounting showing all receipts and disbursements of principal and income of the trust estate." *See* Ex. 1 at 6.15.

C.4 Moreover, the law clearly and unequivocally imposes a duty upon a trustee to provide clear and accurate accounts with respect to his administration of the Irrevocable Trust to the Irrevocable Trust's beneficiaries. *See, e.g.*, RESTATEMENT OF TRUSTS (Second) § 172. A beneficiary's right to an accounting is founded upon the fiduciary relationship that exists between the beneficiaries and the Irrevocable Trustee. Indeed, courts recognize that:

> As a general matter of equity, the existence of a trust relationship is accompanied as a matter of course by the right of the beneficiary to demand of the fiduciary a full and complete accounting at any proper time. . . . The scope of each accounting depends of course upon the circumstances of the individual case, and, as a general rule, should include all items of information in which the beneficiary has a legitimate concern.

Zuch v. Connecticut Bank and Trust Co., Inc., 500 A.2d 565, 568 (Conn. Ct. App. 1985) (citations omitted) (holding that "[a] trustee is under a duty to keep clear and accurate accounts, and in his reports he should know what he has received and expended, and in general such data as will keep beneficiaries informed concerning the management of the trust").

C.5 As previously set forth, over the past fifteen years, Petitioner has never received an inventory of the Irrevocable Trust's assets or an account of its administration, despite a request for the same. Indeed, it was not until on or about June 18, 2013 – weeks after the Family Trustee sold all of the Irrevocable Trust's interests in the LLCs and the Corporations – that Petitioner received any information whatsoever regarding the assets held (or formally held) by the Irrevocable Trust and their purported values.

C.6 Accordingly, the Family Trustee has violated the fiduciary obligations due and owing to Petitioner by failing to provide Petitioner with an inventory of the Irrevocable Trust's assets or render a fiduciary accounting as required under law. Thus, this Court should enter an Order compelling Lubbers to provide Petitioner with an inventory of the Irrevocable Trust's assets and a complete accounting of the Irrevocable Trust's activities from February 24, 1998, the date of the Irrevocable Trust's creation, through the present date.

C.7 Moreover, to the extent necessary, Petitioner seeks an Order from this Court compelling Larry and Heidi, in their capacities as former Family Co-Trustees of the Irrevocable Trust, to provide Lubbers with any and all information and documents needed to provide Petitioner with such an inventory and accounting.

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D.

PETITION TO COMPEL AN INDEPENDENT VALUATION OF THE IRREVOCABLE TRUST ASSETS SUBJECT TO THE PURCHASE AGREEMENT; AND TO AUTHORIZE AND DIRECT THE TRUSTEE TO PROVIDE SETTLOR/BENEFICIARY WITH ANY AND ALL INFORMATION AND DOCUMENTS CONCERNING THE SALE OF THE IRREVOCABLE TRUST'S INTERESTS IN SUCH ASSETS

D.1 A trustee's duty to the trust's beneficiaries are great. Accordingly, Nevada law imposes several duties upon the trustee, including the absolute duty to "invest and manage the trust property solely in the interest of the beneficiaries." NRS 163.715. In so doing, "no trustee may directly or indirectly buy or sell any property for the trust from or to itself or an affiliate, . . . except with the prior approval of the court having jurisdiction of the trust estate." NRS 163.050.

D.2 Nevada law also requires a trustee to invest and manage the trust corpus as a prudent investor would and, in so doing, exercise reasonable care, skill and caution in his administration of the trust by, *inter alia*, assessing the needs of the trust and balancing the risks and the possible returns of the trust investments as a whole. *See* NRS 164.745.

D.3 Similarly, the Irrevocable Trust itself specifically requires the trustees to "act as fiduciaries and not as holders of powers for their own benefit" and, in exercising the powers and discretions afforded to them under the trust, to be "guided by the best interests, as a whole and in a broad sense, of the beneficiaries [thereunder], both present and contingent." *See* Ex. 1 at Art. 8.01.

D.4 Moreover, Nevada law requires a trustee to provide a beneficiary with sufficient information to be apprised of the nature and performance of the trust, including the duty to provide an inventory, to account, to exhibit the trust property and to provide the beneficiary with information and documents concerning the trust and its assets. *See generally* NRS Chapter 165.

D.5 Here, the Family Trustees had a duty to provide Petitioner with the information and documents necessary to keep him apprised of the nature, value and transactions of the Irrevocable Trust. Instead, the trustees sold the Irrevocable Trust's interest in the LLCs and the Corporations to

SJA and the Siblings Trusts without Petitioner's knowledge or consent following a falling out between Petitioner and his parents.

D.6 Thus, Petitioner – both the Irrevocable Trust's settlor and primary beneficiary – lacked the opportunity to conduct any due diligence prior to the sale of the Irrevocable Trust's interests in the LLCs and the Corporations. Indeed, Petitioner continues to lack any way of verifying whether this sale was prudent, advisable and/or conducted for the reasons recited in the Purchase Agreement (*i.e.*, to provide for Petitioner's cash needs in light of the restriction on distributions under the Credit Agreement) or designed to punish him or otherwise harm his financial interests. Indeed, the sale effectively strips the Irrevocable Trust of all of its assets by disposing all of its interests in the LLCs and Corporations in favor of trusts and entities established by Larry for his other three children.[6]

D.7 Moreover, at the time the Family Trustees conducted the sale, the purchasers, SJA and the Siblings Trusts, were managed by Larry thereby creating a conflict as both the buyer and seller. Interestingly, as soon as the Irrevocable Trust completed the deal with SJA and the Siblings Trusts, Heidi and Larry resigned as Family Co-Trustees and appointed Lubbers in their stead. Additionally, SJA is a subsidiary of other organizations in which Larry is involved and it unknown whether Larry has a pecuniary interest in any of the same.

D.8 Petitioner is unaware of whether the "independent" valuation of the Irrevocable Trust's interests in the LLCs and the Corporations has been conducted pursuant to the express provision in the Purchase Agreement. For all the reasons above set forth, however, even if such valuations have been or are in the process of being conducted, it is necessary and proper for and independent valuation expert to conduct the valuation on behalf of the Irrevocable Trust.

[6] Notably, Petitioner is unaware of any similar sale of any interests in the LLCs and/or Corporations owned by the Sibling Trusts. Rather, Petitioner is informed and believes that the Sibling Trusts shall retain their respective interest in the LLCs and Corporations. Moreover, Petition is further informed and believes that the Irrevocable Trustee(s) of the Sibling Trusts have recently made several large distributions and/or acquisitions, despite being subject to the same restrictions imposed by the Credit Agreement.

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D.9 Accordingly, Petitioner is not in a position to be able to assess the propriety of the sale of the Irrevocable Trust's interest in the LLCs and the Corporations under the Purchase Agreement or whether it inured an actual benefit to the Irrevocable Trust or should have been effectuated. Moreover, it is unclear whether and why all of the Irrevocable Trust's interests in such entities, rather than some interest in one or more entities, should have been sold.

D.10 Thus, it is necessary and proper for Petitioner to be provided with any and all information and documents concerning the transaction in addition to an inventory of the Irrevocable Trust's assets and a full, fiduciary accounting of the Irrevocable Trust from both the current and former trustees. Petitioner's understanding of the Irrevocable Trust's cash situation and the historical and present values of the assets held by the LLCs and the Corporations are paramount to the determination of whether the transaction serves the best interest of the Irrevocable Trust and Petitioner as required under both Nevada law and the Irrevocable Trust's very terms.

D.11 In addition, it is necessary and proper for Petitioner to seek and receive inventories and accountings of any and all other trusts in which he has an interest, including, without limitation, the Scott Lyles Graves Canarelli – Secondary Trust, dated October 27, 2006, and the Scott Canarelli Protection Trust.

E.

PRAYER

WHEREFORE, Petitioner requests that this Petition be set for hearing, with notice of the time and place of such hearing given in the manner required by law, and that upon hearing the Petition, this Court make and enter the following orders:

(1) That this Court assume *in rem* jurisdiction over the Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998 ("Trust"), and any and all trusts created within such trust;

(2) That this Court confirm Edward Lubbers as the Family Trustee and the Independent Trustee of the Irrevocable Trust and any and all trusts created within such trust;

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(3) That this Court compel Edward Lubbers, the Family and Independent Trustee of the Irrevocable Trust, with an inventory and an accounting of the Irrevocable Trust from February 24, 1998, the date of the Irrevocable Trust's creation, through the present date;

(4) That, to the extent necessary, this Court compel Lawrence Canarelli and Heidi Canarelli, former Family Co-Trustees of the Irrevocable Trust, to account and provide Edward Lubbers with any and all information and documents needed to provide Petitioner with an inventory and an accounting of the Irrevocable Trust from February 24, 1998, the date of the Irrevocable Trust's creation, through the present date;

(5) That this Court appoint an independent valuation expert to value the assets held by the LLCs and the Corporations that were subject to the Purchase Agreement, dated May 31, 2013;

(6) That this Court authorize and direct Edward Lubbers, the current Family and Independent Trustee, and Lawrence Canarelli and Heidi Canarelli, the former Family Co-Trustees, to provide Petitioner with any and all information and documents concerning the sale of the Irrevocable Trust assets subject to the purchase agreement; and

(7) For such other orders as the Court deems proper.

DATED September 26, 2013.

SOLOMON DWIGGINS & FREER, LTD.

By: _____

MARK A. SOLOMON, ESQ.
Nevada State Bar No. 00418
BRIAN P. EAGAN, ESQ.
Nevada Bar No. 09395
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129

Attorneys for Petitioner, Scott Canarelli

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VERIFICATION

Petitioner, SCOTT LYLE GRAVES CANARELLI, whose mailing address is 3810 Robar Street, Las Vegas, Nevada 89121, declares under penalties of perjury of the State of Nevada:

That he is the Petitioner who makes the foregoing PETITION TO ASSUME JURISDICTION OVER THE SCOTT LYLE GRAVES CANARELLI IRREVOCABLE TRUST; TO CONFIRM EDWARD C. LUBBERS AS FAMILY AND INDEPENDENT TRUSTEE; FOR AN INVENTORY AND ACCOUNTING; TO COMPEL AN INDEPENDENT VALUATION OF THE IRREVOCABLE TRUST ASSETS SUBJECT TO THE PURCHASE AGREEMENT, DATED MAY 31, 2013; AND TO AUTHORIZE AND DIRECT THE IRREVOCABLE TRUSTEE AND FORMER TRUSTEES TO PROVIDE SETTLOR/BENEFICIARY WITH ANY AND ALL INFORMATION AND DOCUMENTS CONCERNING THE SALE OF THE IRREVOCABLE TRUST'S ASSETS UNDER SUCH PURCHASE AGREEMENT that he has read said petition and knows the contents thereof, and that the same is true of his own knowledge except for those matters stated on information and belief, and that as to such matters he believes it to be true.

DATED this 26 day of September, 2013.

SCOTT LYLE GRAVES CANARELLI

EXHIBIT 2

SOLOMON DWIGGINS & FREER, LTD.

Attorneys at Law

Mark A. Solomon
Dana A. Dwiggins
Alan D. Freer

Cheyenne West Professional Centré
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Las Vegas, Nevada 89129

Telephone: (702) 853-5483
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Brian P. Eagan
Brian K. Steadman
Robert D. Simpson
Jeffrey P. Luszeck
Ross E. Evans
Jordanna L. Evans
Alexander G. LeVeque

Of Counsel
Steven E. Hollingworth

Direct Dial:
(702) 589-3500

November 14, 2012

Edward C. Lubbers, Esq.
LUBBERS LAW
8345 West Sunset Road, Suite 250
Las Vegas, Nevada 89113
Email: elubbers@lubberslaw.com

Via Email and U.S. Mail

Re: Scott Canarelli

Dear Ed:

I am in receipt of your letter, dated October 30, 2012, regarding payment of my legal fees. Thank you for remitting payment for Scott's outstanding balance, as of October 25, 2012. I disagree, however, with your interpretation of the Trusts as to the continuing responsibility to pay for legal fees incurred necessarily for the enforcement of the Trusts' support provisions.

Since receiving your letter, I have been informed by Scott that the Trustees have denied and/or failed to act upon several of Scott's recent requests for distributions without appropriate justification. To wit, Scott has requested distributions for: (1) the replacement of his large screen television; (2) money to purchase an anniversary gift for Kylie; and (3) money for Christmas gifts. I am also informed that you are demanding all of the original receipts that Scott has saved for purchases made in the month of October before you make any further decisions concerning distributions. As you should recall, the purpose of the receipt-saving exercise was to prove that Scott's conservative monthly expenses exceed the amount distributed by the Trusts. It was not intended to be construed as a basis for denying distributions. Such a burdensome and unilateral imposition is *per se* bad faith.

Both Scott and I have been patient and flexible thus far given consideration of Scott's desire to attempt a resolution with the Trustees without court intervention. It is clear to me, however, that Trustees' neutrality is compromised and Scott's wellbeing is subordinate to other considerations. Accordingly, I have been authorized by Scott to file a petition to assume jurisdiction over the Trusts to redress the present Trustees' unreasonable interpretation of the HEMS standard, to remove the Trustees, and to demand accountings for both Trusts.

As part of a last ditch effort to avoid the filing of a petition, Scott will afford the Trustees three business days to agree to the following distributions:

(1) [redacted] made payable to Scott Canarelli each month, beginning November 23, 2012, for daily living needs;

(2) [redacted] made payable to Scott Canarelli each February 1 for Valentine's Day gifts.

(3) [redacted] made payable to Scott Canarelli each November 1 for Wedding Anniversary gifts.

(4) [redacted] made payable to Scott Canarelli each December 1 for Christmas Gifts.

(5) [redacted] made payable to Scott Canarelli each January 1 for family birthday gifts; and

(6) [redacted] made payable to my firm to replenish Scott's retainer.

The requested distributions are non-negotiable and refusal to make such distributions will force Scott to seek immediate relief from the Court. In addition to these requests, the Trustees must continue to pay Scott's utilities, property taxes, insurance premiums, medical costs, and other recurring and nonrecurring expenses for his health, education, maintenance and support, including, but not limited to, the routine maintenance and upkeep of his homes. Should you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

SOLOMON DWIGGINS & FREER, LTD.

Mark A. Solomon

MAS/agl

cc: Client *(via email)*

EXHIBIT 3

Subject: RE: Canarelli
Date: Friday, May 18, 2018 at 2:42:17 PM Pacific Daylight Time
From: Dana Dwiggins
To: Colby Williams
CC: Phil Erwin, Tess E. Johnson, Erin L. Hansen, Elizabeth Brickfield, Joel Z. Schwarz, Jeffrey P. Luszeck
Attachments: image001.jpg, image002.jpg, image003.jpg, image004.png, image007.jpg, image008.jpg

Colby,

Thank you for getting back to me today. I will discuss some of these issues with my client; however, I do not believe 60 days is sufficient for extending the initial deadline. I am, of course, willing to extend the time frame between the initial and rebuttal experts, as it makes sense given the amount of entities. As I mentioned to you, since the hearings on the MTC are not set until early June and, if granted, the court will likely allow 30 days, that only allows approximately 3 months for my experts to render their opinions (and that assumes I am provided everything requested and granted by the Court). Therefore, I think we should be realistic and extend it out further. I will look back at the scheduling order and suggest some dates on Monday.

As you have noticed, I have redacted financial numbers from the pleadings I have filed this week to maintain the confidentiality and submitted the exhibits in camera. This has been much easier than seeking an order sealing with each filing. I assume that the redactions are sufficient to meet your concerns at this point. If not, let's discuss another protocol for filings next week before we finalize a modified confidentiality agreement.

Dana A. Dwiggins
SOLOMON DWIGGINS & FREER, LTD.
Direct: 702.589.3505
Email: ddwiggins@sdfnvlaw.com

From: Colby Williams [mailto:jcw@cwlawlv.com]
Sent: Friday, May 18, 2018 2:31 PM
To: Dana Dwiggins <ddwiggins@sdfnvlaw.com>
Cc: Phil Erwin <pre@cwlawlv.com>; Tess E. Johnson <tjohnson@sdfnvlaw.com>; Erin L. Hansen <ehansen@sdfnvlaw.com>; Elizabeth Brickfield <EBrickfield@dickinson-wright.com>; Joel Z. Schwarz <JSchwarz@dickinson-wright.com>
Subject: Re: Canarelli

Dana,

Adding our co-counsel to this chain. I spoke with Larry today regarding the various action items identified in our recent meet and confer sessions. I address them below in no particular order.

1. Modification of Confidentiality Agreement

Respondents are amenable to modifying the Confidentiality Agreement to exclude the purchased entities from its purview with the exception of AWH Ventures and AWDI. For clarity, confidential information of the parties (e.g., Scott, Larry/Heidi, Ed Lubbers' Estate), the Siblings Trusts, SJA, AWH Ventures, and AWDI would remain subject to the order. Additionally, in exchange for agreeing to the modification, we want an agreement that Petitioner will not file a sanction motion related to the disclosure of any alleged confidential information in the BK filings.

2. Modification of the Scheduling Order

Respondents are amenable to extending the expert disclosure and related deadlines. My recollection is that you had tentatively proposed extending these by 90 days or so. Let me know if that is the case and whether you want to submit a proposed new schedule for our consideration. The one thing we desire on this issue is to build in additional time between the disclosure of initial expert reports and the disclosure of rebuttal expert reports. Given the amount and type of financial information at issue, we think 60 days between these two deadlines is appropriate.

3. ESI Searches

We are preparing an expanded list of search terms to run against Ed's ESI as well as Larry's and Heidi's. Additionally, we will search Bob Evans' and Teresa O'Malley's ESI on the theory that they acted as agents of the former trustees in connection with the SCIT. In other words, we do not want the fact that we have agreed to search the ESI of Bob and Teresa, who are employees of AWDI, to be used to argue that the former trustees have possession, custody or control over other AWDI employees.

Please confirm that the foregoing is agreeable.

As far as other items from the meet and confer, we agreed to provide supplemental responses to Larry/Heidi's and Ed's responses by May 31. You agreed to supplement Scott's responses to Larry/Heidi's document requests by the same date. You advised that you are not willing to supplement Scott's interrogatory responses. We advised that we will await Scott's supplemental responses on May 31 before determining whether to file a motion to compel.

Let me know if you wish to discuss anything further.

Thanks,
Colby

J. Colby Williams, Esq.
Campbell & Williams
700 South Seventh Street
Las Vegas, Nevada 89101
T: 702.382.5222
F: 702.382.0540
E: jcw@cwlawlv.com

From: Dana Dwiggins <ddwiggins@sdfnvlaw.com>
Date: Thursday, May 17, 2018 at 2:37 PM

To: Colby Williams <jcw@cwlawlv.com>
Cc: Phil Erwin <pre@cwlawlv.com>, "Tess E. Johnson" <tjohnson@sdfnvlaw.com>, "Erin L. Hansen" <ehansen@sdfnvlaw.com>
Subject: Canarelli

Colby,

I wanted to confirm that you will be discussing with Larry tomorrow the following:

1. Limiting the confidentiality agreement; and
2. Amending the scheduling order.

If you could provide me with a response to these two items before the close of business tomorrow, I would appreciate it.

You were also going to prepare preliminary reports on search terms so we can attempt to reach an agreement. You were also going to confirm the individuals' emails that will be searched in addition to Bob Evans and Theresa O'Malley.

I know there were other issues we discussed; however, these are the ones that I thought you were going to follow up with by the end of the week. Thank you.

Dana A. Dwiggins
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EXHIBIT 4

From: Ed Lubbers [ELubbers@LubbersLaw.com]
Sent: 11/15/2012 5:59:52 PM
To: Bob Evans [BEvans@AmericanWesthomes.com]; Dianne Ferraro [DFerraro@AmericanWesthomes.com]; Teresa OMalley [TOmalley@AmericanWesthomes.com]
Subject: Agenda
Attachments: 11 16 2012.doc

Edward C. Lubbers
Lubbers Law
8345 West Sunset Road
Suite 250
Las Vegas, NV 89113-2092
702-257-7575
702-480-6197 cell
elubbers@lubberslaw.com

Canarelli/American West Companies
AGENDA
November 17, 2012

A. DOCUMENTS

B. TOPICS

1.
2.
3.
4.

Redacted

5.
6.
7.
8.
9.
10. Scott – lawsuit threatened

DECLARATION OF DAVID S. LEE

DECLARATION OF DAVID S. LEE

I, DAVID S. LEE, declare as follows:

1. I am a partner in the law firm Lee, Hernandez, Landrum, & Carlson. I have been a licensed and practicing attorney in the State of Nevada continuously since 1996.

2. I make this Declaration in support of Respondents' Opposition to Motion for Determination of Privilege Designation of RESP013284-RESP013288 and RESP78899-RESP78900 .

3. I have personal knowledge of the facts stated in this Declaration unless otherwise so stated, and am competent to testify thereto if called upon to do so.

4. In or about early-mid October 2013, Edward Lubbers contacted our law firm, which was then known as Lee, Hernandez, Landrum, Garofalo & Blake, to represent him in connection with responding to several petitions that had been filed in probate court by the law firm Solomon Dwiggins & Freer. The petitions related to several trusts in which Scott Canarelli was a beneficiary and Mr. Lubbers was a trustee. One of the trusts at issue was The Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998 (the "SCIT"), which was the subject of Case No. P-13-078912-T.

5. I have reviewed certain of our firm's records related to our representation of Mr. Lubbers in this matter, and note that we provided Mr. Lubbers with a written retainer agreement on or about October 17, 2013. I am aware, however, that attorneys at our firm had substantive discussions with Mr. Lubbers about the representation prior to October 17 as set forth below.

6. I have reviewed my firm's billing records from October 2013 for the Canarelli trust matters, which were created at or about the time of the events recorded therein in the normal course of business. A true and correct copy of my firm's billing records for October 2013 for the

Canarelli trust matters is attached hereto. The records have been redacted to protect attorney work-product and attorney-client communications.

7. The subject billing records reflect that Charlene Renwick, another attorney at the firm, and I conducted a conference call with Mr. Lubbers on October 14, 2013 that lasted approximately a half hour. The general subject matter of the call reflected in the records is "re: responses to petition."

8. During the aforementioned conference call, I recall Mr. Lubbers asking Ms. Renwick and I several questions about his potential response to the petitions. I also recall Mr. Lubbers stating his views about several matters related to the petitions and potential strategies for defending against certain of the allegations contained therein. I further recall having additional discussions with Mr. Lubbers at different times about these same subjects during the period of time our firm represented him in these matters.

9. In or about mid-November 2013, the law firm Campbell & Williams substituted into this action on behalf of Mr. Lubbers in the place and stead of our firm as Ms. Renwick, who was going to be the attorney with primary responsibility on the Canarelli trust matters, was taking maternity leave.

10. I declare under penalty of perjury of the laws of the State of Nevada that the foregoing is true and correct.

DATED this 6 day of August, 2018.

DAVID S. LEE

DECLARATION OF CHARLENE N. RENWICK

DECLARATION OF CHARLENE N. RENWICK

I, CHARLENE N. RENWICK, declare as follows:

1. I am an attorney at the law firm Lee, Hernandez, Landrum, & Carlson. I have been a licensed and practicing attorney in the State of Nevada continuously since 2006.

2. I make this Declaration in support of Respondents' Opposition to Motion for Determination of Privilege Designation of RESP013284-RESP013288 and RESP78899-RESP78900 .

3. I have personal knowledge of the facts stated in this Declaration unless otherwise so stated, and am competent to testify thereto if called upon to do so.

4. In or about early-mid October 2013, Edward Lubbers contacted our law firm, which was then known as Lee, Hernandez, Landrum, Garofalo & Blake, to represent him in connection with responding to several petitions that had been filed in probate court by the law firm Solomon Dwiggins & Freer. The petitions related to several trusts in which Scott Canarelli was a beneficiary and Mr. Lubbers was a trustee. One of the trusts at issue was The Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998 (the "SCIT"), which was the subject of Case No. P-13-078912-T.

5. I have reviewed my firm's billing records from October 2013 for the Canarelli trust matters, which were created at or about the time of the events recorded therein in the normal course of business.

6. The subject billing records reflect that David Lee, one of the partners at our firm, and I conducted a conference call with Mr. Lubbers on October 14, 2013 that lasted approximately a half hour. My time entry specifically states, in part, "Lengthy t/s w/ E. Lubbers (client) re: retention for hearing on petitions filed by S. Canarelli, issues requiring clarification by court and

. . . ." The rest of the entry has been redacted to protect attorney-work product and attorney-client privileged communications.

7. During the aforementioned conference call, I recall Mr. Lubbers asking Mr. Lee and I several questions about his potential response to the petitions. I also recall Mr. Lubbers stating his views about several matters related to the petitions and potential strategies for defending against certain of the allegations contained therein. As the primary attorney on this file, I further recall having multiple discussions with Mr. Lubbers at different times about similar subjects during the period of time our firm represented him in these matters.

8. In or about mid-November 2013, the law firm Campbell & Williams substituted into this action on behalf of Mr. Lubbers in the place and stead of our firm as I was taking maternity leave.

9. I declare under penalty of perjury of the laws of the State of Nevada that the foregoing is true and correct.

DATED this 6 day of August, 2018.

CHARLENE N. RENWICK

EXHIBIT 5

LEE, HERNANDEZ, LANDRUM, GAROFALO & BLAKE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

7575 VEGAS DRIVE, SUITE 150
LAS VEGAS, NEVADA 89128

TAX I.D. NO. 88-1663241

TELEPHONE: (702) 880-9750
FACSIMILE: (702) 314-1210

Ed Lubbers
8345 W. Sunset Rd. #250
Las Vegas, NV 89113

APPROVAL SCOTT001
COMPANY LEEHE
VENDOR
PAY DATE 2/05/14
INVOICE # 84457
AMOUNT $7336.38
SVCS 2013/10:11
ACCT/PROJ 81000
SUB CC 0000

Statement Date: November 30, 2013
Statement No. 84457
Account No. 2087.035
Page: 1

Attn: Ed Lubbers

Lubbers - Trustee of Canarelli Trust

Fees

ENTERED FEB 03 2014

			Rate	Hours	
10/14/2013	CNR	Review and analysis of S. Canarelli's probate petitions and supporting trusts and documents in preparation for drafting responses to the same	300.00	1.50	450.00
	CNR	Review and analysis of statutory authority and case law pertaining to [redacted]	300.00	0.50	150.00
	CNR	Lengthy t/c w/ E. Lubbers (client) re: retention for hearing on petitions filed by S. Canarelli, issues requiring clarification by court and [redacted]	300.00	0.40	120.00
	DSL	Prepare for and attend conference call w/ E. Lubbers (trustee) re: response to petition	300.00	0.80	240.00
10/15/2013	DSL	Send and receive e-corr and enclosures from client re: [redacted]	300.00	0.70	210.00
	CNR	Review and draft mult. e-corres. from/to E. Lubbers (Client) re: [redacted]	300.00	0.80	240.00
	CNR	T/c w/ E. Lubbers (client) re: [redacted]	300.00	0.20	60.00
	CNR	Draft Response to Canarelli Petition re: Irrevocable Trust	300.00	0.30	90.00
	CNR	Draft Response to Canarelli Petition re: Secondary Trust	300.00	0.30	90.00
	CNR	Draft Response to Canarelli Petition re: Asset Protection Trust	300.00	0.30	90.00
10/16/2013	CNR	Lengthy t/c w/ E. Lubbers (client) re: [redacted]	300.00	0.30	90.00
	CNR	T/c w/ M. Solomon (counsel for Petitioner) re: list of inventory and accounting requested to be provided, proposed appraisal expert, counsel not willing to take Petition hearing off calendar as stipulated Order is required by Petitioner	300.00	0.20	60.00
	CNR	Draft and review mult. e-corres. to/from Client re: [redacted]			

Ed Lubbers

11/30/2013
Account No: 2087-035
Statement No: 84457

Lubbers - Trustee of Canarelli Trust

			Rate	Hours	
		[redacted]	300.00	0.40	120.00
10/17/2013	DSL	Outline course of action based upon discussions w/ client and opposing counsel	300.00	0.40	120.00
10/18/2013	CNR	Prepare for hearing on Petitions re: Scott Canarelli's trusts	300.00	0.60	180.00
	CNR	Attend hearing on Petitions re: Scott Canarelli's trusts (includes post hearing conferences w/ Petitioner's counsel and Client)	300.00	1.70	510.00
	CNR	Travel to/from Probate Court (601 Pecos Rd., Las Vegas, NV) for hearing on Petitions re: Scott Canarelli's trusts	300.00	1.00	300.00
	CNR	Review Supplement to Petition re: S. Canarelli Protection Trust	300.00	0.10	30.00
	DSL	Review results of hearing and outline future course of action based upon same	300.00	0.30	90.00
10/21/2013	DSL	Attend brief meeting w/ client re: proposed strategy/course of action	300.00	0.40	120.00
10/23/2013	CNR	Review and draft e-corres. from/to Client re: [redacted]	300.00	0.30	90.00
	CNR	Draft corres. to M. Solomon (counsel for petitioner) re: agreement to use S. Nicolatus as appraisal expert for sale of trust assets, clarification required regarding retention of the same and deadline for producing trust accounting	300.00	0.20	60.00
10/24/2013	CNR	Review e-corres. from Client re: [redacted]	300.00	0.10	30.00
	CNR	Brief t/c w/ Client re: [redacted]	300.00	0.10	30.00
10/28/2013	CNR	Draft and review brief e-corres. to/from Client re: [redacted]	300.00	0.20	60.00
	CNR	T/c w/ S. Nicolatus (valuation expert) re: retention per agreement w/ Petitioner's counsel and protocol for the same	300.00	0.20	60.00
	CNR	Draft e-corres. to S. Nicolatus (valuation expert) re: Canarelli petition, scope of retention, agreement for the same and conference to be set with Trustee and Petitioner's counsel	300.00	0.20	60.00
10/29/2013	CNR	Review and draft mult. e-corres. from/to B. Eagan (counsel for Petitioner) re: proposed Stipulation for valuation expert, proposed protocol for conference w/ S. Nicolatus (valuation expert), notice that Order referenced in Stipulation was not served and provision of the same	300.00	0.60	180.00
	CNR	Review proposed Stipulation b/w Client and Petitioner re: retention of S. Nicolatus (valuation expert) to value asset sold by Petitioner's Irrevocable Trust	300.00	0.10	30.00
	CNR	Review Order Granting Petition re: Irrevocable Trust	300.00	0.10	30.00
	CNR	Review Order Granting Petition re: Secondary Trust	300.00	0.10	30.00
	CNR	Review Order Granting Petition re: Protection Trust	300.00	0.10	30.00
	CNR	Review Court Minute Orders related to Canarelli Petitions and [redacted]			

			Rate	Hours	
		[redacted]			
	CNR	Draft and review mult. e-corres. to/from Client re: [redacted]	300.00	0.20	60.00
	CNR	Review and draft brief e-corres. from/to S. Nicolatus (valuation expert) re: availability for conference to discuss valuation of LLC/corp interests	300.00	0.50	150.00
10/30/2013	DSL	Review various orders rec'd from Canarelli's counsel and outline course of action based upon same	300.00	0.20	60.00
	CNR	T/c w/ Client re: [redacted]	300.00	0.40	120.00
	CNR	Draft e-corres. to counsel for Petitioner re: objection to Petitioner's inclusion of language in Petition Orders that was not included in Court's instruction or agreed to, request that counsel to resubmit orders w/out said language and the same to be addressed at follow up hearing if counsel refuses to comply with request	300.00	0.20	60.00
	CNR	T/c w/ B. Eagan (counsel for Petitioner) re: objection to Petitioner's inclusion of language in Petition Orders that was not included in Court's instruction or agreed to, counsel's position that said language simply sets forth a legal standard and position that the same is inappropriate based on instructions requested of the Court and is suited to alternative relief that may be subsequently sought by Petitioner	300.00	0.20	60.00
	CNR	Draft and review brief e-corres. to/from Client re: [redacted]	300.00	0.20	60.00
	CNR	Review and draft mult. e-corres. from/to S. Nicolatus (valuation expert) and B. Eagan (Petitioner's counsel) re: proposed protocol for conference b/w parties and expert and initial conference to discuss terms of retention	300.00	0.90	270.00
10/31/2013	CNR	Draft and review mult. brief e-corres. to/from B. Eagan (counsel for Petitioner) re: request to modify Petition Orders, refusal of the same and Trustee to maintain objection and place the same on the record with Court	300.00	0.30	90.00
	CNR	Draft brief e-corres. to Client re: [redacted]	300.00	0.10	30.00
	CNR	Draft Objections to Orders granting Petitions re: Canarelli Irrevocable Trust, Secondary Trust and Protection Trust	300.00	0.30	90.00
11/01/2013	CNR	Prepare for hearing to address Trustee's objections to Orders for Canarelli Petitions	300.00	0.40	120.00

Ed Lubbers

11/30/2013
Account No: 2087-035
Statement No: 84457

Lubbers - Trustee of Canarelli Trust

			Rate	Hours	
	CNR	Travel to/from Probate Court (601 Pecos, Las Vegas, NV) for hearing to address Trustee's objections to Orders for Canarelli Petitions	300.00	1.00	300.00
	CNR	Attend hearing to address Trustee's objections to Orders for Canarelli Petitions	300.00	1.70	510.00
	CNR	[redacted]	300.00	0.20	60.00
11/02/2013	DSL	Review results of hearing before trustee	300.00	0.20	60.00
11/07/2013	CNR	Lengthy t/c w/ S. Nicolatus (valuation expert), B. Eagan (Petitioner's counsel) and Client re: scope of retention for expert, terms of engagement, further conference to obtain additional information on entities to be evaluated for purpose of putting together scope of work, timeline for the same and applicable rate for work to be performed	300.00	0.50	150.00
	CNR	Review and draft brief e-corres. from/to Client re: [redacted]	300.00	0.20	60.00
11/12/2013	CNR	T/c w/ Client re: [redacted]	300.00	0.20	60.00
	CNR	Lengthy t/c w/ C. Williams (Client's counsel) re: [redacted]	300.00	0.30	90.00
		For Current Services Rendered		21.90	6,570.00

Recapitulation

Timekeeper	Title	Hours	Rate	Total
David S. Lee	Partner	3.20	$300.00	$960.00
Charlene N. Renwick	Associate	18.70	300.00	5,610.00

Expenses

10/24/2013	Photocopies - Letter to Solomon (1 x .10)	0.10
11/14/2013	Photocopies - Emails from file (107 x .10)	10.70
	Photocopies	10.80
10/24/2013	Postage - Letter to Solomon	0.46
	Postage	0.46
	Total Expenses	11.26

Advances

11/15/2013	Other Bankcard Center (BOW) - Conference call on 11/07/13	24.05
11/18/2013	Other First Legal Investigations - Deliver Responses (3) to District Court on 10/16/13 and Family Court on 10/17/13 (Inv. 3718714)	21.00
	Other	45.05
10/31/2013	Electronic Filing Fee (Per Court Order): 10/16/13 Trustee Edward C. Lubbers'	

Ed Lubbers

11/30/2013
Account No: 2087-035
Statement No: 84457

Lubbers - Trustee of Canarelli Trust

	Response to Petition to Assume Jurisdiction Over the Scott Canarelli Protection Trust; to Confirm Trustees; to Compel the Production of a Fully Executed Copy of the Trust; and to Compel an Inventory and an Accounting	233.19
10/31/2013	Electronic Filing Fee (Per Court Order): 10/16/13 Trustee Edward C. Lubbers' Response to Petition to Assume Jurisdiction Over the Scott Lyle Graves Canarelli Irrevocable Trust; to Confirm Edward C. Lubbers as Family and Independent Trustee; for an Inventory and Accounting; to Compel an Independent Valuation of the Trust Assets Subject to the Purchase Agreement, Dated May 31, 2013; and to Authorize and Direct the Trustee and Former Trustees to Provide Settlor/Beneficiary With Any and All Information and Documents Concerning the Sale of the Trust's Assets Under Such Purchase Agreement	233.19
10/31/2013	Electronic Filing Fee (Per Court Order): 10/16/13 Trustee Edward C. Lubbers' Response to Petition to Assume Jurisdiction Over the Scott Lyle Graves Canarelli Irrevocable Trust - Secondary Trust; to Confirm Trustee; and to Compel an Inventory and an Accounting	233.19
10/31/2013	Electronic Filing Fee (Per Court Order): 10/31/13 Trustee's Objection to Order Granting Petition to Assume Jurisdiction Over the Scott Lyle Graves Canarelli Irrevocable Trust - Secondary Trust; to Confirm Trustee; and to Compel an Inventory and an Accounting	3.50
10/31/2013	Electronic Filing Fee (Per Court Order): 10/31/13 Trustee's Objection to Order Granting Petition to Assume Jurisdiction Over the Scott Lyle Graves Canarelli Irrevocable Trust; to Confirm Edward C. Lubbers as Family and Independent Trustee; for an Inventory and Accounting; to Compel an Independent Valuation of the Trust Assets Subject to the Purchase Agreement, Dated May 31, 2013; and to Authorize and Direct the Trustee and Former Trustees to Provide Settlor/Beneficiary With Any and All Information and Documents Concerning the Sale of the Trust's Assets Under Such Purchase Agreement	3.50
10/31/2013	Electronic Filing Fee (Per Court Order): 10/31/13 Objection to Order Granting Petition to Assume Jurisdiction Over the Scott Canarelli Protection Trust; to Confirm Trustees; to Compel the Production of a Fully Executed Copy of the Trust; and to Compel an Inventory and an Accounting	3.50
	Electronic Filing Fee (Per Court Order):	710.07
	Total Advances	755.12
	Total Current Work	7,336.38
	Balance Due	$7,336.38

EXHIBIT 6

STIP

MARK A. SOLOMON, ESQ.
Nevada Bar No. 00418
Email: msolomon@sdfnvlaw.com
BRIAN P. EAGAN, ESQ.
Nevada Bar No. 09395
Email: beagan@sdfnvlaw.com
SOLOMON DWIGGINS & FREER, LTD.
Cheyenne West Professional Centré
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: (702) 853-5483
Facsimile: (702) 853-5485

Attorneys for Petitioner, Scott Canarelli

DISTRICT COURT

COUNTY OF CLARK, 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 Hearing Date: N/A Hearing Time: N/A

STIPULATION AND ORDER APPOINTING VALUATION EXPERT AND CLARIFYING ORDER

WHEREAS on October 24, 2013, this Court entered the Order Granting the Petition to Assume Jurisdiction Over the Scott Lyle Graves Canarelli Irrevocable Trust; to Confirm Edward C. Lubbers as Family and Independent Trustee; for an Inventory and Accounting; to Compel an Independent Valuation of the Trust Assets Subject to the Purchase Agreement, dated May 31, 2013; and to Authorize and Direct the Trustee and Former Trustees to Provide Settlor/Beneficiary with any and all Information and Documents Concerning the Sale of the Trust's Assets Under Such Purchase Agreement ("Order");

WHEREAS the Order provides, in pertinent part, that:

> IT IS HEREBY FURTHER ORDERED that Edward Lubbers, the Family and Independent Trustee of the [Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998 (the "Irrevocable Trust")], shall prepare and produce to Scott Canarelli, Settlor and Beneficiary of the

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Irrevocable Trust, an inventory and an accounting of the Irrevocable Trust from February 24, 1998, the date of the Irrevocable Trust's creation, through the present date within sixty (60) days of entry of this order;

. . .

IT IS HEREBY FURTHER ORDERED that the Irrevocable Trust is hereby authorized and directed to retain a neutral valuator on behalf of Scott Canarelli to value the assets held by the LLCs and the Corporations that were subject to the Purchase Agreement, dated May 31, 2013, and that Edward Lubbers, Lawrence Canarelli and Heidi Canarelli shall fully cooperate with and facilitate such valuation;

IT IS HEREBY FURTHER ORDERED that the hearing regarding the determination of whether Western Valuation Advisors, the valuator proposed by Scott Canarelli, shall be retained to valuate the assets held by the LLCs and the Corporations that were subject to the Purchase Agreement, dated May 31, 2013, shall be and hereby is continued to Friday, November 1, 2013, at 9:30 a.m., unless Scott Canarelli and Edward Lubbers can agree regarding the same and then such parties shall so stipulate in advance of such hearing and vacate the same;

IT IS HEREBY FURTHER ORDERED that Edward Lubbers, the current Family and Independent Trustee of the Irrevocable Trust, and Lawrence Canarelli and Heidi Canarelli, the former Family Co-Trustees of the Irrevocable Trust, shall provide to Scott Canarelli any and all information and documentation within his or her knowledge or control concerning the Purchase Agreement, dated May 31, 2013, including, without limitation, any and all information and documents in his or her control regarding the advisability, necessity, fairness and reasonableness of all aspects of the transaction and whether it was in the best interest of the Irrevocable Trust.

WHEREAS on October 31, 2013, counsel for Edward C. Lubbers filed a limited objection to the Order regarding the language concerning the Trustee's agreement to provide the Beneficiary with information and documentation concerning the Purchase Agreement, dated May 31, 2013, on the grounds that such language were not specifically set forth in the petition or agreed to at the hearing, to wit: ". . . including, without limitation, any and all information and documents in his or her control regarding the advisability, necessity, fairness and reasonableness of all aspects of the transaction and whether it was in the best interest of the Irrevocable Trust;"

WHEREAS on November 1, 2013, this Court held a hearing regarding the determination of a valuation expert and heard Edward C. Lubbers' limited objection to the language of the Order;

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WHEREAS, at such hearing, the Parties agreed to the appointment of STEPHEN NICOLATUS of WESTERN VALUATION ADVISORS to valuate the assets held by the LLCs and Corporations that were subject to the Purchase Agreement, dated May 31, 2013, pursuant to the terms of the Order; and

WHEREAS, at such hearing, the Court declared that the wording of the Order contemplates the scope of information and documents that Edward Lubbers, the current Family and Independent Trustee of the Irrevocable Trust, and Lawrence Canarelli and Heidi Canarelli, the former Family Co-Trustees of the Irrevocable Trust, shall provide to Scott Canarelli concerning the Purchase Agreement, dated May 31, 2013, but does not establish the standard for the determination of the actions of such Trustees vis-à-vis the Purchase Agreement, dated May 31, 2013, as such standard will be determined at the appropriate time in the future, if necessary, with all parties reserving their respective positions and right to address the Court on this issue.

ACCORDINGLY, Petitioner, SCOTT CANARELLI, Settlor and Beneficiary of the Irrevocable Trust by and through his counsel of record, the law firm of SOLOMON DWIGGINS & FREER, LTD. and EDWARD LUBBERS, Successor Family and Independent Trustee of the Irrevocable Trust, by and through his counsel of record, the law firm of CAMPBELL & WILLIAMS, HEREBY STIPULATE AND AGREE AS FOLLOWS:

IT IS HEREBY STIPULATED AND AGREED that EDWARD LUBBERS, Successor Family and Independent Trustee of the Irrevocable Trust, is hereby authorized and directed to retain STEPHEN NICOLATUS of WESTERN VALUATION ADVISORS as a valuation expert on behalf of Scott Canarelli to value the assets held by the LLCs and the Corporations that were subject to the Purchase Agreement, dated May 31, 2013, the cost of such valuation to be solely borne by the Irrevocable Trust; and

IT IS HEREBY STIPULATED AND AGREED that the wording of the Order regarding the Trustee's agreement to provide the Beneficiary with information and documentation concerning the

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Purchase Agreement, dated May 31, 2013, contemplates the scope of information and documents that Edward Lubbers, Lawrence Canarelli and Heidi Canarelli shall provide to Scott Canarelli concerning such purchase agreement, but does not establish the standard for the determination of the actions of such Trustees vis-à-vis the Purchase Agreement, dated May 31, 2013, as such standard will be determined at the appropriate time in the future, if necessary, with all parties reserving their respective positions and right to address the Court on this issue.

DATED November 25th, 2013.

SOLOMON DWIGGINS & FREER, LTD.

BRIAN P. EAGAN, ESQ.
Nevada State Bar No. 09395
9060 W. Cheyenne Avenue
Las Vegas, Nevada 89129

Attorneys for Scott Canarelli

DATED November 25th, 2013.

CAMPBELL & WILLIAMS

J. COLBY WILLAMS, ESQ.
Nevada State Bar No. 05549
700 S. Seventh Street
Las Vegas, Nevada 89101

Attorneys for Edward Lubbers

IT IS SO HEREBY ORDERED.

DATED this 26th day of November, 2013.

DISTRICT COURT JUDGE

Submitted by:
SOLOMON DWIGGINS & FREER, LTD.

MARK A. SOLOMON, ESQ.
Nevada State Bar No. 00418
BRIAN P. EAGAN, ESQ.
Nevada State Bar No. 09395
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Las Vegas, Nevada 89129

Attorneys for Petitioner, Scott Canarelli

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EXHIBIT 7

SOLOMON DWIGGINS & FREER, LTD.

Attorneys At Law

Mark A. Solomon
Dana A. Dwiggins
Alan D. Freer
Brian K. Steadman

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Brian P. Eagan
Robert D. Simpson
Jeffrey P. Luszeck
Ross E. Evans
Jordanna L. Evans
Alexander G. LeVeque
Joshua M. Hood
Bri F. Issurdutt

Of Counsel
Steven E. Hollingworth

December 6, 2013

J. Colby Williams, Esq.
CAMPBELL & WILLIAMS
700 South Seventh Street
Las Vegas, NV 89101

RE: Scott Canarelli Trusts

Dear Colby:

Thank you for your letter of December 6, 2013. We will direct all communications to you and serve you with a copy of any future court filings. However, until we receive the substitution of counsel, we will also be required to serve court filings upon the Lee Hernandez firm.

We agree the accountings are due no later than Monday, December 30, 2013, and we are agreeable to the secure online dropbox mechanism you have proposed for the accountings and backup documentation.

As you probably know, Scott was never told about the sale of the trust assets until after the fact, and we still have questions about the appropriateness of the sale in the first instance. Since we cannot answer those questions until we receive the accountings, and perhaps other information including appraisal information, Scott is being careful not to agree or do anything that would estop him from seeking to unwind the sale if we determine that is appropriate. I assume that is what he told or meant to tell Ed at the December 3, 2013, meeting you reference. If you would like to stipulate around this issue so as to assist Ed in meeting his fiduciary obligations to invest the funds in his hands, I am sure we can work something out that is satisfactory to both sides.

We look forward to working with you on this matter.

Very truly yours,

Mark A. Solomon

MAS/beb
cc: Client
Brian P. Eagan, Esq.

EXHIBIT 8

SOLOMON | DWIGGINS | FREER LTD
TRUST AND ESTATE ATTORNEYS

Mark A. Solomon
Dana A. Dwiggins
Alan D. Freer
Brian K. Steadman

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Direct Dial (702) 589-3555
afreer@sdfnvlaw.com

December 9, 2014

VIA HAND DELIVERY
J. Colby Williams, Esq.
CAMPBELL & WILLIAMS
700 South Seventh Street
Las Vegas, Nevada 89101

Re: *The Scott Lyle Graves Canarelli Irrevocable Trust; The Scott Lyle Graves Canarelli Irrevocable Trust – Secondary; and The Scott Canarelli Protection Trust,*

Dear Colby:

This letter follows my letter dated July 28, 2014, and the supplemental documents your office has made available to us, via the "Accounting" Dropbox, on or around September 4, 2014, consisting of general ledgers and journal entries for both the Scott Canarelli Irrevocable Trust and Protection Trust.

Dan Gerety has now had an opportunity to review the supplemental documents provided. Unfortunately, the documents provided do not resolve the issues initially raised in Mr. Gerety's letter dated May 5, 2014, and the accompanying objection to accounting set forth in my letter dated May 6, 2014.

In a last effort to resolve the accounting and information request issues without further litigation, Mr. Gerety has drafted an additional letter dated November 21, 2014, which supplements his letter of May 5 and outlines the information necessary to evaluate the accountings. A copy of Mr. Gerety's letter is enclosed for your review. For convenience, I also enclose is a copy of Mr. Gerety's May 5.

As the issues regarding the accounting have been pending for quite some time, I request that the information identified in Mr. Gerety's letters be produced within the next thirty (30) days, which would be on or before January 9, 2015. Should you wish to discuss this matter further, please do not hesitate to contact me at my direct line stated above.

Best Regards,

Alan D. Freer

Encl.

cc: Scott Canarelli
Dan Gerety, CPA

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW

VIA EMAIL December 12, 2014

Alan D. Freer, Esq.
Solomon Dwiggins & Freer, Ltd.
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129

Re: *Scott Canarelli Trusts – Case Nos. P-13-078912-T; P-13-078913-T; P-13-078919-T*

Dear Alan:

I am in receipt of your letter dated December 9, 2014. I will address the matters contained therein, but let me begin by expressing my disappointment that you did not pick up the phone and call me if you (or Mr. Gerety) believed we had not provided the information requested and discussed in our previous communications about the prior accountings. You will recall that I raised this very subject in my email to you on July 30, 2014 wherein I responded to your July 28, 2014 letter threatening to file a petition with the Probate Court at that time. A copy of that e-mail is included herewith for your convenience. The upshot of that correspondence and the instant response is simply this – our office, Ed Lubbers, as Trustee of Scott Canarelli's various trusts, and the personnel at American West have bent over backwards to produce whatever documentation has been requested in connection with the independent valuations being performed by Western Valuation Advisors and Houlihan Capital as well as your office's review of the prior accountings. The volume of documents produced is well into the many thousands of pages, we have diligently facilitated responses to the many questions posed by the valuators, and we have further arranged multiple in-person meetings to walk all concerned parties and their representatives through the information provided. In short, our track record of cooperating on the production of information is well established.

Turning to the specific issue of our purported failure to produce K1's issued to the trust, *see* Gerety Letter dated 11/21/14 at p. 4, I advised you and Mark on September 8, 2014 that we had uploaded the subject K1's to the Accountings dropbox. A copy of my e-mail dated September 8 is also being submitted herewith for your convenience. At no time in the intervening 3 months, from September 8 until I received your letter on December 9, did you or Mr. Gerety advise you were having trouble accessing the K1's. A simple phone call is all that would have been required to address the problem. Instead,

700 SOUTH SEVENTH STREET
LAS VEGAS, NEVADA 89101

PHONE: 702/382-5222
FAX: 702/382-0540

Mr. Gerety insinuates in his letter that this can be construed as an attempt by the Trustee "to avoid his duties to account to the beneficiary and to keep him informed as to the management of the trust assets." Gerety Letter at p. 1. This is both false and offensive. In any event, we are having delivered to Mr. Gerety's office on Monday, December 15, 2014, a CD with all of the K1's contained thereon. We are also going to reload the K1's into the Accountings dropbox so that your office can access them as well. Should you continue to have trouble accessing these materials I would again ask you to simply advise us of any issues.

With respect to Mr. Gerety's complaints about the purported failure to produce McGladrey's work papers, I addressed this issue in my September 8 email as well. Specifically, I explained that McGladrey's attorneys had advised me that the only other materials in the firm's possession concerning the subject trusts would be "grouping reports" that compile and organize the general ledgers, the journal entries, and the K1's. I further explained that McGladrey's attorneys advised that they considered these materials to be the firm's work product that would not be produced absent a subpoena, and even then may be contested. This is McGladrey's position, not ours. Given that Mr. Gerety was a longtime employee/partner at McGladrey—including during a portion of the time the firm prepared certain of the financial statements at issue—he must be familiar with this policy. That said, and as I explained previously, if you and or Mr. Gerety genuinely believe you need this information from McGladrey in order to evaluate the prior accountings, I am happy to discuss the best approach for trying to obtain it.

Given Mr. Gerety's myriad of criticisms regarding McGladrey's work in connection with Scott's trusts up though 2012, none of which are agreed to or conceded, please be advised that Mr. Lubbers, in his capacity as Trustee, intends to retain Mr. Gerety's firm to perform the 2014 accountings of Scott's trusts so as to avoid these complaints on a going forward basis.

In closing, let me summarize: (i) we disagree with the allegations and insinuations contained in Mr. Gerety's latest letter and reserve the right to contest the same at the appropriate time; (ii) we will, however, reproduce the K1's in the manner set forth above and will work with you to address how best to obtain the "grouping reports" from McGladrey should you/Mr. Gerety determine that you/he truly need them; (iii) Mr. Lubbers intends to hire Mr. Gerety's firm to perform the 2014 accountings for Scott's trusts in light of his professed knowledge about what is required by NRS Chapter 165, et seq.; and (iv) should you have any questions, comments or require further information, please call me so that we may both avoid having to write letters like this in the future.

The foregoing is not meant to be a full expression of our client's rights, defenses, or positions all of which are expressly and impliedly reserved and not waived.

Very truly yours,

CAMPBELL & WILLIAMS

J. Colby Williams, Esq.

JCW/
cc: Donald J. Campbell, Esq.
Mark A. Solomon, Esq.
Edward Lubbers, Esq.
(all via e-mail)

[redacted]

EXHIBIT 9

SUBMITTED UNDER SEAL
IN CAMERA PURSUANT TO
CONFIDENTIALITY
AGREEMENT

Consent dated November 18, 2015

EXHIBIT 10

RSPN
Dana A. Dwiggins (#7049)
Jeffrey P. Luszeck (#9619)
Tess E. Johnson (#13511)
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tjohnson@sdfnvlaw.com

Attorneys for Scott Canarelli

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 **Hearing Date: July 26, 2018** **Hearing Time: 9:30 a.m.**

PETITIONER'S RESPONSE TO RESPONDENTS' OBJECTIONS TO THE DISCOVERY COMMISSIONER'S APRIL 20, 2018 REPORT AND RECOMMENDATIONS.

Petitioner, Scott Canarelli ("Petitioner" or "Scott"), beneficiary of The Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998 (the "SCIT"), by and through his counsel, the law firm of Solomon Dwiggins & Freer, Ltd., hereby submits this Response to Respondents Lawrence Canarelli, Heidi Canarelli and Edward Lubbers' ("Lubbers") (collectively the "Respondents") Objection to the Discovery Commissioner's April 20, 2018 Report and Recommendations as it relates to the Motion to Compel Disclosure of Daniel T. Gerety, CPA's Records Relating to the Administration of the Scott Lyle Graves Canarelli Irrevocable Trust ("Motion to Compel").[1]

[1] *See* Discovery Commissioner's Report and Recommendations for the Motion to Compel Edward Lubbers' Deposition, Discovery Commissioner's Report and Recommendations for the Motion to Compel Edward Lubbers' Responses to Scott Canarelli's Request for Production Nos. 28-33, and Discovery Commissioner's Report and Recommendations for: (1) the Motion to Compel Disclosure of Daniel T. Gerety, CPA's Records Relating to the Administration of the

> We will compile, form the information you provide, the accounting and the related schedules for the period January 1, 2014 to December 31, 2014, to be included ***in the form prescribed by the Clark County District Court of Nevada*** and issue an accountants' report thereon in accordance with Statements on Standards for Accounting and Review Services issued by the American Institute of Certified Public Accountants.
>
> The objective of a compilation is to assist you in presenting financial information in the form of financial statements. We will utilize information that is your representation without undertaking to obtain or provide any assurance that there are no material modifications that should be made to the financial statements ***for them to be in conformity with the requirements prescribed by the Clark County District Court of Nevada.***[38]

Consequently, Lubbers' contention that he sought to protect himself in litigation is contrary to not only his fiduciary duty to provide an accounting and supporting records to Petitioner but also his own representations to this Court.

The two remaining factors also weigh in Petitioner's favor. Petitioner is clearly party for whose benefit Gerety's services were procured. Gerety was retained to ensure that the Prior Accountings for the Trust, of which Scott was a beneficiary, complied with the Trust and Nevada statutory requirements. Further, litigation was not pending or threatened as it related to Gerety's limited scope of preparing the accountings the 2014 to 2016 accountings.

At the time Lubbers retained Gerety to prepare the 2014 accounting, there were several unanswered questions raised by Petitioner through Gerety that potentially could result in litigation. Lubbers did not retain Gerety to respond to such questions or otherwise reconcile the Prior Accountings. In fact, Gerety prepared additional opinions on behalf of Petitioner outlining the deficiencies in the Prior Accountings and continued to meet and communicate with Lubbers' agents in an effort to obtain supporting documents and/or clarification of these deficiencies. These meetings and communications continued for over two (2) years after Lubbers retained Gerety to prepare the 2014 accounting. Lubbers not only consented to the same but he never objected to or otherwise contended that Gerety was precluded from participating in these meetings or continuing to attempt to reconcile the Prior Accountings on behalf of Petitioner.

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[38] *See* Engagement Letter attached hereto for *in camera* review as **Exhibit 3** (Emphasis added).

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This is not a situation where the Discovery Commissioner has allowed Petitioner unfettered access to all of Gerety's communications with Lubbers. Instead, the Discovery Commissioner has undergone efforts to protect communications Lubbers may have had with Gerety that related not to the Trust's administration, but in defending himself in this litigation.

IV. CONCLUSION

For the reasons stated above, Scott Canarelli respectfully requests that this Court deny uphold the Discovery Commissioner's Report and Recommendations as it relates to Respondents' Objections to the Discovery Commissioner's April 20, 2018, Report and Recommendations.

DATED this 12th day of July, 2018.

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CERTIFICATE OF SERVICE

PURSUANT to NRCP 5(b), I HEREBY CERTIFY that on July 12th, 2018, I served a true and correct copy of the **PETITIONER'S RESPONSE TO RESPONDENTS' OBJECTIONS TO THE DISCOVERY COMMISSIONER'S APRIL 20, 2018, REPORT AND RECOMMENDATIONS** to the following in the manner set forth below:

Via:

[___] Hand Delivery

[___] U.S. Mail, Postage Prepaid

[___] Certified Mail, Receipt No.: _____

[___] Return Receipt Request

[X] E-Service through the Odyssey eFileNV/Nevada E-File and Serve System, as follows:

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EXHIBIT 11

CONFIDENTIALITY AGREEMENT

Respondents, Heidi Canarelli, Lawrence Canarelli and Edward Lubbers, trustee and former trustees of The Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998 ("Trust"), by and through their counsel, J. Colby Williams and Hunter Campbell of the law firm Campbell and Williams and Elizabeth Brickfield of the law firm Dickinson Wright PLLC, and Petitioner, Scott L. Canarelli, as Grantor, Beneficiary and custodial parent of Gage, Degon, Scottlyn Canarelli, by and through their counsel of record, Mark A. Solomon and Dana A. Dwiggins of the law firm Solomon Dwiggins & Freer, Ltd. and (together with Respondents, the "Parties), stipulate that discourse and discovery activity in the matter known as In the Matter of the Scott Lyle Graves Canarelli Irrevocable Trust dated February 24, 1998, (the "Action") are likely to involve the production of confidential, proprietary, or private information for which special protection from public disclosure and use for any purpose other than prosecuting this litigation would be warranted.

Accordingly, the Parties agree to the following Confidentiality and Protective Agreement ("Agreement"). The Parties acknowledge that this Agreement does not confer blanket protections on all disclosures or responses to discovery and that the protection it affords extends only to the limited information or items that are entitled under the applicable legal principles to treatment as confidential and protected.

The Parties hereby STIPULATE as follows:

1. This Agreement shall be applicable to and govern all depositions, documents, financial information or things produced by a party or non-party ("Disclosing Party") in connection with this litigation voluntarily or in response to court orders, requests for production of documents, requests for inspection of things, answers to interrogatories, responses to requests for admissions, answers to deposition questions and all other discovery taken pursuant to the Nevada Rules Of Civil Procedure, (hereafter "Discovery Material") that the Disclosing Party designates as "Confidential."

2. In addition, any and all financial information not previously disclosed concerning the entities owned, in whole or in part by any and all of the parties in any capacity shall be deemed "Confidential" without the need to be designated as such; provided, however, that any assets solely owned by the Trust shall not be designated Confidential.

3. The Parties agree that it is the best interest of the Parties, all members of the Canarelli family, their trusts and any and all business enterprises owned in whole or in part by any members of the Canarelli family for information relating to the financial affairs of any of the above to be kept from the public record.

4. The Parties may make any and all financial information available as necessary to themselves, counsel to the Parties in this Action, including, associate attorneys, paralegals, secretarial staff, and other regular employees, as well as their accountants and expert witnesses, provided that no Discovery Material designated as "Confidential" and no financial information shall be disclosed to any expert witness other than an accountant unless and until such person has executed a Declaration of Compliance to be developed by the parties and their counsel.

5. Unless otherwise permitted by statute, rule or prior Court order, papers filed with the Court including Confidential Information shall be accompanied by a contemporaneous motion for leave to file those documents under seal.

6. It is the present intention of the Parties that the provisions of this Agreement shall govern disclosures and discovery in this Action and, if the Parties are unable to resolve their differences, shall be entitled to seek modification of this Agreement. This Agreement, however, may not be modified by the Parties hereto in any attempt to use the "Confidential" Discovery Material other than for purposes of this specific Action only.

7. The provisions of this Agreement shall, absent written permission of the Parties, continue to be binding throughout and after the conclusion of this Action, including without limitation any appeals in this Action. Within thirty (30) days after receiving notice of the entry of an order, judgment, or decree finally disposing of this Action, including the exhaustion of all permissible appeals, all persons and entities having received "Confidential" Discovery Material, shall either make a good faith effort to return such material and all copies thereof (including summaries and excerpts) to counsel for the Designating Party or destroy all such "Confidential" Discovery Material and copies thereof (including summaries and excerpts) and certify that fact to counsel for the Designating Party; provided, however, that Scott Canarelli and/or his attorneys or accountant(s) shall be entitled to retain a copy of any and all information relating to the assets of the Trust, value thereof, or information necessary to the reporting of tax information to the Internal Revenue Service or other governmental agency. Outside counsel for the Parties shall be entitled to retain all filings, court papers, deposition and trial transcripts, deposition and trial

exhibits, and attorney work product (regardless of whether such materials contain or reference Discovery Materials designated as "Confidential" by any Designating Party), provided that such outside counsel, and employees and agents of such outside counsel, shall not disclose any Confidential Information contained or referenced in such materials to any person except pursuant to court order, agreement with the Designating Party, or any governmental agency, including the Internal Revenue Service. All materials, if any, returned to the Parties or their counsel by the Court likewise shall be disposed of in accordance with this Paragraph.

8. If any person receiving Discovery Material covered by this Agreement is subpoenaed, served with a demand in another action to which he or she is a party, or served with any other legal process (the "Receiving Person") by one not a Party to this Action, the legal process of which seeks disclosure or production of Discovery Material that was produced or designated as "Confidential" by someone other than the Receiving Person, the Receiving Person shall give actual written notice, by hand or facsimile transmission, within five (5) business days of receipt of such subpoena, demand, or legal process, to the Designating Party. The Receiving Person shall not produce any of the Designating Party's "Confidential" Discovery Material, until the Designating Party gives notice to the Receiving Person that the Designating Party consents to production, or opposes production of its "Confidential" Discovery Material, and has had a reasonable opportunity to object to the production. The Designating Party shall be solely responsible for asserting any objection to the requested production and shall further be solely responsible for any attorney's fees or costs incurred by the Trust or Petitioner, including timely reimbursing the Trust and/or Petitioner for any such fees or costs. Nothing in this Paragraph shall be construed as requiring the Receiving Person or anyone else covered by this Agreement to challenge or appeal any order requiring production of "Confidential" Discovery Material covered by this Protective Order, nor shall this Paragraph be construed to subject such person to any penalties for non-compliance with any legal process or order, the filing of any tax returns, or as precluding such person from seeking any relief from any Court.

9. Nothing contained herein shall be construed or otherwise deemed to prohibit or limit the introduction of confidential or financial information into evidence at any trial or hearing of the within Action. If a Party wishes to place Confidential or financial information into evidence on the public record, such party must timely file a motion seeking such relief. Any otherwise Confidential or financial Information that is received into evidence on the public

record shall not be treated as Confidential Information in any appeal from any order or judgment entered by the District Court in the within Action.

10. This Agreement may be executed in counterparts, each of which shall constitute one and the same agreement.

Dated this 15 day of September, 2016

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Dated this __ day of September, 2016

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Dated this __ day of September, 2016

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record shall not be treated as Confidential Information in any appeal from any order or judgment entered by the District Court in the within Action.

10. This Agreement may be executed in counterparts, each of which shall constitute one and the same agreement.

Dated this __ day of September, 2016

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Dated this 21st day of September, 2016

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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 Hearing Date: August 29, 2018 Hearing Time: 1:30 p.m. ***Before the Discovery Commissioner***

REPLY TO OPPOSITION TO MOTION FOR DETERMINATION OF PRIVILEGE DESIGNATION OF RESP013284-RESP013288 AND RESP78899-RESP78900; AND OPPOSITION TO COUNTERMOTION FOR REMEDIATION OF IMPROPERLY DISCLOSED ATTORNEY-CLIENT PRIVILEGED AND WORK PRODUCT PROTECTED MATERIALS

Petitioner Scott Canarelli ("Petitioner"), beneficiary of The Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998 (the "SCIT"), by and through his Counsel of Record, the law firm of Solomon Dwiggins & Freer, Ltd., hereby submits his Reply to Opposition to Motion for Determination of Privilege Designation as to documents produced by Respondents Lawrence and Heidi Canarelli (the "Canarellis"), and Frank Martin, Special Administrator of the Estate of Edward C. Lubbers ("Lubbers") (collectively the "Respondents") and identified by Bates labels RESP013284-RESP013288 and RESP78899-RESP78900, and Opposition to Countermotion for Remediation of Improperly Disclosed Attorney-Client Privileged and Work Product Protected Materials.

This Reply and Opposition are made and based on the Memorandum of Points and Authorities set forth herein, all of the papers and pleadings already on file with the Court, and any oral argument that the Court may entertain at the time of hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

[redacted]

Understanding the legal significance of the aforementioned facts, Respondents contend that Bates Labels RESP013284-RESP013288 ("Lubbers' Notes")[1] and RESP78899-RESP78900 ("Nicolatus' Meeting Notes")[2] (collectively "Disputed Notes") are privileged. Respondents' contention is far-fetched for reasons, including, but not limited to the following. Respondents, who have the heavy burden to prove that privilege attaches to either of the Disputed Notes, have failed to introduce any evidence that Lubbers' Notes are protected by the attorney-client privilege. Respondents' contention that the Typed Memo was drafted as "an aid" to assist Lubbers in an October 14, 2013 telephone conference with Counsel is based upon speculation and conjecture, as there is no evidence that said notes were: (1) ever provided to Lubbers' Counsel; or (2) that he

[1] *See* Motion, at In Camera Ex. 1. Lubbers' Notes are comprised of handwritten notes and the Typed Memo.

[2] *Id.* at In Camera Ex. 2.

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discussed any of the subject matter with his Counsel on October 14, 2013. Indeed, Respondents' reliance on the self-serving Declarations of David S. Lee and Charlene N. Renwick and their purported review of their "billing records" actually confirm that they have no specific recollection of what they discussed with Lubbers during the 19-24 minute conversation on October 14, 2013.

Respondents' claim that the Disputed Notes are further protected by the work product doctrine fails for the same reason; namely, they have not and cannot meet the stringent standard required to protect the notes from disclosure. Specifically, Respondents have failed to prove that said notes were prepared in "anticipation of litigation," even under the "totality of the circumstances test." Irrespective, the Disputed Notes would still not be privileged because they would merely constitute "ordinary work product" as opposed to "opinion work product." Opinion work product under NRCP 26(b)(3) only applies to the "mental impressions, conclusions, opinion, or legal theories of an attorney" and not to a client/party.

Each of Respondents' contentions, however, are refuted by the simple fact that the Typed Memo contains "facts" that are not protected under either the attorney-client privilege or work product doctrine. Lubbers' use of the words "believe" or "belief" does not convert facts that are otherwise subject to disclosure to mental impressions. While Lubbers states what he "believes" the court might find, he nonetheless confirmed such facts in the same document. Indeed, the question simply boils down to the following: in testifying truthfully under oath, would Petitioner illicit testimony from Lubbers during a deposition that supported the factual statements made in the Typed Memo. The answer is unequivocally yes.

In an effort to detract from the main issues in the Motion for Determination, however, Respondents make a number of red-herring arguments that Petitioner somehow violated ESI Protocol and the Confidentiality Agreement by attaching copies of the Disputed Notes to the Motion for Determination. Not only does this argument defy logic, because how can this Court determine whether the notes are in fact privileged without reviewing the same, but it is also inconsistent with what Respondents recently stated to Judge Gloria Sturman: that the Discovery Commissioner is the appropriate judicial officer to review the notes *in camera* to determine whether the documents are protected. For these reasons, and those set forth below, Petitioner

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respectfully requests that this Court grant the Motion for Determination in its entirety and deny the Countermotion.

II. RESPONSE TO RESPONDENTS' "FACTUAL BACKGROUND"

A. Respondents' Grossly Misstate the Purported "Adversarial Nature" of the Relationship Between Petitioner and Lubbers in 2012 and 2013.

In a desperate attempt to "claw-back" the Disputed, Respondents grossly misstate what they deem to be an "adversarial" relationship between Petitioner and Lubbers between 2012 through late 2015. While Petitioner concedes there was hostility between himself and the Canarellis as early as 2012, said hostility did not extend to Lubbers. To the contrary, as confirmed in correspondence to Respondents' Counsel, Petitioner was always fond of Lubbers and never had the intention of filing suit against him except as required to proceed against Larry and Heidi, at least until early 2017.[3] Petitioner's position regarding Lubbers is confirmed by correspondence dated November 14, 2012 ("November 2012 Letter"), the Initial Petition (upon which Respondents so heavily rely) and correspondence dated December 6, 2013 ("December 2013 Letter").

Specifically, the November 2012 Letter confirms that the "threatened litigation" was limited to the Family Trustees, which at that time were Larry and Heidi, for their unreasonable interpretation of the HEMS standard as it related to distributions. Indeed, Article V, Section 5.01 of the SCIT states that the Family Trustee(s), as opposed to the Independent Trustee, makes distributions.[4] Consequently, even if litigation was "threatened" on November 14, 2012 it was

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[3] *See* Correspondence to J. Colby Williams, Esq. dated December 30, 2015, a copy of which is attached hereto as **Exhibit 1** (Attachments Omitted). Petitioner's feelings regarding Lubbers in 2015 are consistent with his feelings in 2012 and 2013.

[4] *See* SCIT at Article V, Section 5.01, a copy of which is attached as Exhibit 1 to the Initial Petition filed on September 30, 2013 ("The Family Trustee shall pay to or apply for the benefit of the Grantor, the Grantor's spouse, and/or descendants of the Grantor who are then living even though not now living, as much of the net income and principal of the trust as the Family Trustee in the Family Trustee's discretion, deems appropriate for their proper, health, education, support and maintenance...").

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limited to issues concerning the Canarellis' unreasonable interpretation of the HEMS standard and to a request for accountings for both Trusts, all of which were functions of the Family Trustees. Respondents have failed to introduce any evidence that Lubbers believed that the litigation referenced in the November 2012 Letter was directed at him, individually, and/or in his capacity as Independent Trustee of the SCIT.[5]

Respondents' reliance on the Initial Petition fails for the same reason: any allegations of wrongdoing were directed against solely the Canarellis during their tenure as Family Trustee between February 24, 1998 and May 24, 2013. Respondents have failed to identify any allegations of wrongdoing levied against Lubbers. Indeed, the excerpts relied upon by Respondents in their Opposition specifically refer to the Canarellis by name and/or identify them in their capacity as Family Trustees:

- "Since the Irrevocable Trust's creation fifteen years ago, ***Petitioner has never received an inventory of the Irrevocable Trust's assets or an annual accounting***..." *See* Opposition, Ex. 1, Initial Petition at ¶ A.10 (Emphasis Added);

- "In or about May 2012, ***the Family Trustees became hostile toward Petitioner and stopped making distributions to Petitioner and/or his family***...The cessation of distributions followed receipt by Petitioner of ***a letter from Larry and Heidi that read that Larry and Heidi were 'not willing to continue financing [Petitioner's] existence' because 'it is against everything that [the Canarellis] think is good for [Petitioner].***" *Id.* ¶ A.13 (Emphasis Added);

- "...***Larry would not authorize the provision of an accounting and/or inventory of the Irrevocable Trust or its assets***. Further, the Independent Trustee admitted to Petitioner that he had little or no personal knowledge of the Irrevocable Trust's management or its assets despite serving as Independent Trustee since 2005." *Id.* ¶ A.15 (Emphasis Added); and

- "Thus, ***Larry had a conflict*** as both Co-Family Trustee of the Irrevocable Trust, on one hand, and Trustee of the Siblings Trust [sic] and manager of SJA." *Id.* ¶ A.20 (Emphasis Added).

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[5] Indeed, not even the Agenda that Lubbers sent to Larry and Evans on November 15, 2012 (which was not produced by Respondents until July 13, 2018, the date the Motion for Determination was filed), indicates that Petitioner was threatening him personally or in his capacity as Independent Trustee.

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While Lubbers was named a Party in the Initial Petition, it did not create an adversarial and/or hostile relationship between Petitioner and Lubbers because: (1) no claims were asserted against Lubbers (or the Canarellis for that matter); and (2) the only relief requested was to provide information relating to the SCIT's finances and the Purchase Agreement and to have an appraisal performed pursuant to the terms of the Purchase Agreement. Indeed, Lubbers was only named because he was the then acting Family Trustee and required to be named in the Initial Petition. Specifically, Petitioner's Prayer for Relief requested an Order from this Court directing Lubbers to provide: "an inventory and an accounting of the [SCIT] from February 24, 1998, the date of the [SCIT's] creation, through the present date," and "to provide Petitioner with any and all information and documents concerning the sale of the [SCIT's] assets subject to the purchase agreement."[6] Petitioner only wanted an accounting and documents relating to the sale. That is it. Simply because a beneficiary requests information and raises potential concerns regarding certain aspects of the trust administration to a trustee does not mean each and every aspect of trust administration becomes adversarial, hostile and/or subject to "anticipated litigation."[7] This is especially true when an event has yet to happen, *e.g.* the sale, when the November 2012 Letter was sent to Lubbers.

Finally, Respondents' reliance upon the December 2013 Letter is similarly misplaced, as said correspondence merely advised Respondents that Petitioner had questions regarding the appropriateness of the sale and was reserving his right to unwind the same.

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[6] *See* Opposition, Ex. 1, Decl. of Williams at 15: 1-4 and 12-16.

[7] Although irrelevant to the analysis of whether the Disputed Notes are privileged, Respondents spend two paragraphs misrepresenting the circumstances surrounding Lubbers' retention of Daniel Gerety, CPA in late 2014, which occurred nearly a year after the notes at issue were authored, to support what they deem was an adversarial relationship. Said argument fails, however, because the "Consent" executed by Lubbers (which provides in part "for the purpose of litigation matters" on Petitioner's behalf) was drafted by Gerety and constituted his interpretation of the proceeding (as opposed to Lubbers or Petitioner). Further, Petitioner's purported statement that there was "several unanswered questions that could result in litigation" pertained to accountings, or the lack thereof, between 1998 and 2012 when the Canarellis served as Family Trustees.

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B. Respondents' Contention That Lubbers' Notes Reflect Lubbers' Request For "Legal Advice" and/or Constitute His "Mental Impressions" Is Speculative, Self-Serving And Unsupported By The Evidence.

Although Respondents are apparently seeking to claw-back both the Typed Memo and handwritten portions of Lubbers' Notes, the Opposition focuses solely on the Typed Memo because it is so damning to their position. In that regard, Respondents' brazenly contend that the Typed Memo is protected by the attorney-client privilege based upon: (1) their belief that it was prepared by Lubbers in an anticipation of a telephone call with Lee, Hernandez, Landrum, Garofalo & Blake (LHLGB); (2) billing statements indicating a 19-24 minute telephone call between Lubbers and LHLCB occurred on October 14, 2013; (3) vague declarations from certain LHLGB attorneys who purportedly are able to recall specific questions and answers discussed during an initial telephone call that occurred nearly five (5) years ago; and (4) the Canarellis' interpretation of the Typed Memo. As will be shown herein, Respondents' self-serving beliefs are simply that: conjecture and speculation.

As an initial matter, other than the self-serving Declaration of J. Colby Williams that states "[i]n anticipation of the call with attorneys Lee and Renwick, Lubbers prepared type-written notes,"[8] Respondents have provided absolutely no evidence to support their contention that the Typed Memo was prepared in anticipation of a telephone call with LHLGB. Indeed, the Typed Memo does not include a date and/or any other indication as to when said document was written. While Petitioner concedes that somebody, presumably Lubbers, handwrote "10-14-13" on the Typed Memo, the handwriting provides no guidance as to when the document was typed, when the handwriting was added, what it meant and/or whether Lubbers intended to discuss the same with LHLGB (or any other law firm). Mr. Williams cannot attest to the same because he was not Counsel at such time.

Next, LHLGB's billing statements and the self-serving Declarations that were executed by Attorneys Lee and Renwick do not establish that Lubbers discussed any portion of the Typed Memo with them during the October 14, 2013 telephone call. It is difficult to fathom that Lee and

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[8] *See* Opposition, Ex. 1, Decl, of Williams at ¶ 12,

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Renwick can remember with any specificity what was discussed during the 19-24 minute telephone call that occurred nearly five (5) years ago, especially when the billing statements provide no further clarification (other than to generically state potential responses to a petition).[9] Indeed, the Declarations do not state that either has seen a copy of either portion of Lubbers' Notes (prior to or after the October 14, 2013 telephone conference), reviewed their client file for a copy of the same and/or reviewed any notes that they took as a result of the October 14, 2013 telephone call to actually confirm whether any of the contents in handwritten portion of Lubbers' Notes (or the Typed Memo) were discussed during such call. Further, the Declarations completely omit the fact that there were three (3) separate petitions filed concerning three (3) separate trust matters that were purportedly discussed with Lubbers (*i.e.* the Initial Petition, and Petition to Assume Jurisdiction that was filed in the Matter of THE SCOTT LYLES GRAVES CANARELLI IRREVOCABLE TRUST –SECONDARY TRUST, dated October 27, 2006, PROTECTION TRUST, Clark County Case No. P-13-078913-T and in the Matter of THE SCOTT CANARELLI PROTECTION TRUST, Clark County Case No. P-13-078919-T, all of which were filed on September 30, 2013).[10] To the contrary, Lee and Renwick generically state that they "have reviewed [their] firm's billing records from October 2013 for the Canarelli trust matters" and that said bills indicated that the "general subject matter of the call reflected in the records is "re: responses to petition.""[11]

This Court is well aware of the complexity of this matter. It is hard to fathom that during an initial consultation telephone call that lasted less than 24 minutes Lubbers discussed each of the topics in the handwritten notes, including (1) the relevant provisions of three separate trusts; (2) three separate pending petitions; (3) questions raised by the attorneys based upon their review of the documents before the call (as set forth in the billing records), and then further addressed the

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[9] *See* Opposition, Ex. 5.

[10] Copies of the cover pages for the Petitions to Assume Jurisdiction filed in the other trust matters are attached hereto as **Exhibits 2** and **3**.

[11] *See* Opposition, Ex. 4, Decl. of David S. Lee at ¶ 6.

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contents of the Typed Memo, which included issues totally outside the scope of the Initial Petition. This Court is able to easily assess the reasonableness of the same by reviewing the handwritten notes. Although the Initial Petition was neutral, at least as to Lubbers, because it merely sought the production of an accounting and documentation relating to the Purchase [redacted] the Typed Memo were never discussed with LHLGB in their totality.

Finally, Respondents' interpretation of the relevant portion of the Typed Memo is taken out of context and self-serving because any "beliefs" described in the same are based upon what happened, which on its face constitute facts. Irrespective of Lubbers' belief as to what a court might do, his notes confirmed the facts of what happened based upon his personal knowledge.

C. Nicolatus' Meeting Notes Were Also Created At A Time When Petitioner Had Not Asserted Any Claims Against Lubbers.

Respondents' description of the facts and circumstances regarding the preparation of the Nicolatus' Meeting Notes is similarly misplaced because when said notes were created on or around December 19, 2013 the instant litigation was administrative and not adversarial in nature. The fact that Petitioner had filed the Initial Petition requesting accounting information and documentation relating to the Purchase Agreement did not somehow create a hostile relationship between Petitioner and Lubbers. The fact that Petitioner reserved his right to unwind the sale also is of no consequence. At the time Petitioner did not have sufficient information relating to the sale and an appraisal had yet to be done pursuant to the terms thereof.

D. Respondents' Attempt To "Claw-Back" Lubbers' Notes Three Weeks After Petitioner Had Attached The Same As An Exhibit.

It is undisputed that Lubbers' Notes were produced by Respondents' on December 15, 2017 in their Initial Disclosure of Witnesses and Documents Pursuant to NRCP 16.1. It is also undisputed that when Petitioner referenced and attached Lubbers' Notes as an exhibit to his Surcharge Petition that was filed on May 18, 2018, Respondents had not taken the position that

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said documents were privileged. In fact, prior to that time, Respondents had clawed back multiple documents but not Lubbers' Notes. Notwithstanding, Respondents have the audacity to allege that Petitioner and/or his Counsel are somehow "exploiting" Respondents' efforts "in preparing for litigation that the work product doctrine is designed to prevent."

Respondents' failure to claw-back Lubbers Notes prior to June 5, 2018 is significant because it led Petitioner and his Counsel to reasonably conclude that Respondents were fully aware that they had disclosed Lubbers' Notes and were not claiming privilege. Indeed, in February 2018 (three months after Lubbers' Notes were disclosed), Respondents' Counsel, Joel Schwartz, sought to claw-back certain disclosed documents from Petitioner. The fact that Respondents' Counsel had in fact sought to claw-back certain documents that were Bates Numbered RESP013471-RESP013473, which were only a couple of hundred pages away from Lubbers' Notes that are Bates Numbered RESP00013284-RESP0013288, further supports Petitioner's belief that Respondents' Counsel had re-reviewed their disclosures on two separate occasions and were not claiming privilege or work product.[12]

Notwithstanding the foregoing, Respondents contend that Petitioner acted inappropriately by referencing and/or attaching a copy of Lubbers' Notes to his Supplement Surcharge Petition. Respondents' position is troubling in light of the fact that their Counsel did not seek to claw-back Lubbers' Notes until June 5, 2018, which is nearly three weeks after the Supplement Surcharge Petition was filed. In other words, if Lubbers' Notes are "clearly privileged" as Respondents now contend, they should have taken the necessary steps to claw-back the same prior to, or immediately after, the Supplement Surcharge Petition was filed.

Additionally (and although it bears no relevance as to whether Lubbers' Notes are in fact privileged), Respondents' complain that Petitioner somehow violated the Confidentiality Agreement and ESI Protocol because he did not redact Lubbers' Notes from his Supplement Surcharge Petition and "made affirmative use" of Lubbers' Notes in his Motion for

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[12] *See, e.g.*, Correspondence dated February 16 and 19, 2018, attached hereto as **Exhibits 4** and **5** respectively.

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Determination. Said arguments fail, however, because the Confidentiality Agreement was intended to protect only the Parties' financial information.[13] Consequently, Petitioner is not at fault for citing portions of a document that Respondents' inappropriately marked "Confidential" in its Supplement Surcharge Petition (or any other filing).

Finally, Respondents' contention that Petitioner violated the ESI Protocol because it disclosed the content of Lubbers' Notes to this Court, as opposed to "sequestering" the same, is similarly misplaced because it would be difficult, if not impossible, for this Court to determine whether Lubbers' Notes are in fact privileged without reviewing and/or being aware of its contents. Petitioner contends that the relevant portion of the Typed Memo constitute facts. As such, the only way for this Court to determine whether the privilege applies is by reviewing Lubbers' Notes. Any argument/insinuation from Respondents that this Court should not review Lubbers' Notes contradicts what they told Judge Gloria Sturman in correspondence dated August 13, 2018: "[u]nlike this Court, Commissioner Bulla will not be sitting as the ultimate trier of fact in this matter. Thus, we believe she is an appropriate "other judicial officer" capable of reviewing the notes in camera without creating the potential for possible recusal as referenced in *Lund*."[14]

Further, Lubbers' Notes were initially filed on May 18, 2018, months before the Motion for Determination was filed, and as such, have been a part of the Court Docket since said time. Pursuant to Section 21 of the ESI Protocol the Parties "may refer to the information contained in the privilege log" in order to assist the court in ruling on the instant Motion for Determination;

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[13] *See, e.g.*, Opposition, Ex. 11, Confidentiality Agreement at ¶ 3 ("The Parties agree that it is in the best interest of the Parties … for information relating to the financial affairs of any of the above to be kept from the public record.").

[14] *See* Correspondence to Judge Sturman dated August 13, 2018 a copy of which is attached hereto as **Exhibit 6** ("Unlike this Court, Commissioner Bulla will not be sitting as the ultimate trier of fact in this matter. Thus, we believe she is an appropriate "other judicial officer" capable of reviewing the notes in camera without creating the potential for possible recusal as referenced in *Lund*."). Petitioner disputes the position set forth by Respondents to Judge Sturman and will be responding to the same.

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however, since Respondents failed to produce a privilege log, the only way for this Court to determine whether the privilege applies is by reviewing Lubbers' Notes.

E. Respondents' Attempt to Claw-Back Nicolatus' Meeting Notes.

Although Respondents are also seeking to claw-back Nicolatus' Meeting Notes they do not appear to be concerned with its contents. Indeed, the only reason why Respondents even reference Nicolatus' Meeting Notes is because they purportedly believe it illustrates "how the ESI Protocol is supposed to operate." As stated in the Motion for Determination, the reason why Petitioner's Counsel contacted Respondents' Counsel to inquire whether Nicolatus' Meeting Notes were privileged is because said notes were included in a larger batch of documents (RESP078889-RESP078932)[15] that appeared to include attorneys' notes of Mr. Williams. Consequently, the facts and circumstances surrounding the production and review of Nicolatus' Meeting Notes is distinctly different then the review and utilization of Lubbers' Notes.

III. LEGAL ARGUMENT

A. Reply To Opposition To Motion For Determination.

1. The Attorney Client Privilege Does Not Apply To Lubber's Notes Because Respondents Have Failed to Establish the Heavy Burden That Said Notes Were Provided to or Shared with Respondents' Counsel.[16]

As conceded in their Opposition, Respondents have the "heavy burden"[17] of establishing that the attorney-client privilege exists.[18] Although the Parties both agree that "[m]ere facts are

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[15] While it is true that Nicolatus' Meeting Notes were not Bates Numbered, the Bates Numbers were derived by Petitioner by the gap in Bates Numbering that exists in those documents produced as part of Respondents' First Supplement. Lubbers' Notes were in fact Bates Numbered.

[16] In Footnote 18 of their Opposition Respondents concede that they believe the attorney-client privilege only extends to Lubbers Notes.

[17] *See In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d 180, 183–84 (2d Cir. 2007).

[18] *See* Opposition at 15:13-14 and 16:3-4.

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not privileged, but communications about facts in order to obtain legal advice are,"[19] they disagree as to whether Lubbers' Notes were ever "communicated" to LHLGB and the manner so communicated.

As indicated *supra*, there is no evidence that the Typed Memo was provided to LHLGB.[20] Additionally, there is no evidence that the Typed Memo was discussed with LHLGB prior to, during or after the October 14, 2013 telephone conference.[21] Not even Lee or Renwick could confirm whether the topics in the Lubbers' Notes were discussed and/or that Lubbers utilized the same "as an aid to guide the topics he wished to discuss with [LHLGB]"[22] during said telephone conference. To the contrary, the Declarations do not reference whether either attorney was ever provided a copy of the Typed Memo (prior to or after the October 14, 2013 telephone conference), reviewed their client file for a copy of the same or reviewed any notes taken during the call to confirm whether any of the contents in Lubbers' Notes were in fact discussed. Further, other than Mr. Williams' Declaration that states "[i]n anticipation of the call with attorneys Lee and Renwick, Lubbers prepared type-written notes,"[23] Respondents have failed to introduce any evidence confirming that the Typed Memo even existed when Lubbers had his initial conference call with LHLGB on October 14, 2013.

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[19] *Id.* at Opposition at 26:17-19.

[20] As stated in the Motion for Reconsideration, because the type-written portion of Lubbers' Notes was contained within Lubbers' "hard file," there is no evidence that it was ever provided to LHLGB. Respondents' Opposition ignores this issue.

[21] To the extent that they were, however, except as will be discussed below in Section (3)(a) below, Petitioner does not contend (at this time) that the actual conversation between Lubbers and LHLGB is not protected.

[22] *See* Opposition at 27:16-17. While it may seem "logical" for Respondents to assume that Lubbers used his notes as an "aid" during the October 14, 2013 conference call, said "logic" does not satisfy the stringent standard for the invocation of privilege. Further, it is illogical to believe that Lubbers and LHLGB would have been able to discuss all of the issues identified in Lubbers' Notes (hand and type-written) compromising four (4) full pages during their 19-24 minute conference call on October 14, 2013.

[23] *See* Opposition, Ex. 1, Decl. of Williams at ¶ 12,

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Likewise, there is no way to confirm whether the Typed Memo was written by Lubbers during the October 14, 2013 telephone call. Even though the handwritten portion of Lubbers' Notes are dated October 14, 2013, and refer to Lee and Renwick, the substance of the handwritten notes do not correlate with the substance of the Typed Memo. Further, it is difficult to fathom that Lubbers and LHLGB were able to discuss all of the topics identified in Lubbers' Notes in less than 24 minutes. Because Respondents have failed to establish that Lubbers' Notes were ever communicated to LHLGB, the attorney-client privilege does not apply. To the extent Respondents are able to prove Lubbers' Notes are in fact privileged said privilege has been waived for the reasons set forth in Section II(A)(3)(a) below.

2. The Work Product Doctrine Does Not Apply.[24]

a. Neither Lubbers' Notes Nor Nicolatus' Meeting Notes Were Prepared as a Result of the Prospect and/or Anticipation of Litigation.[25]

As indicated in Section II(A) *supra*, the Disputed Notes were not prepared in "anticipation of litigation" because the Initial Petition did not assert any allegations or claims against Lubbers for misconduct of a nature. Ironically, although Respondents contend that "there can be no legitimate debate that the [Initial Petition] asserted allegations of wrongful conduct against both Lubbers and the Canarellis,"[26] they then proceed to identify the wrongful conduct solely alleged against the Canarellis, not Lubbers.[27] Indeed, in their thirty-six (36) page Opposition

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[24] In Footnote 18 of their Opposition Respondents contend that the Disputed Notes are protected by the attorney work product doctrine because they were "created primarily because of the prospect of litigation."

[25] Because the Initial Petition cannot be considered "adversarial" for the reasons stated herein, it is irrelevant whether Lubbers' Notes were prepared at the request of Counsel; as such, will not be responded to.

[26] *See* Opposition at 19:11-2.

[27] Equally ironic, is that Respondents belittle Petitioner for "mak[ing] the omniscient determination of when Respondents anticipated litigation," yet, they do the exact same thing regarding Lubbers' thought process regarding the creation of the Typed Memo and the reasons therefore. The only person who is qualified to testify regarding the facts and circumstances

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Respondents failed to identify one single allegation of wrongdoing asserted by Petitioner against Lubbers.

Notwithstanding, Respondents' contend that the Initial Petition constitutes "adversarial litigation" because Petitioner could have cross-examined witnesses or "subjected an opposing party's presentation of proof to equivalent disputation"; however, the case Respondents' relied upon for this proposition do not support such contention. In *Fru-Con Const. Corp. v. Sacramento Mun. Util. Dist.*, 2006 WL 2050999, at *4 (E.D. Cal. July 20, 2006), the court articulated the "determining factor in the analysis" is "whether the parties have a right to cross-examine witnesses and therefore introduce evidence." For example, *Fru-Con Const. Corp.* recognized a distinction between tasks that primarily constitute an "*ex parte* administrative proceeding," such as preparation of a patent application for prosecution as being non-adversarial, whereas "interference proceedings in the patent office (to determine which party has the earlier patent date)" was considered adversarial.

Respondents' position shows a basic lack of understanding of trust proceedings. Indeed, pursuant to NRS 153.031, a trustee or beneficiary may "petition the court regarding any aspect of the affairs of the trust," the majority of which are administrative in nature and not adversarial. *See, e.g.*, NRS 153.031(1) (determining the existence of a trust, the validity of a provision of a trust, ascertaining beneficiaries, settling accounts, instructing the trustee, granting a trustee powers, fixing or allowing trustee's compensation, *etc.*). The fact that Petitioner filed the Initial Petition regarding the administration of the SCIT (*i.e.* providing an accounting and documentation relating to the Purchase Agreement) does not mean that it was adversarial even under *Fru-Con Const. Corp.,* but rather akin to an *ex parte* administrative proceeding. While a "petition" in Probate Court is the equivalent of a "complaint" when claims are asserted and damages sought, this is not the case with the Initial Petition. After the entry of the Court's order following the hearing (and the stipulation appointing Nicolatus), there was no further hearing on the Initial

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regarding the creation of the aforementioned notes is Lubbers, who unfortunately Petitioner was unable to depose prior to his death due to reasons already known by this Court.

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Petition. There was no evidentiary hearing scheduled, no scheduling order entered, no discovery propounded and no depositions noticed. There was absolutely no opportunity to cross-examine witnesses or introduce evidence at an evidentiary hearing. Similar to many other petitions filed in Probate Court, it was essentially a one-time petition and hearing.

Even if this Court finds that the Initial Petition constitutes "adversarial litigation," however, any privilege would be limited to the discreet issues contained therein and not otherwise encompass all aspects of trust administration. This Court is familiar with the fiduciary exception[28] to privilege as it has already applied said exception with respect to Lubbers' retention of Mr. Gerety to prepare the 2014 accounting.[29] In other words, the fact that Petitioner requested Respondents to produce an accounting and documentation regarding the Purchase Agreement does not equate to an adversarial relationship as to all issues relating to the administration of the SCIT.

Both Parties recognize that Nevada has adopted the "because of" test in determining whether work was done in anticipation of litigation. However, Nevada also has adopted the "totality of the circumstances" standard. Under this standard, this Court is required to look "to the context of the communication and content of the document to determine whether request for legal advice is *in fact* fairly implied, taking into account the facts surrounding the creation of the

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[28] *United States v. Mett*, 178 F.3d 1058, 1062–64 (9th Cir. 1999) ("The Ninth Circuit... has joined a number of other courts in recognizing a "fiduciary exception" to the attorney-client privilege."); *S.E.C. v. Goldstone*, 301 F.R.D. 593, 652–53 (D.N.M. 2014) ("The common law recognizes an exception to the attorney-client privilege called the fiduciary exception: "when a trustee obtains legal advice related to the exercise of fiduciary duties ..., the trustee cannot withhold attorney-client communications from the beneficiary of the trust.").

[29] *See, e.g.*, March 2, 2018 Hearing Transcript attached hereto as **Exhibit 7** at 25:15-24 ("...my plan when I reviewed everything was to say that all of the documents that the accountant produced that are related to the petitioner's trust need to be produced. I don't think there's any dispute on that...But he was definitely working with Mr. Lubbers, I think, in Mr. Lubbers' capacity as trustee, but he was also working on the trust itself at Mr. Lubbers' direct. So any of the documents that would necessarily implicate the operation of the trust, the petitioner's trust, I think are produced, period.").

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document and the nature of the document.""[30] "Lastly, the court should consider "whether communication explicitly sought advice and comment.""[31]

Here, the totality of the circumstances confirm that neither of the Disputed Notes were prepared in anticipation of litigation, but rather by a Trustee seeking to fulfill his fiduciary duties and administer the SCIT pursuant to its terms. Indeed, the fact that Lubbers was not acting in his capacity as an attorney in October 2013 is confirmed by the fact that he did not charge any attorneys' fees during said month, but only his normal trustee fee in the amount of $5,000 per month.[32] Further, Lubbers' Notes were drafted by Lubbers, in his capacity as Trustee, to document certain facts and there is no evidence that said notes were drafted to seek "advice and comment." To the contrary, Nicolatus' Meeting Notes solely relate to a valuation by a third party appraiser pursuant to the terms of the Purchase Agreement. As there is no evidence under the totality of the circumstances standard that said notes were prepared in anticipation and/or prospect of litigation, the work product doctrine cannot apply.

b. "Opinion Work Product" Extends to the Mental Impressions of an Attorney and/or Attorney Representative, not a Client/Party.[33]

The Disputed Notes cannot be construed as "opinion work product" because said doctrine only applies to the "mental impressions, conclusions, opinion, or legal theories of an attorney or

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[30] *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court in & for County of Clark*, 399 P.3d 334, 348 (Nev. 2017).

[31] *Id.* Although unclear, it also seems that Respondents seek to invoke an objective/subjective component to the "because of" test referenced in the unpublished decision *S. Fifth Towers, LLC v. Aspen Ins. Uk, Ltd*, 2016 WL 6594082, at *5 (W.D. Ky. Nov. 4, 2016). Said case is inapposite to Respondents' position as they have failed to introduce any evidence to "establish [Lubbers] subjective believe that litigation was a real possibility."

[32] *See, e.g.*, Excerpts of the general ledger for the SCIT attached hereto as **Exhibit 8**.

[33] Petitioner stands by his position that the "substantial needs test" applies to the Disputed Notes because said notes constitute "ordinary work product" for the reasons set forth in the Motion for Determination at 18:10-21:10, namely, Lubbers is a material witness who died before Petition was able to take his deposition.

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other representative of a party concerning the litigation"[34] and not the opinions of a client/party. When Lubbers contacted LHLGB it was in his capacity as Trustee of the SCIT, and under the law, Lubbers is precluded from acting as Petitioner's fiduciary and his own attorney at the same time.[35] Respondents have failed to cite a single case where a court extended "opinion work product" to a client/party because he/she happens to be an attorney. To the contrary, in all of the cases relied upon by Respondents the "opinion work product" was invoked on behalf of trial counsel and/or other counsel for the party (as opposed to the client/party itself).[36] The fact that Lubbers was not acting as an attorney when he contacted and/or engaged in the October 14, 2013 telephone conference with LHLGB is confirmed by the fact that he was not charging the SCIT attorneys' fees for preparing for and/or responding to the Initial Petition.[37] Rather, Lubbers continued to only receive a trustee fee of $5,000 a month.

Even if this Court finds that "opinion work product" may extend to a client/party's mental impressions as Respondents' espouse, the Disputed Notes are still subject to disclosure because (1) facts contained within "opinion work product" are not privileged; and (2) Lubbers' death constitutes a "compelling need" for disclosure.

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[34] *See* NRCP 26(b)(3) (Emphasis Added); Cotter v. Eighth Judicial District Court, 134 Nev. Adv. Op. 32, 416 P.3d 228, 232 (2018) ("[T]he work-product privilege exists "to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent.") (Emphasis Added); *Whitehead v. Nevada Com'n on Judicial Discipline*, 110 Nev. 380, 873 P.2d 946 (1994) (purpose of work-product doctrine is to protect against disclosure of mental impressions, conclusions, opinions and legal theories of counsel).

[35] *See, e.g.*, St. *Paul Reinsurance Company, Ltd. v. Commercial Financial*, 197 F.R.D. 620 (N.D. Iowa 2000) (documents were not privileged because attorney was acting in his capacity as a claims investigator or claims adjustor, not as an attorney when documents were created).

[36] *See, e.g., Hooke v. Foss Mar. Co.*, No. 13-CV-00994-JCS, 2014 WL 1457582, at *6 (N.D. Cal. Apr. 10, 2014) (finding that forms do not "indicate the existence of an attorney's private impressions, opinions, or theories that the heightened work product privilege is intended to protect."); *Upjohn Co. v. United States*, 449 U.S. 383, 400, 101 S. Ct. 677, 688, 66 L. Ed. 2d 584 (1981) ("[i]n ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.").

[37] *See* Ex. 6.

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i. "Opinion work product" protects mental impressions and not facts.

In order "to be entitled to protection for opinion work product, the party asserting the privilege must show "a real, rather than speculative, concern" that the work product will reveal counsel's thought processes "in relation to pending or anticipated litigation."[38] Further, "opinion work product" is not triggered unless the attorney had a justifiable expectation that the mental impressions revealed by the materials will remain private.[39] Here, Respondents failed to introduce evidence that Lubbers expected his notes to "remain private" and/or that he believed they contained his "mental impressions." Indeed, Respondents' contention that Lubbers' Notes constitute "mental impressions" is based upon conclusory statements and speculation, which are insufficient to meet the "heavy burden of demonstrating the applicability of the [opinion work product]."[40]

[redacted]

mental impressions, factual material embedded in attorney notes do not receive a heightened

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[38] *In re Grand Jury Subpoena*, 510 F.3d at 183–184 ("Since Appellant's arguments and the affirmation are "mere[ly] conclusory or ipse dixit assertions," he did not carry his "heavy burden" of demonstrating the applicability of the privilege; consequently, the district court did not err in concluding that he failed to prove that the recordings were opinion work product."

[39] *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 296 (W.D.Mich. May 30, 1995) ("Opinion work product protection is not triggered unless 'disclosure creates a real, non-speculative danger of revealing the lawyer's mental impressions' and the attorney had 'a justifiable expectation that the mental impressions revealed by the materials will remain private.'")

[40] *In re Grand Jury Subpoena*, 510 F.3d at 183–84.

[41] *See* Motion for Determination, Ex. 1, Lubbers' Notes.

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degree of protection under opinion work product, and as such, are subject to disclosure.[42] Further, "where the same document contains both facts and legal theories an attorney, adversary party can discover the facts. If facts and impressions are intertwined the document can be redacted."[43]

Here, there can be no reasonable dispute that the statements referenced above constitute facts, and as such, are subject to disclosure as Lubbers would have been required to respond to the same during a deposition. The fact that a portion of such notes contain the word "belief" is of no consequence for the reasons previously set forth herein. To the extent that this Court finds that a portion of the Disputed Notes contain "impressions" that are entitled to protection under the work product doctrine, it can order the redaction of such portion(s). The facts, however, are subject to disclosure.

ii. Lubbers' death creates a compelling need for disclosure.

Finally, Lubbers' death creates a "compelling need" for disclosure[44] under NRCP 26(b)(3) because Lubbers was a material witness in this case. It cannot be disputed that if Petitioner's

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[42] *See, e.g., FTC v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 778 F.3d 142, 152 (D.C.Cir.2015) (reversing district court's determination that certain investigative documents were opinion work product, as opposed to fact work product because they did not reveal "counsel's legal impressions or views of the case"); *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995) ("Because the work product doctrine is intended only to guard against divulging the attorney's strategies and legal impressions, it does not protect facts concerning the creation of work product or facts contained within the work product."); *Graff v. Haverhill N. Coke Co.*, 2012 WL 5495514, at *50 (S.D. Ohio Nov. 13, 2012) ("neither the attorney-client privilege nor the work product doctrine applies to prevent the disclosure of underlying facts, regardless of who obtained those facts").

[43] *See Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 595 (3d Cir. 1984). *See also Chevron Corp. v. Weinberg Grp.*, 286 F.R.D. 95, 99-100 (D.D.C. 2012) (the proper procedure is to produce portions of the documents that are fact work product and redact those that are opinion work product, submitting a description of the excised material that complied with Rule 26 by explaining why the redacted portion qualifies for protection); *Underwriters Ins. Co. v. Atl. Gas Light Co.*, 248 F.R.D. 663 (N.D. Ga. Feb. 19, 2008) (ultimately barring discovery of opinion work product contained in insurer's claim file and permitting redaction of opinion work product prior to production, but requiring production of fact work product in light of proof of substantial need and undue burden once the underlying insurance coverage dispute was resolved).

[44] *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 634 (D. Nev. 2013) ("Opinion work product, an attorney's mental impressions, conclusions, opinions or legal theories, is only discoverable

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Counsel was provided an opportunity to ask Lubbers questions on the issues contained within the Disputed Notes, or more importantly, the Typed Memo during a deposition, none of the subjects would be protected under "opinion work product." Indeed, even if Lubbers' purported "mental impressions" are protected under NRCP 26(b)(3), questions regarding opinions and legal conclusions (even for an attorney) do not apply to deposition testimony.[45] In other words, [redacted] topic areas identified in the Motion for Determination, which are herein incorporated by reference. Because Lubbers was a trustee of the SCIT at such time and has personal knowledge of such facts, Respondents cannot hide behind the privilege or work product doctrine.

The factual statements made by Lubbers in the Typed Memo are further admissions that demonstrate fraudulent conduct on the part of Respondents, or primarily the Canarellis. There is absolutely no other available means for Petitioner to obtain Lubbers' testimony concerning factual circumstances surrounding the Purchase Agreement and/or any of the other facts relating to these issues.[46] Denying Petitioner the ability to utilize Lubbers' admissions will thwart his ability to prove fraud, conspiracy, fraudulent concealment, *etc.* and otherwise unfairly prejudice

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when counsel's mental impressions are at issue and there is a compelling need for disclosure."); *FDIC v. Wachovia Ins. Servs.*, 241 F.R.D. 104, 106–07 (D. Conn. 2007) ("only in rare circumstances where the party seeking discovery can show extraordinary justification.").

[45] *See* 8 Wright & Miller, Federal Practice & Procedure, § 2023 ("courts have consistently held that the work product concept furnishe[s] no shield against discovery, by interrogatories or by deposition, of the facts that the adverse party's lawyer has learned, or the persons from whom he or she had learned such facts, or the existence or nonexistence of documents, even though the documents themselves may not be subject to discovery").

[46] Although Petitioner is more concerned with the facts contained within the Typed Memo there is a "compelling need" for the disclosure of the remaining notes as well. Respondents' contention in Footnote 23 of their Opposition that Petitioner has other ways to obtain evidence of what occurred at the December 19, 2013 meeting fails since he cannot obtain the "substantial equivalent" of Nicolatus' Meeting Notes due to Lubbers' death.

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Petitioner. Consequently, Lubbers' death creates a "compelling need" for disclosure of the Disputed Notes, primarily the clear facts set forth in the Typed Memo.

3. Lubbers Waived Any Privilege Associated With the Disputed Notes.

No privilege ever existed as to the October 14, 2013 telephone conference with LHLGB because third-parties, Larry and Bob Evans, participated in said conference. Further, Lubbers waived any potential privilege associated with the Disputed Notes when they were turned over to a third-party not otherwise encompassed with the privilege, namely AWDI. To avoid this reality, Respondents' contend that Petitioner is unable to prove that Larry and Evans were on the October 14, 2013 conference call and/or that the Disputed Notes were ever in AWDI's possession. Attempting to overcome such disclosure, Respondents contend that, even if there was disclosure to third-parties, said communications are still privileged under the "common interest doctrine." Said arguments fail for the reasons set forth below.

a. <u>The Attorney-Client Privilege Did Not Attach to the October 14, 2013 Telephone Conference Because Third-Parties Participated in the Conversation</u>.

The attorney-client privilege did not attach to the October 14, 2013 telephone conference and/or Lubbers' Notes because Larry and Evans participated in said telephone conference. While Respondents' contend the "isolated reference" to Larry and Evans in the handwritten portion of Lubbers' Notes do not "corroborate" that they participated in the October 14, 2013 conference call they have failed to rebut Petitioner's logical presumption. Indeed, if Larry and Evans had not participated in the conference call Respondents would have undoubtedly denied the same in their Opposition or in the Declarations of Lee and Renwick (or obtained declarations from Larry or Evans denying their participation).

Notwithstanding, Respondents generally contend that even if Larry and Evans participated in the conference call the communication would be privileged under "Nevada's common interest rule" as codified in NRS 49.095(3). Contrary to their contention, Nevada's common interest rule does not apply to the October 14, 2013 conference call for at least four (4) reasons. First, NRS 49.095(3) is inapplicable because it requires communications "by the client [Lubbers] or the

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client's lawyer [Lubbers' Counsel, LHLGB]" on one hand, "to a lawyer representing another [Larry] in a matter of common interest."[47] Here, it is undisputed that LHLGB never represented Larry[48] and Larry's Counsel (to the extent he had counsel on October 14, 2013) did not participate in the October 14, 2013 conference call. Consequently, NRS 49.095(3) cannot apply.[49]

Second, Respondents have provided no evidence that the October 14, 2013 conference was in the "course of an on-going and joint effort to set up a common defense strategy." Indeed, although Respondents' self-servingly state that all Respondents share a common legal interest they have failed to introduce any evidence that: (1) a common legal interest existed on October 14, 2013; and/or (2) that the October 14, 2013 telephone conference was made in an on-going and joint effort to set up a common defense strategy. Respondents' omission is significant because the Nevada Supreme Court has repeatedly rejected the invocation of NRS 49.095 when a party fails to introduce evidence of a joint defense.[50] In other words, NRS 49.095 does not

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[47] *See also FSP Stallion 1, LLC v. Luce*, 2010 WL 3895914, at *18 (D. Nev. Sept. 30, 2010) (recognizing that "the majority of courts apply the common interest doctrine where parties are represented by separate counsel but engaged in a common legal enterprise.").

[48] LHLGB's engagement letter confirms that Lubbers was its sole client at that time. Further, the Response to Initial Petition filed by LHLGB was filed solely on Lubbers' behalf, and not the Canarellis. It was not until mid-November 2013 that Respondents retained the same counsel. *See* also Opposition, Ex. 1, Decl. of Williams at ¶ 14.

[49] Because Respondents' realize that NRS 49.095(3) cannot apply to the October 14, 2013 conference call they rely upon *dicta* from *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 578 (N.D. Cal. 2007), which recognized that parties "may communicate among themselves and with the separate attorneys on matters of common legal interest..." *Nidec* is factually distinguishable, however, because the exception adopted in that case was based on a treatise that is contrary to the requirements set forth in NRS 49.095(3).

[50] *See, e.g., Collins v. State*, 113 Nev. 1177, 1183–84, 946 P.2d 1055, 1060 (1997) ("Mr. Collins argues that the convictions should be reversed because the district court admitted statements that Mr. Collins made to Mrs. Collins' former attorney, Annabelle Hall, in violation of the attorney-client privilege. The privilege does not protect such statements because there is no evidence that Mr. Collins was either speaking to Hall as Mrs. Collins' representative, or engaged in a joint defense with Mrs. Collins."). *See also Neuberger Berman,* 230 F.R.D. 398, 416 (D. Md. 2005) ("The proponent of the common interest privilege "must establish that *when* communications were shared among individuals with common legal interests, the act of sharing was part of an ongoing common legal enterprise."); *I Prowess, Inc. v. Raysearch Labs.*

automatically apply to any co-defendants at the outset of litigation as Respondents seem to contend. Because Respondents have failed to introduce any evidence that a joint defense had been contemplated and/or agreed to on or before October 14, 2013 the attorney-client cannot apply to said telephone conference or Lubbers' Notes.

Third, the common interest doctrine does not apply when there is a risk the parties would revert to adversaries.[51] Here, there can be no dispute that there is a risk that Respondents will "revert to adversaries" because the majority, if not all, of the allegations of wrongdoing are against the Canarellis, and the sole reason Lubbers was named a Party in the Initial Petition was due to his position as Family Trustee. As it relates to the Purchase Agreement, Larry was the mastermind behind the sale and the timing thereof. Discovery in this case has clearly demonstrated that Larry started to undertake the actions to sell the SCIT's interest in the Purchased Entities prior to January, 2013. On seven (7) of the eight (8) drafts of the Purchase Agreement that were first circulated in March, 2013, the Canarellis were designated as the Former Trustees, with Larry specifically signing the Purchase Agreement on behalf of the SCIT and on behalf of the Siblings Trust as its trustee. It was only one (1) week prior to the Purchase Agreement being executed that the draft Purchase Agreement was revised to identify Lubbers as the Family Trustee. Based upon such facts, it is highly probable that Lubbers and the Canarellis would revert to adversaries.

Finally, Evans participation in the October 14, 2013 conference call waived the attorney-client privilege for the same reason as Larry's participation, namely, there is no evidence that

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AB, 2013 WL 509021, at *5 (D. Md. Feb. 11, 2013) (no common interest doctrine protection where a common interest agreement was not signed until after the communications occurred and did not state when the common interest arrangement began); *Byrnes v. Jetnet Corp.*, 111 F.R.D. 68, 72 (M.D.N.C.1986) (party cannot establish a common interest by relying "solely on counsel's conclusory allegation that the communications were privileged based on the common interest in the [ ] litigation.").

[51] *Mt. McKinley Ins. Co. v. Corning Inc.*, 2009 WL 6978591 (N.Y. Sup. Ct. Dec. 4, 2009) (holding that even if the three parties involved shared a common legal interest, there was a substantial risk that the parties would revert to adversaries; thus, the parties were precluded from withholding documents on the basis of the common interest privilege.).

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Evans was acting as Lubbers' agent as of October 14, 2013 and/or a "client representative" as defined by NRS 49.075 to facilitate the rendition of legal services. If anything, Evans was only acting as Larry's agent or representative at such time.

In light of the foregoing, the common interest doctrine does not apply and the attorney-client privilege cannot attached to Lubbers' Notes or the October 14, 2013 conference call.

b. American West Development, Inc.'s Possession of Lubbers' Boxes Constitutes Waiver.

Lubbers also waived any potential privilege associated with the Disputed Notes because said notes were in the possession of a third-party, American West Development, Inc. ("AWDI"). In lieu of denying and/or providing any evidence that Lubbers' Notes and Nicolatus' Meeting Notes were never in AWDI's possession, Respondents' contend that: (1) the email relied upon by Petitioner "referenc[es] an entirely different, non-privileged directive from Lubbers; and (2) Respondents and AWDI share a common interest because Petitioner has issued a subpoena duces tecum to AWDI. Said arguments fail for the reasons set forth below.

First, the Disputed Notes were contained within Lubbers' hard file that, after being provided to Dickinson Wright, was "returned to" AWDI in November, 2017. Contrary to Respondents' contention, the file was not provided to AWDI after Lubbers' death for "safe keeping." Indeed, Tina Goode, the Director of Corporate Administration with AWDI, confirmed in an email that she not only received the boxes from Ms. Brickfield's office but actually went through the boxes to recover "missing records." Specifically, the email states:

> I know I will sleep better tonight . . . ***we received Ed's boxes back from Elizabeth[Brickfield's] office*** and our missing e-mail confirming deferring payments along with Ed's memo was in the box . . . [52]

Irrespective of the fact that the email potentially references a document other than the Lubbers' Notes, the fact of the matter is that the AWDI had boxes – plural – of Lubbers' hard file. Indeed, during multiple meet and confers in this matter, Respondents' Counsel has represented

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[52] *See* Motion for Determination, Ex. 12 (Emphasis added).

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that Lubbers' hard files consisted of at least 7 to 9 boxes. Respondents attempt to persuade this Court that the Lubbers' Notes were not contained within the boxes fails because Petitioner cannot prove the same. Petitioner, however, is not required to "prove" the same. It can be reasonably inferred that the boxes that were "returned" to AWDI did in fact contain Lubbers' Notes since it was produced in discovery within one (1) of Dickinson Wright returning said boxes. Indeed, Respondents never contend in the Opposition that Lubbers' Notes was not in the boxes.

Respondents then contend that they share a "common legal interest" with AWDI because Petitioner has issued subpoenas to AWDI and other AWG entities. "For the common interest rule to apply, the "transferor and transferee [must] ***anticipate litigation against a common adversary*** on the same issue or issues" and "have strong common interests in sharing the fruit of the trial preparation efforts.""[53] Further, there needs to be a "showing" of the common interest "such as attorneys exchanging confidential communications from client who are or potentially may be codefendants or have common interests in litigation."[54] Here, none of the requirements for the imposition of the "common legal interest" have been met.

In considering the application of the common interest doctrine, this Court needs to focus on the actual entity that Respondents claim a common interest. In the Opposition, Respondents continually refer to AWG, or The American West Home Building Group. Not only was AWG not an entity subject to the Purchase Agreement, but Ms. Goode's signature block on the email expressly references AWDI, not AWG. It goes without saying that Respondents do not have a common interest with entities that have no relation to Petitioner or the SCIT and were not otherwise subject to the Purchase Agreement.

The actual entity that was in possession of Lubbers' boxes was AWDI. Respondents' contention that it shares a common interest with AWDI is contrary to the procedural history in this matter and the representations made by Respondents and AWDI in other motions and at

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[53] *Cotter*, 134 Nev. Adv. Op. 32, 416 P.3d at 232 (Emphasis Added).

[54] *Id.*

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hearings. As this Court recalls, when Petitioner issued a subpoena to AWDI, it sought to reopen its bankruptcy proceeding to hold Petitioner and his Counsel in contempt. In connection with the briefing before the Bankruptcy Court and this Court in response to the Motion to Stay Respondents filed, it was briefed ad nauseam that Petitioner was not asserting a claim against AWDI. This Court not only additionally found the same, but Respondents have acknowledged it themselves.

Specifically, Respondents, the Purchased Entities, the Siblings Trusts, SJA Acquisitions and AWDI have adamantly and repeatedly argued that they are separate and distinct in all respects. Indeed, when Petitioner propounded requests for production to the Canarellis seeking documentation relating to the Purchased Entities, AWDI, *etc.* the Canarellis took the position that:

> Insofar as Petitioner seeks additional documents from these distinct entities, he is not permitted to do so through the Canarellis in their capacity as former trustees of the SCIT simply because Larry Canarelli may occupy officer or trustee positions with other entities.[55]

The Canarellis further contended:

> **Here, Scott has not sued (and claims he cannot sue) any of the Purchased Entities, the Siblings' Trusts, SJA, or AWDI**. Nor has he sued Larry in his individual capacity. He has instead sued the Canarellis solely in their capacity as former trustees of the SCIT.[56]

Respondents' acknowledgment that Petitioner has not asserted a claim against AWDI, coupled with Respondents' acknowledgement that Respondents are only being sued in their capacity as Former Trustees, completely undermines any colorable contention that Respondents

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[55] *See* Opposition to Motion to Compel the Canarellis at 11:10-14 filed on May 29, 2018. *See also* at 16:20-24 ("A number of Scott's document requests demand the Canarellis to produce documents from various entities, including the Purchased Entities, the parties to the Purchase Agreement (the Siblings' Trusts and SJA), and AWDI-none of which are parties to this action.").

[56] *Id.* at 18:11-19, Respondents further stated: "If a party is not entitled to compel the production of corporate documents from a corporate officer when he is sued in his individual capacity and the corporation is not a party, it is even further afield to seek corporate documents from a defendant who is sued in an altogether different capacity with an altogether different entity."

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and AWDI share a common interest. Petitioner's claims against Respondents solely relate to their actions as the Former Trustees of the SCIT. The "issues" before this Court and set forth in the Surcharge Petition and supplement thereto are, in part, whether Respondents breached their fiduciary duties to Petitioner and otherwise committed fraud by selling the SCIT's interest in the Purchased Entities with the intent to financially harm Petitioner (both as to the underlining value at the time of sale and timing thereof). AWDI was never a trustee of the SCIT and otherwise did not owe a fiduciary duty to Petitioner in the context of the Purchase Agreement. AWDI was not even one of the entities sold under the Purchase Agreement. Accordingly, it is a far fetch contention that Respondents and AWDI "anticipated litigation" by Petitioner on the "same issue or issues."

Similarly, the Purchased Entities and AWDI have repeatedly argued over the last five (5) months that the Purchased Entities and any additional entities that fall under the "AWG umbrella" are "nonparties" and, as such, should not be compelled to produce documentation. Most recently, AWDI stated in its Opposition to Motion to Compel filed on July 31, 2018 that because they are a "nonparty" "there is no basis for [] intrusive discovery..." against it.[57] In fact, AWDI further stated:

> AWDI is a general contractor. . . **. AWDI was not one of the entities sold by the Purchase Agreement. AWDI was not one of the buyers or sellers of the Purchase Agreement.** . . AWDI was the general contractor who performed improvement work for certain of the sold entities.[58]

While AWDI's contentions have no bearing on whether Petitioner is entitled to obtain discovery from AWDI, such contentions nonetheless demonstrate that there exists no common issues between it and Respondents. The "common legal interest" does not attach merely because Petitioner issued subpoenas duces tecum to AWDI and the Purchased Entities; and Respondents have failed to cite any legal authority to the contrary.

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[57] *See* Opposition to Motion to Compel AWDI at 3:2-4.

[58] *Id.* at p. 12:5, 13:15 (Emphasis added).

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The fact that Canarelli and Evans are executives of AWDI is of no consequence. Jeffrey Canarelli is also an executive of AWDI. His irrevocable trust was one of the purchasers and a member of the other purchaser. If this Court were to adopt Respondents' contention that it shares a common interest with AWG, then essentially this Court would be finding the Sellers and Buyers under the Purchase Agreement share a common interest, along with each and every single entity subject to the sale and all other entities compromising the "American West Group." As there is no litigation anticipated against AWDI, AWG, the Purchased Entities or any other AWG entity for Respondents' actions as the Former Trustees of the SCIT, there is clearly no "strong common interest in sharing the fruit of the trial preparation efforts."

Although not entirely clear, Respondents further appear to contend that the Lubbers' Notes and Nicolatus' Meeting Notes are protected by the work product doctrine because AWDI is somehow part of the "legal team" tasked "to facilitate the rendition of legal advice" on behalf of Respondents. Even if that were true, the notes are still subject to disclosure because Respondents have failed to show that the disclosures were only made to a "limited group of persons who are necessary for the communication, and attempts [have been] to keep the information confidential and not widely disclosed."[59] Evans can still serve as Respondents' agent without extending the common interest to AWDI. Indeed, the fact that Lubbers' boxes were stored at AWDI makes it appear that the notes in question were widely disclosed and readily accessible to any and all employees as opposed to a "limited group of persons." Respondents produce no evidence that the Lubbers' boxes were secured in any type of manner to protect the "sanctity" of the attorney client privilege and/or work product doctrine.

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[59] *Wynn Resorts*, 399 P.3d at 341.

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B. OPPOSITION TO COUNTERMOTION FOR REMEDIATION OF IMPROPERLY DISCLOSED ATTORNEY-CLIENT PRIVILEGED AND WORK PRODUCT PROTECTED MATERIALS.

1. Petitioner's Counsel Complied with NRPC 4.4(b).

NRPC 4.4(b) is inapplicable to this matter because neither Lubbers' Notes nor Nicolatus' Meeting Notes "relate to the representation of the lawyer's client," but rather, Lubbers' citation to facts. Respondents' reliance on *Merits Incentives, LLC v. Eighth Jud. Dist., Ct.*, 127 Nev. 689, 262 P.3d 720 (2011), is similarly misplaced because in *Merits* the documents at issue were disclosed by an anonymous source, whereas here, Lubbers' Notes were disclosed by his Counsel.

Even if NRPC 4.4(b) and *Merits* applied in this instance (which they do not), Petitioner's Counsel did not know that said documents were "inadvertently disclosed" for the reasons indicated *supra*, namely, (1) the Bates Numbers for Lubbers' Notes were not identified on any privilege logs, and (2) Petitioner reasonably believed that Respondents were aware of its disclosure of Lubbers' Notes and were not claiming privilege because Respondents had previously clawed-back documents before and after the Bates Numbers on Lubbers' Notes.

2. Petitioner's Counsel did not Violate the ESI Protocol.

Respondents' contention that Petitioner's Counsel somehow violated the ESI Protocol because it refused to "redact their public filings" fails because the ESI Protocol contains no such requirement. Contrary to their contention, Petitioner's Counsel did in fact "sequester" Lubbers' Notes after Respondents' claimed privilege on June 5, 2018. Further, the fact that Lubbers' Notes were attached to the Opposition to the Motion to Dismiss (or other Court filings) is of no consequence because said notes were initially filed on May 18, 2018, and as such, part of the court docket.

Further, it would be difficult, if not impossible, for this Court to determine whether Lubbers' Notes are in fact privileged without reviewing and/or being aware of its contents because Respondents failed to identify the Lubbers Notes on a privilege log as required by Section 21 of the ESI Protocol.

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3. Petitioner's Counsel did not Violate the Confidentiality Agreement.

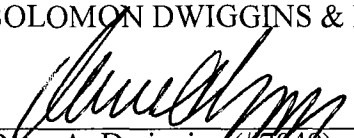
Finally, Petitioner's Counsel did not violate the Confidentiality Agreement because said agreement was intended to protect the Parties financial information as opposed to a Parties' typed and/or handwritten notes.[60] As such, Petitioner is not at fault for citing portions of a document that Respondents' inappropriately marked "Confidential" in its Supplement Surcharge Petition (or any other filing).

IV. CONCLUSION

For the above reasons, Petitioner respectfully requests that this Court find that Lubbers' Notes and Nicolatus' Meeting Notes be deemed discoverable and not subject to either the attorney-client privilege or work product doctrine. Petitioner further requests that this Court deny the Countermotion in its entirety.

DATED this 24th day of August, 2018.

SOLOMON DWIGGINS & FREER, LTD.



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[60] *See, e.g.*, Opposition, Ex. 11, Confidentiality Agreement at ¶ 3 ("The Parties agree that it is in the best interest of the Parties … for information relating to the financial affairs of any of the above to be kept from the public record.").

CERTIFICATE OF SERVICE

PURSUANT to NRCP 5(b), I HEREBY CERTIFY that on August 24, 2018, I served a true and correct copy of the **REPLY TO OPPOSITION TO MOTION FOR DETERMINATION OF PRIVILEGE DESIGNATION OF RESP013284-RESP013288 AND RESP78899-RESP78900; AND OPPOSITION TO COUNTERMOTION FOR REMEDIATION OF IMPROPERLY DISCLOSED ATTORNEY-CLIENT PRIVILEGED AND WORK PRODUCT PROTECTED MATERIALS** to the following in the manner set forth below:

Via:

[____] Hand Delivery

[____] U.S. Mail, Postage Prepaid

[____] Certified Mail, Receipt No.: _____

[____] Return Receipt Request

[X] E-Service through the Odyssey eFileNV/Nevada E-File and Serve System, as follows:

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EXHIBIT 1

EXHIBIT 1

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December 30, 2015

Via FACSIMILE & EMAIL
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Re: Scott Lyle Graves Canarelli Irrevocable Trust ("Trust")
SETTLEMENT COMMUNICATIONS

Dear Colby,

As we previously discussed, I was scheduled to meet with Scott and I wanted to do so prior to meeting with you and your client, Edward Lubbers, to discuss Ed's "ideas" in attempting to resolve this matter. I have now had an opportunity to meet with Scott and both he and I are prepared to meet with you the work week starting January 4, 2016, or the week starting January 18, 2016. In connection with such meeting, I believe it would be helpful for you to have an understanding of Scott's legal position as it relates to the Agreement to sell the Trust's interest in certain limited liability companies and corporations ("Purchase Agreement").

Although Scott has the desire to try to resolve this matter and avoid the costs associated with litigation, he is prepared to pursue his rights in order to make the Trust whole as a result of the breach of fiduciary duties stemming from the Purchase Agreement and effectuation of the same. Scott believes Larry entered into the Purchase Agreement with the intent of harming Scott's interest for the benefit of Larry's other children. In that regard, I am enclosing herewith a draft petition that I am

prepared to file on Scott's behalf relating to damages resulting from the Purchase Agreement and Larry and Heidi's breach of fiduciary duties related thereto.

Scott is fond of Ed Lubbards and has no present intention to proceed against him, as the Successor Trustee of the Trust, except as required to proceed against Larry and Heidi, as explained below. Please note, however, that we did advise Scott we believe there are several claims he may assert against Ed as a result of the Purchase Agreement and his unilateral suspension of the Promissory Notes, including but not limited to:

- Payment of $4.7 million, plus interest thereon since March, 2013, for undervalue of the interests of the limited liability companies subject to the Purchase Agreement;
- Failure to timely obtain a valuation under the Purchase Agreement;
- Failure to enforce the Purchase Agreement and/or suspend the payments under the Purchase Agreement;
- Payment of default interest under the Promissory Notes;
- Breach of fiduciary duty relating to the Houlihan Capital valuation;
- Violation of N.R.S. 163.060;
- Failure to obtain a new guaranty under the terms of the Purchase Agreement;
- Aiding and abetting a breach of fiduciary duty by Larry and Heidi;
- Failure to pursue a claim against the former trustees;
- Removal as Trustee;
- Failure to adequately account and damages equal to unaccounted for funds of the Trust, as set forth in the correspondence of Dan Gerety;
- Attorney's fees and costs paid to your firm;
- Accounting fees paid to Gerety & Associates; and
- Attorney's fees and costs paid to my firm;

As mentioned above, in order to force the claims of the Trust against Larry and Heidi and his siblings' trusts and entities, Scott is additionally prepared to file a separate petition compelling Ed to enforce the rights of the Trust under the Purchase Agreement, Promissory Notes and Guaranty. For your reference, I am enclosing a draft of such petition herewith.

The purposes of enclosing the draft petitions herewith is not to be adversarial but rather to assist in the facilitation of resolution by setting forth Scott's position relative to the Purchase Agreement.

Please advise me when you and Ed can meet with Scott and me.

Sincerely,

Mark A. Solomon

cc: client (w/encl.)

EXHIBIT 2

EXHIBIT 2

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CLERK OF THE COURT

PET

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Attorneys for Petitioner, Scott Canarelli

DISTRICT COURT

COUNTY OF CLARK, NEVADA

In the Matter of the THE SCOTT CANARELLI PROTECTION TRUST.	Case No.: P-13-078919-T Dept. No.: XXVI/PROBATE Hearing Date: 10/18/2013 Hearing Time: 9:30 a.m.

PETITION TO ASSUME JURISDICTION OVER THE SCOTT CANARELLI PROTECTION TRUST; TO CONFIRM TRUSTEES; TO COMPEL THE PRODUCTION OF A FULLY EXECUTED COPY OF THE TRUST AND TO COMPEL AN INVENTORY AND AN ACCOUNTING

Pursuant to NRS 164.010, 164.015, 153.031 and 164.030, Scott Lyle Graves Canarelli ("Petitioner"), Settlor and Beneficiary of the Scott Canarelli Protection Trust (the "Protection Trust"), by and through his attorneys, the law firm of Solomon Dwiggins & Freer, Ltd., hereby petitions this Court to assume jurisdiction over the Protection Trust; to confirm Lawrence Canarelli as Family Trustee and Edward C. Lubbers as the Independent Trustee of the Protection Trust and any and all sub-trusts created thereunder; to compel the production of a fully executed copy of the Protection Trust to Petitioner; and to compel an inventory of the Protection Trust's assets and a trust accounting

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EXHIBIT 3

EXHIBIT 3

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Attorneys for Petitioner, Scott Canarelli

DISTRICT COURT

COUNTY OF CLARK, NEVADA

In the Matter of the THE SCOTT LYLE GRAVES CANARELLI IRREVOCABLE TRUST – SECONDARY TRUST, dated October 27, 2006.	Case No.: P-13-078913-T Dept. No.: XXVI/PROBATE Hearing Date: 10/18/2013 Hearing Time: 9:30 a.m.

PETITION TO ASSUME JURISDICTION OVER THE SCOTT LYLE GRAVES CANARELLI IRREVOCABLE TRUST – SECONDARY TRUST; TO CONFIRM TRUSTEE; AND TO COMPEL AN INVENTORY AND AN ACCOUNTING

Pursuant to NRS 164.010, 164.015, 153.031 and 164.030, Scott Lyle Graves Canarelli ("Petitioner"), Beneficiary of the Scott Lyle Graves Canarelli Irrevocable Trust – Secondary Trust, dated October 27, 2006 (the "Secondary Trust"), by and through his attorneys, the law firm of Solomon Dwiggins & Freer, Ltd., hereby petitions this Court to assume jurisdiction over the Secondary Trust; to confirm Edward C. Lubbers as the Trustee of the Secondary Trust and any and all sub-trusts created thereunder; and to compel an inventory of the Secondary Trust's assets and a trust accounting from October 27, 2006, the date of the Secondary Trust's creation, through the present.[1] A

[1] Contemporaneously herewith, Petitioner is initiating separate actions concerning the Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998, and the Scott Canarelli Protection Trust wherein Petitioner requests, among other things, an inventory of such trusts and accountings thereof.

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EXHIBIT 4

EXHIBIT 4

DICKINSON WRIGHT PLLC

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Joel Z. Schwarz
JSchwarz@dickinsonwright.com
(702) 550-4436

February 16, 2018

VIA E-MAIL
ddwiggins@sdfnvlaw.com
tjohnson@sdfnvlaw.com

Dana Dwiggins, Esq.
Tess Johnson, Esq.
Solomon Dwiggins & Freer, Ltd.
9060 West Cheyenne Avenue
Las Vegas, NV 89129

Re: Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998 (the "Trust")
District Court Case No. P-13-078912-T

Dear Counsel:

As we were reviewing our supplemental productions, we found that RESP045293 had inadvertently been produced. Pursuant to the "claw back" provisions in the order entered in this case, I ask you gather any and all copies of RESP045293 and either 1) return them to my office, or 2) provide me with written confirmation that you have destroyed all copies.

Thank you for your attention to this matter.

Sincerely,

Joel Z. Schwarz

JZS:lms

cc: Elizabeth Brickfield, Esq.
J. Colby Williams, Esq.
Jennifer Braster, Esq.

EXHIBIT 5

EXHIBIT 5

DICKINSON WRIGHT PLLC

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February 19, 2018

VIA E-MAIL
ddwiggins@sdfnvlaw.com
tjohnson@sdfnvlaw.com

Dana Dwiggins, Esq.
Tess Johnson, Esq.
Solomon Dwiggins & Freer, Ltd.
9060 West Cheyenne Avenue
Las Vegas, NV 89129

Re: Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998 (the "Trust")
District Court Case No. P-13-078912-T

Dear Counsel:

As we were reviewing the supplemental productions in this matter, we located additional items which have been marked Attorney Client and/or Accountant Client Privilege:

RESP013471-RESP013473; RESP019380-RESP019382; RESP019383-RESP019383; RESP019335-RESP019336; RESP019337-RESP019338; RESP045260-RESP045261; RESP045263-RESP045263; RESP045264-RESP045264; RESP045265-RESP045265; RESP045266-RESP045266; RESP045267-RESP045267; RESP045268-RESP045268; RESP045269-RESP045269; RESP045270-RESP045271; RESP045272-RESP045272; RESP045276-RESP045276; RESP045277-RESP045277; RESP045280-RESP045281; RESP045282-RESP045284; RESP045288-RESP045292; RESP045293-RESP045293; RESP045311-RESP045311; RESP045312-RESP045316.

Pursuant to Paragraph 21 of the ESI Protocol, please promptly return the documents and confirm that any copies of the document have been destroyed.

Thank you for your attention to this matter.

Sincerely,

Joel Z. Schwarz

JZS:lms
cc: Elizabeth Brickfield, Esq.
J. Colby Williams, Esq.
Jennifer Braster, Esq.

EXHIBIT 6

EXHIBIT 6

CAMPBELL
& WILLIAMS
ATTORNEYS AT LAW

VIA FACSIMILE August 13, 2018

The Honorable Gloria Sturman
Department XXVI
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155

Re: *In the Matter of the Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998;* Case No. P-13-078912-T

Dear Judge Sturman:

We write in connection to Respondents' Motion to Dismiss Petitioner's Supplemental Petition, which is set for hearing this Thursday, **August 16, 2018**. Respondents are filing their Reply in support of the Motion today. There is, however, an important issue we wish to alert you to in advance of the hearing.

Exhibit 4 to the Supplemental Petition (filed May 18, 2018) is a set of hand-written and type-written notes prepared by Edward C. Lubbers. These notes were inadvertently produced in this action as they are attorney-client privileged and work product protected. Petitioner disagrees with Respondents' position, and the parties have engaged in motion practice related to this dispute that is set to be heard before Commissioner Bulla on **August 29, 2018**. While Exhibit 4 was submitted *in camera*, Petitioner quoted from a portion of the notes in the body of his publicly-filed Supplemental Petition at p. 18, l. 24 – p. 19, l. 8. Petitioner has additionally quoted from Mr. Lubbers' notes in his Opposition to the Motion to Dismiss (filed July 31, 2018) at p. 27, ll. 19-20.

Respectfully, Respondents believe it would be inappropriate at this time for Her Honor to review the notes submitted as Exhibit 4 or the portions of Petitioner's papers where those notes are quoted. This position is not meant as any disrespect for the Court. It is just the opposite; Respondents seek to prevent the Court from being unwittingly tainted if, in fact, the notes are deemed to be protected. An opinion from the Arizona Supreme Court, sitting *en banc*, recently explained a similar situation as follows:

> [T]he trial court must determine whether the [disputed] documents are indeed privileged. To that end, the court properly ordered JS & S to produce a privilege log and Miller and Bradford to file a response.
>
> The trial court, however, erred by ruling that it would review all the documents to determine whether they are privileged. The court should have awaited the

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> responses to the privilege log and considered the parties' arguments regarding privilege and waiver to determine whether in camera review was warranted for particular documents before reviewing them.
>
> ***If in camera review is needed, the trial judge should consider whether another judicial officer should conduct the review in light of the possibility that a review of privileged materials may be so prejudicial as to require the judge's recusal. If the trial judge conducts an in camera review and upholds the privilege claim, the judge should consider whether recusal is then necessary.***

Lund v. Myers, 305 P.3d 374, 377 (Ariz. 2013) (emphasis added). A copy of the case is included herewith for the convenience of the Court and the parties.

Unlike this Court, Commissioner Bulla will not be sitting as the ultimate trier of fact in this matter. Thus, we believe she is an appropriate "other judicial officer" capable of reviewing the notes *in camera* without creating the potential for possible recusal as referenced in *Lund*. If either or both parties wish to seek review of Commissioner Bulla's recommendations after the August 29 hearing, perhaps the parties and the Court can discuss the best way to handle such review at that time.

Until then, however, we must still address the hearing on Respondents' Motion to Dismiss set for August 16. As the moving parties, Respondents are amenable to taking this matter off-calendar pending the results of the proceedings before Commissioner Bulla and any review thereof. Provided appropriate safeguards are implemented, Respondents are likewise willing to proceed with the hearing on August 16 to address those portions of the Supplemental Petition that are not premised on Mr. Lubbers' notes.

Please let us know how the Court wishes to proceed, or if it would like to discuss this matter further in advance of Thursday's hearing.

Respectfully submitted,

CAMPBELL & WILLIAMS

J. Colby Williams, Esq.

JCW/
encl. a/s
cc: Dana A. Dwiggins, Esq./Tess E. Johnson, Esq.
Elizabeth Brickfield, Esq./Joel Z. Schwarz, Esq.
(all via e-mail w/encl.)

232 Ariz. 309
Supreme Court of Arizona,
En Banc.

Bradford D. **LUND**, an individual;
William S. **Lund**, and Sherry L.
Lund, husband and wife, Petitioners,
v.
The Honorable Robert D. MYERS, Judge of the
Superior Court of the State of Arizona, in and
for the County of Maricopa, Respondent Judge,
Michelle A. **Lund**, Diane Disney
Miller, Kristen **Lund** Olson, and Karen
Lund Page, Real Parties in Interest,
Jennings, Strouss & Salmon, P.L.C., Intervenor.

No. CV–12–0349–PR.
|
July 16, 2013.

Synopsis
Background: Parties opposing a conservatorship petition sought special action relief from an order of the Superior Court, Maricopa County, No. PB2009–002244, Robert D. Myers, J., retired, requiring an in camera inspection of inadvertently disclosed documents that were allegedly subject to protection by the attorney-client privilege or work product doctrine. The Court of Appeals granted relief. Opposers appealed.

Holdings: The Supreme Court, en banc, Brutinel, J., held that:

[1] filing of inadvertently disclosed documents with trial court under seal did not constitute impermissible "use" of documents, and

[2] trial court was required to determine whether in camera review was necessary to resolve privilege claim prior to conducting in camera review of documents.

Vacated and remanded.

Opinion, 230 Ariz. 445, 286 P.3d 789, vacated.

West Headnotes (4)

[1] **Pretrial Procedure**
Use of items obtained

Receiving party's file of inadvertently disclosed, potentially privileged, documents to the trial court under seal did not constitute "use" of the documents so as to violate procedural rule governing inadvertently disclosed documents; although each of these actions involved a literal "use" of the documents, the rule permitted receiving counsel to sequester the documents, including filing them under seal, making good faith efforts to resolve the issue with opposing counsel, and, if necessary, move for the court's resolution of the issue. 16 A.R.S. Rules Civ.Proc., Rule 26.1(f)(2).

Cases that cite this headnote

[2] **Pretrial Procedure**
Determination

Privileged Communications and Confidentiality
In camera review

In camera review of inadvertently disclosed documents may be required if the receiving party makes a factual showing to support a reasonable, good faith belief that the document is not privileged. 16 A.R.S. Rules Civ.Proc., Rule 26.1(f)(2).

1 Cases that cite this headnote

[3] **Pretrial Procedure**
Use of items obtained

Following an inadvertent disclosure of documents, any documents found to be non-privileged may be used in the litigation and any documents determined to be privileged must be returned to the disclosing party or destroyed. 16 A.R.S. Rules Civ.Proc., Rule 26.1(f)(2).

Cases that cite this headnote

|4| **Pretrial Procedure**
Determination

Privileged Communications and Confidentiality
In camera review

Prior to reviewing in camera documents allegedly protected by attorney-client privilege that were inadvertently disclosed, trial court in conservatorship proceeding was required to determine that in camera review was necessary to resolve the privilege claim; the court should have awaited responses to a requested privilege log and considered the parties' arguments regarding privilege and waiver to determine whether in camera review was warranted for particular documents before reviewing them. 16 A.R.S. Rules Civ.Proc., Rule 26.1(f)(2).

1 Cases that cite this headnote

Attorneys and Law Firms

**375 Jones, Skelton & Hochuli, P.L.C. by A. Melvin McDonald, Phoenix, and Shumway Law Offices, P.L.C. by Jeff A. Shumway, Scottsdale, Attorneys for Bradford D. Lund.

Meyer Hendricks, PLLC by Ed F. Hendricks, Jr., Brendan A. Murphy, W. Douglas Lowden, Phoenix, Attorneys for William S. Lund and Sherry L. Lund.

Burch & Cracchiolo, P.A. by Daryl Manhart, Bryan F. Murphy, Jessica Conaway, Phoenix, Attorneys for Michelle A. Lund, Diane Disney Miller, Kristen Lund Olson, and Karen Lund Page.

Jennings, Strouss & Salmon, P.L.C. by John J. Egbert, J. Scott Rhodes, Phoenix, Attorneys for Jennings, Strouss & Salmon, P.L.C.

OPINION

BRUTINEL, Justice.

*310 ¶ 1 We address when a trial court, in deciding issues of privilege and waiver, may review in camera allegedly privileged documents that were inadvertently disclosed. [1] We hold that before reviewing a particular document, a trial court must first determine that in camera review is necessary to resolve the privilege claim.

I.

¶ 2 This litigation began in 2009, when relatives of Bradford Lund (the real parties in interest in this case, collectively, "Miller") sought the appointment of a guardian and conservator to manage Bradford's assets. Bradford, his father, and his stepmother (collectively, "the Lunds") opposed the appointment.

¶ 3 In September 2011, Miller's counsel, Bryan Murphy of Burch & Cracchiolo ("B & C"), served the law firm Jennings, Strouss & Salmon ("JS & S"), which had previously represented Bradford in petitioning for the appointment of a guardian, with a subpoena duces tecum requesting all non-privileged information relating to Bradford. Mistakenly believing that Murphy represented Bradford, a JS & S attorney responded to the subpoena by delivering the entire client file to Murphy without reviewing it for privileged information.

¶ 4 Early in October, Bradford's attorney, Jeff Shumway, learned that JS & S had given Bradford's file to Murphy. Shumway told Murphy by email that he believed the file contained at least two privileged documents that should be returned. Murphy replied that he would wait to hear from Shumway, who responded he would inform Murphy if further review revealed other privileged documents. After not hearing further from Shumway for three weeks, Murphy distributed the entire file to all other counsel in the case, as well as a court-appointed investigator, as part of Miller's second supplemental disclosure statement.

¶ 5 On November 14, the Lunds filed a motion to disqualify Murphy and B & C on the ground that they had "read, kept, and distributed" privileged materials. The next day, JS & S moved to intervene to file a motion to compel Murphy and B & C to comply with the rules

applicable to inadvertent disclosure, Ethical Rule 4.4(b) and Arizona Rule of Civil Procedure 26.1(f)(2).

¶ 6 On November 16, the Lunds filed an emergency motion to prevent Murphy from disclosing the file to the court and for an order that it be returned to JS & S. At a November 29 hearing, the trial court permitted Murphy to retain the file, but directed him to not copy any documents from the file or convey them to anyone. The court also ordered JS & S to create a privilege log, which JS & S filed with the court on December 9. On January 9, 2012, the court granted JS & S's motion to intervene.

¶ 7 In a January 13 minute entry, the trial court recognized its obligation to determine whether the documents were in fact privileged and directed JS & S to file under seal a detailed explanation of the legal basis for the privilege claim, attached to each allegedly privileged document. Each counsel was to receive a copy of this explanation, including the documents. After allowing the other *311 **376 parties to respond, the court intended to review the documents and counsels' arguments before ruling on whether each document was privileged.

¶ 8 On January 19, the Lunds objected to the trial court reviewing the documents in camera, arguing that Miller must first provide evidence that the documents are not privileged and requesting in the alternative that another judge conduct the review. JS & S moved to extend the deadline for filing the privilege explanations and documents, but the court denied the motion and ordered JS & S to file them on January 31. The court stated it would rule on the Lunds' objection to any in camera review before reviewing the documents. The Lunds then filed a petition for special action with the court of appeals and requested a stay of the superior court's orders.

¶ 9 The court of appeals accepted jurisdiction and granted a stay. Lund v. Myers ex rel. Cnty. of Maricopa, 230 Ariz. 445, 449 ¶ 12, 286 P.3d 789, 793 (App.2012). The court ultimately held that although the plain language of Rule 26.1(f)(2) seemingly placed no limitations on the receiving party's right to present the inadvertently disclosed documents to the court under seal or on the court's ordering the disclosing party to do the same, such a broad reading would conflict with the receiving party's duty under that rule to "return, sequester, or destroy" the privileged documents and with Arizona Rule of Civil Procedure 26(g). Id. at 453 ¶¶ 25–26, 286 P.3d at 797. The court reasoned that the receiving party did not have "an unqualified right to file privileged information with the court," but could obtain in camera review only after complying with procedural rules and showing that (a) "specific documents are likely not privileged" or (b) "the privilege has been waived." Id. ¶ 27. Finally, the court concluded that if Miller met this threshold, a judicial officer not permanently assigned to the case should conduct the in camera review given the "unique circumstances" of the case. Id. at 456 ¶ 38, 286 P.3d at 800.

¶ 10 We granted review to clarify our rules regarding the inadvertent disclosure of privileged information, a legal issue of statewide importance. We have jurisdiction pursuant to Article 6, Section 5(3) of the Arizona Constitution and A.R.S. § 12–120.24.

II.

[1] ¶ 11 When a party has inadvertently disclosed privileged information, Rule 26.1(f)(2) outlines the proper procedure for claiming privilege and resolving any dispute.[2] The party who claims that inadvertently disclosed information is privileged should "notify any party that received the information of the claim and the basis for it." Ariz. R. Civ. P. 26.1(f)(2). Once the receiving party has been notified of the privilege claim, that party "must promptly return, sequester, or destroy the specified information ... and may not use or disclose the information until the claim is resolved." Id.; accord Fed.R.Civ.P. 26(b)(5)(B). Our rule, like its federal counterpart, "is intended merely to place a 'hold' on further use or dissemination of an inadvertently produced document that is subject to a privilege claim until a court resolves its status or the parties agree to an appropriate disposition." Ariz. R. Civ. P. 26.1(f)(2) State Bar committee's note to 2008 amend.

¶ 12 Ethical Rule 4.4(b) also addresses inadvertent disclosures, providing that a "lawyer who receives a document and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures." Together, these provisions emphasize that a receiving party has a duty to suspend use and disclosure of the allegedly privileged documents until the privilege

claim has been resolved either through agreement or court ruling.

¶ 13 The receiving party may contest the privilege claim by asserting that the documents **377 *312 are not privileged or that the disclosure has waived the privilege. To have the trial court resolve the privilege dispute, the receiving party should "promptly present the information to the court under seal for a determination of the claim." Ariz. R. Civ. P. 26.1(f)(2). This procedure allows the court to act as a repository for the documents while the parties litigate the privilege claim.

¶ 14 Unlike the court of appeals, we do not find that a receiving party who presents the information under seal to the court thereby violates Rule 26.1(f)(2) by using the information and failing to return, sequester, or destroy it. See Lund, 230 Ariz. at 453 ¶ 26, 286 P.3d at 797. The prohibition in Rule 26.1(f)(2) on the "use" of the documents does not preclude filing the documents with the court under seal or other conduct allowed by the rules. See Fed.R.Civ.P. 26(b)(5)(B) advisory committee's note to 2006 amend. (stating that the receiving party may not use the information "pending resolution of the privilege claim," but that it "may present to the court" the questions of privilege and waiver). Counsel may sequester the documents, including filing them under seal; make good faith efforts to resolve the issue with opposing counsel, see Ariz. R. Civ. P. 26(g); and, if necessary, move for the court's resolution of the issue. Although each of these actions involve a literal "use" of the documents, Rule 26.1(f)(2) contemplates that the privilege claim may be "resolved" through such use.

[2] [3] ¶ 15 If the allegedly privileged documents are filed under seal with the trial court, the court may not view the documents until it has determined, as to each document, that in camera review is necessary to resolve the privilege claim. Such review may be required if the receiving party makes a factual showing to support a reasonable, good faith belief that the document is not privileged. Cf. United States v. Zolin, 491 U.S. 554, 572, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989) (requiring a threshold showing to be made before the court could perform in camera review to determine whether the crime-fraud exception to the privilege applies); Kline v. Kline, 221 Ariz. 564, 573 ¶ 35, 212 P.3d 902, 911 (App.2009) (holding that a party must present prima facie evidence to invoke the crime-fraud exception). Any documents found to be non-privileged may be used in the litigation and any documents determined to be privileged must be returned to the disclosing party or destroyed.

¶ 16 If the receiving party does not contest the disclosing party's claim of privilege, the court need not determine the privilege issue or review the undisputedly privileged documents filed under seal. See Fed.R.Civ.P. 26(b)(5)(B) advisory committee's note to 2006 amend. The receiving party in this situation must either return or destroy the documents and any copies. Ariz. R. Civ. P. 26.1(f)(2).

[4] ¶ 17 With these principles in mind, we consider whether the trial court in this case abused its discretion in its rulings regarding the disputed documents. See State Farm Mut. Auto. Ins. Co. v. Lee, 199 Ariz. 52, 57 ¶ 12, 13 P.3d 1169, 1174 (2000) (noting that discovery rulings relating to privilege are reviewed for abuse of discretion). Here, because the Lunds' motion to disqualify is based on Murphy's disclosure of allegedly privileged materials in violation of Rule 26.1(f)(2), the trial court must determine whether the documents are indeed privileged. To that end, the court properly ordered JS & S to produce a privilege log and Miller and Bradford to file a response.

¶ 18 The trial court, however, erred by ruling that it would review all the documents to determine whether they are privileged. The court should have awaited the responses to the privilege log and considered the parties' arguments regarding privilege and waiver to determine whether in camera review was warranted for particular documents before reviewing them.

¶ 19 If in camera review is needed, the trial judge should consider whether another judicial officer should conduct the review in light of the possibility that a review of privileged materials may be so prejudicial as to require the judge's recusal. If the trial judge conducts an in camera review and upholds the privilege claim, the judge should consider whether recusal is then necessary, see Ariz.Code of Judicial Conduct Rule 2.11, and a party who can show actual bias may, of course, move for the judge's removal for *313 **378 cause, see Ariz. R. Civ. P. 42(f)(2); see also A.R.S. § 12-409(B).

¶ 20 After the trial court rules on the privilege and waiver issues, the court shall consider the pending motion to disqualify Murphy and B & C. Miller has not yet responded to that motion, and we decline to

comment on its merits or on the related issue whether, by seeking disqualification, Bradford waived the attorney-client privilege. These issues are appropriately determined by the trial court in the first instance.

III.

¶ 21 For the foregoing reasons, we vacate the court of appeals' opinion and the trial court's January 13, 2012 order and remand to the trial court for proceedings consistent with this opinion.

CONCURRING: REBECCA WHITE BERCH, Chief Justice, SCOTT BALES, Vice Chief Justice, JOHN PELANDER and ANN A. SCOTT TIMMER, Justices.

All Citations

232 Ariz. 309, 305 P.3d 374

Footnotes

1 For ease of reference, we refer to all documents at issue in this case as "privileged" even though some documents are claimed only to be protected trial-preparation material.

2 Arizona Rule of Civil Procedure 45(c)(5)(C)(ii) provides the same procedure for a person who has inadvertently produced privileged documents in response to a subpoena. While A.R.S. § 12–2234 states that "an attorney shall not, without the consent of his client, be examined as to any communication made by the client to him," the statute does not address inadvertent document disclosure.

End of Document

EXHIBIT 7

EXHIBIT 7

Electronically Filed
3/8/2018 11:30 AM
Steven D. Grierson
CLERK OF THE COURT

TRAN

EIGHTH JUDICIAL DISTRICT COURT
CIVIL/CRIMINAL DIVISION
CLARK COUNTY, NEVADA

IN THE MATTER OF THE TRUST OF: THE SCOTT LYLE GRAVES CANARELLI IRREVOCABLE TRUST, DATED FEBRUARY 24, 1998	CASE NO. P-13-078912 DEPT. NO. XXVI/Probate

BEFORE THE HONORABLE BONNIE BULLA, DISCOVERY COMMISSIONER

FRIDAY, MARCH 2, 2018

TRANSCRIPT RE:
ALL PENDING MOTIONS

APPEARANCES:

For the Petitioner: DANA A. DWIGGINS, ESQ.
TESS E. JOHNSON, ESQ.

For the Trustee/Respondents: JON COLBY WILLIAMS, ESQ.
ELIZABETH BRICKFIELD, ESQ.
JOEL Z. SCHWARZ, ESQ.

ALSO PRESENT: SCOTT CANARELLI

RECORDED BY: Francesca Haak, Court Recorder

supplement these requests with any additional ESI that you're still making your way through, and I will give you up to and including April 6th of 2018 to supplement. So that's within 30 days and I expect those supplements to be done.

I am not awarding fees and costs today, but I'm going to reserve my right to impose Rule 37 sanctions if necessary. But the motion is granted within those parameters. And, Ms. Dwiggins, you'll get to prepare both Report and Recommendations today.

MS. DWIGGINS: Okay.

DISCOVERY COMMISSIONER: Actually, Ms. Johnson, you can prepare them for me.

MS. DWIGGINS: And I'll run it by counsel.

DISCOVERY COMMISSIONER: Thank you.

Finally, we get to probably the most problematic motion, which is the motion to compel the CPA records regarding the administration of the trust. And I think I'm probably going to need a little help on this, Ms. Brickfield, but my plan when I reviewed everything was to say that all of the documents that the accountant produced that are related to the petitioner's trust need to be produced. I don't think there's any dispute on that. Now, what role Mr. Gerety can play in this litigation will need to be determined by the district court judge. I understand that there are some problems here because he was wearing two hats; maybe more. But he was definitely working with Mr. Lubbers, I think, in Mr. Lubbers' capacity as trustee, but he was also working on the trust itself at Mr. Lubbers' direction.

So any of the documents that would necessarily implicate the operation of the trust, the petitioner's trust, I think are produced, period. Some of

MR. WILLIAMS: Very good.

DISCOVERY COMMISSIONER: All right. Good luck.

MR. WILLIAMS: Thank you, Judge.

MS. BRICKFIELD: Thank you.

MS. DWIGGINS: Thank you, Your Honor.

DISCOVERY COMMISSIONER: Status check, I'll see you again back here -- what did we say, April 18th at 10:00.

THE CLERK: Yes.

MS. DWIGGINS: And then 10 days for the R&R submission, correct?

DISCOVERY COMMISSIONER: Correct. And I'm going to have the petitioner's counsel prepare that and run it by your colleagues.

MS. DWIGGINS: Of course.

DISCOVERY COMMISSIONER: Anything further? All right, good luck.

MS. DWIGGINS: Thank you, Your Honor.

MS. JOHNSON: Thank you, Your Honor.

DISCOVERY COMMISSIONER: Thank you. Have a nice weekend.

(PROCEEDINGS CONCLUDED 12:33 PM.)

* * * * * *

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

Liz Garcia

Liz Garcia, Transcriber
LGM Transcription Service

EXHIBIT 8

EXHIBIT 8

SCOTT L. GRAVES CANARELLI IRRV

Detail General Ledger - Standard

Periods: 01-10 Through 05-14 As of: 5/23/2014 Ledger ID: ACTUAL

{vr_01620.RPT_Company_RI_ID} = 3 AND {vr_01620.FiscYr} in '2010' to '2014' AND ({ {vr_01620.Period_Post} >= '201001' AND {vr_01620.Period_Post} <= '201405' })

Jrnl Type	Tran Type	Bat Nbr	Per Post	Reference Nbr	Tran Date	Project/ Lot	Activity Code	Tran Description	Beginning Balance	Debit Amount	Credit Amount	Ending Balance
AP	CK	013217	07-13	000376	07/31/13			STVIA		0.00	700.00	
GJ	GL	021272	07-13	USB	07/31/13			INTEREST 2013/07		183.37	0.00	
GJ	GL	021325	08-13	DEPOSIT	08/02/13			DEPOSIT		71,708.39	0.00	
AP	CK	013386	08-13	000377	08/09/13			CLART		0.00	3,902.31	
AP	CK	013386	08-13	000378	08/09/13			COXCO		0.00	318.38	
AP	CK	013386	08-13	000379	08/09/13			JLSLS		0.00	350.00	
AP	CK	013386	08-13	000380	08/09/13			RENDO		0.00	195.00	
AP	CK	013386	08-13	000381	08/09/13			SCOTT		0.00	490.00	
AP	CK	013386	08-13	000382	08/09/13			SCOTT		0.00	490.00	
AP	CK	013386	08-13	000383	08/09/13			SCOTT		0.00	490.00	
AP	CK	013386	08-13	000384	08/09/13			SCOTT		0.00	490.00	
AP	CK	013386	08-13	000385	08/09/13			SCOTT		0.00	490.00	
AP	CK	013386	08-13	000386	08/09/13			SOLOM		0.00	3,030.80	
AP	CK	013542	08-13	000387	08/16/13			LUBBE		0.00	5,000.00	
GJ	GL	022084	08-13	USB	08/23/13			WIRE FEE		0.00	30.00	
GJ	GL	022084	08-13	WIRE	08/23/13			DISTRIBUTION		0.00	6,500.00	
AP	CK	013749	08-13	000388	08/30/13			CROSS		0.00	2,400.00	
AP	CK	013749	08-13	000389	08/30/13			NEVPO		0.00	667.32	
AP	CK	013749	08-13	000390	08/30/13			PITBL		0.00	62.00	
AP	CK	013749	08-13	000391	08/30/13			WATER		0.00	470.07	
GJ	GL	022357	08-13	USB	08/30/13			INTEREST 2013/08		186.37	0.00	
GJ	GL	022485	09-13	DEPOSIT	09/06/13			DEPOSIT		71,708.39	0.00	
AP	CK	014020	09-13	000392	09/18/13			COXCO		0.00	250.22	
AP	CK	014020	09-13	000393	09/18/13			JLSLS		0.00	350.00	
AP	CK	014020	09-13	000394	09/18/13			LUBBE		0.00	5,001.50	
AP	CK	014020	09-13	000395	09/18/13			NEVPO		0.00	621.31	
AP	CK	014020	09-13	000396	09/18/13			PITBL		0.00	62.00	
AP	CK	014020	09-13	000397	09/18/13			QUESD		0.00	35.00	
AP	CK	014020	09-13	000398	09/18/13			RENDO		0.00	225.00	
AP	CK	014020	09-13	000399	09/18/13			STATL		0.00	637.24	
AP	CK	014020	09-13	000400	09/18/13			STATL		0.00	489.32	
AP	CK	014020	09-13	000401	09/18/13			STATL		0.00	761.85	
AP	CK	014020	09-13	000402	09/18/13			STATL		0.00	103.75	
AP	CK	014020	09-13	000403	09/18/13			STATL		0.00	153.15	
AP	CK	014020	09-13	000404	09/18/13			STVIA		0.00	700.00	

SCOTT L. GRAVES CANARELLI IRRV

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	Jrnl Type	Tran Type	Bat Nbr	Per Post	Reference Nbr	Tran Date	Project/ Lot	Activity Code	Tran Description	Beginning Balance	Debit Amount	Credit Amount	Ending Balance
	AP	CK	014541	10-13	000433	10/23/13			STATL		0.00	548.45	
	AP	CK	014541	10-13	000434	10/23/13			STATL		0.00	3,571.00	
	AP	CK	014541	10-13	000435	10/23/13			SWGAS		0.00	30.45	
	GJ	GL	023674	10-13	USB	10/24/13			WIRE FEE		0.00	30.00	
	GJ	GL	023674	10-13	WIRE	10/24/13			DISTRIBUTION		0.00	10,000.00	
	AP	CK	014608	10-13	000436	10/31/13			LUBBE		0.00	5,000.25	
	GJ	GL	023846	10-13	USB	10/31/13			INTEREST 2013/10		279.17	0.00	
^	GJ	GL	023864	11-13	DEPOSIT	11/01/13			DEPOSIT		68,625.06	0.00	
	AP	CK	014726	11-13	000437	11/08/13			COXCO		0.00	308.05	
	AP	CK	014726	11-13	000438	11/08/13			FORTI		0.00	1,170.00	
	AP	CK	014726	11-13	000439	11/08/13			JLSLS		0.00	350.00	
	AP	CK	014726	11-13	000440	11/08/13			NEVPO		0.00	348.13	
	AP	CK	014726	11-13	000441	11/08/13			QUESO		0.00	25.00	
	AP	CK	014726	11-13	000442	11/08/13			RENDO		0.00	195.00	
	AP	CK	014726	11-13	000443	11/08/13			RHSLM		0.00	673.70	
	AP	CK	014726	11-13	000444	11/08/13			SHCMA		0.00	416.68	
	AP	CK	014726	11-13	000445	11/08/13			WATER		0.00	345.85	
	AP	CK	014793	11-13	000446	11/13/13			LUBBE		0.00	5,033.69	
	AP	CK	014793	11-13	000447	11/13/13			MCGLA		0.00	7,200.00	
	GJ	GL	024277	11-13	USB	11/22/13			WIRE FEE		0.00	30.00	
	GJ	GL	024277	11-13	WIRE	11/22/13			DISTRIBUTION		0.00	10,000.00	
	GJ	GL	024375	11-13	USB	11/29/13			INTEREST 2013/11		272.53	0.00	
^	GJ	GL	024388	12-13	DEPOSIT	12/02/13			DEPOSIT		68,625.06	0.00	
	AP	CK	015156	12-13	000448	12/11/13			COXCO		0.00	308.05	
	AP	CK	015156	12-13	000449	12/11/13			JLSLS		0.00	350.00	
	AP	CK	015156	12-13	000450	12/11/13			NEVEN		0.00	471.39	
	AP	CK	015156	12-13	000451	12/11/13			PITBL		0.00	62.00	
	AP	CK	015156	12-13	000452	12/11/13			RENDO		0.00	235.00	
	AP	CK	015156	12-13	000453	12/11/13			SCOTT		0.00	490.00	
	AP	CK	015156	12-13	000454	12/11/13			SCOTT		0.00	490.00	
	AP	CK	015156	12-13	000455	12/11/13			SCOTT		0.00	490.00	
	AP	CK	015156	12-13	000456	12/11/13			SCOTT		0.00	490.00	
	AP	CK	015156	12-13	000457	12/11/13			SCOTT		0.00	490.00	
	AP	CK	015156	12-13	000458	12/11/13			SCOTT		0.00	490.00	
	AP	CK	015156	12-13	000459	12/11/13			SCOTT		0.00	490.00	

SCOTT L. GRAVES CANARELLI IRRV

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Jrnl Type	Tran Type	Bat Nbr	Per Post	Reference Nbr	Tran Date	Project/ Lot	Activity Code	Tran Description	Beginning Balance	Debit Amount	Credit Amount	Ending Balance
AP	CK	015156	12-13	000460	12/11/13			SCOTT		0.00	490.00	
AP	CK	015156	12-13	000461	12/11/13			SCOTT		0.00	490.00	
AP	CK	015156	12-13	000462	12/11/13			SCOTT		0.00	490.00	
AP	CK	015156	12-13	000463	12/11/13			SCOTT		0.00	490.00	
AP	CK	015156	12-13	000464	12/11/13			SCOTT		0.00	490.00	
AP	CK	015156	12-13	000465	12/11/13			SCOTT		0.00	490.00	
AP	CK	015156	12-13	000466	12/11/13			STVIA		0.00	700.00	
AP	CK	015156	12-13	000467	12/11/13			STVIA		0.00	700.00	
AP	CK	015156	12-13	000468	12/11/13			STVIA		0.00	700.00	
AP	CK	015156	12-13	000469	12/11/13			SWGAS		0.00	34.56	
AP	CK	015156	12-13	000470	12/11/13			WATER		0.00	289.05	
AP	CK	015177	12-13	000471	12/13/13			LUBBE		0.00	5,000.00	
AP	CK	015177	12-13	000472	12/13/13			MCGLA		0.00	3,275.00	
GJ	GL	024713	12-13	USB	12/24/13			WIRE FEE		0.00	30.00	
GJ	GL	024713	12-13	WIRE	12/24/13			DISTRIBUTION		0.00	10,000.00	
AP	CK	015359	12-13	000473	12/27/13			CAMPW		0.00	13,269.57	
AP	CK	015414	12-13	000474	12/31/13			PITBL		0.00	62.00	
AP	CK	015414	12-13	000475	12/31/13			SWGAS		0.00	49.78	
AP	CK	015414	12-13	000476	12/31/13			WATER		0.00	152.35	
GJ	GL	024634	12-13	USB	12/31/13			INTEREST 2013/12		284.41	0.00	
GJ	GL	024847	01-14	DEPOSIT	01/02/14			DEPOSIT		68,625.06	0.00	
AP	CK	015560	01-14	000477	01/10/14			MCGLA		0.00	2,000.00	
AP	CK	015642	01-14	000478	01/17/14			COXCO		0.00	250.31	
AP	CK	015642	01-14	000479	01/17/14			CROSS		0.00	2,500.00	
AP	CK	015642	01-14	000480	01/17/14			JLSLS		0.00	610.00	
AP	CK	015642	01-14	000481	01/17/14			NEVEN		0.00	804.43	
AP	CK	015642	01-14	000482	01/17/14			PITBL		0.00	62.00	
AP	CK	015642	01-14	000483	01/17/14			RENDO		0.00	195.00	
AP	CK	015642	01-14	000484	01/17/14			STATL		0.00	708.33	
GJ	GL	025309	01-14	USB	01/24/14			WIRE FEE		0.00	30.00	
GJ	GL	025309	01-14	WIRE	01/24/14			DISTRIBUTION		0.00	10,000.00	
AP	CK	015760	01-14	000485	01/27/14			STATL		0.00	1,131.00	
AP	CK	015760	01-14	000486	01/27/14			SWGAS		0.00	45.21	
AP	CK	015760	01-14	000487	01/27/14			WATER		0.00	124.25	
AP	CK	015820	01-14	000488	01/31/14			LUBBE		0.00	5,000.00	