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

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PETITIONERS' APPENDIX TO PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

(VOLUME 4 OF 5)

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CERTIFICATE OF SERVICE

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

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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

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

Petitioner 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 Objection to the Discovery Commissioner's Report and Recommendations on (1) the Motion for Determination of Privilege Designation, (2) the Supplemental Briefing on Appreciation Damages (the "Report and Recommendation").[1] Petitioner specifically objects to certain findings and recommendations made by the Discovery Commissioner in relation to those privileges that Respondents Lawrence ("Larry") and Heidi Canarelli ("Heidi) (collectively, the "Canarellis"), and Frank Martin, Special Administrator of the Estate of Edward C. Lubbers ("Lubbers") (collectively the "Respondents") claim apply to documents identified by Bates Nos. RESP013284 – RESP013288 (the "Group 1

[1] *See* Report and Recommendation attached hereto as **Exhibit 1**.

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Case Number: P-13-078912-T

Documents") and RESP078899 – RESP078900 (the "Group 2 Documents")[2] (collectively the "Disputed Documents").[3]

This Objection is 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.

DATED this 17th day of December, 2018.

SOLOMON DWIGGINS & FREER, LTD.

By: _____

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[2] The Bates range of RESP078899 – RESP078900 may not be exact because these pages do not have the Bates labels listed on the individual pages. The parties have also identified these pages as pgs. 16-17 of the produced records. *See* June 19, 2018 letter from Ms. Dwiggins, the June 20, 2018 letter, and the June 25, 2018 letter from Ms. Dwiggins attached to the Motion for Determination of Privilege Designation of RESP013284 – RESP013288 and RESP078899 – RESP078900 ("Privilege Motion"), filed July 13, 2018, as Exhibits 9, 10 and 11, respectively.

[3] The Group 1 Documents are attached hereto for *in camera* review as **Exhibit 2** and the Group 2 Documents are attached hereto for *in camera* review as **Exhibit 3**. Petitioner acknowledges the Report and Recommendation precludes filing the Disputed Documents with other filings. *See* **Exhibit 1**, at p. 10:7-10. However, Petitioner hereby objects to this recommendation to the extent it precludes Petitioner from using the Disputed Documents in the instant objection.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Objection relates to the privilege designation of several documents that Respondents have recklessly produced during this litigation as part of Lubbers' hard file. Several months after Respondents made their initial NRCP 16.1 disclosures and even exercised the claw back provision of the ESI Protocol[4] with respect to other records, Petitioner attached a portion of the Group 1 Documents as an exhibit in a supplemental petition. Weeks later, Respondents demanded the return of these documents and the redaction of any reference thereto, asserting privilege. Petitioner disputed Respondents' claims and the Parties subsequently appeared before the Discovery Commissioner regarding the same.

While the Discovery Commissioner ultimately found that portions of the Disputed Documents were not protected, she did so under the premise that, to the extent such privileges applied, there were exceptions to the attorney-client privilege and/or the work product doctrine; specifically, the NRS 49.115(5) exception, the fiduciary exception and the substantial need doctrine. However, in finding that a privilege even existed, the Commissioner erroneously based her findings on speculation and assumptions rather than actual evidence that Lubbers communicated the Group 1 Documents and/or their subject matter to his counsel or that he even anticipated litigation in 2012 and 2013. Instead of ruling that there were exceptions to the privileges claimed by Respondents, the Discovery Commissioner committed clear error by finding that exceptions to the privileged applied instead of finding that the Disputed Documents simply were not protected.

Further, the Discovery Commissioner erred in finding the Disputed Documents contained opinion work product, despite the Commissioner acknowledging that: (1) it was not clear whether the Disputed Documents in fact contained Lubbers' opinions or mental impressions; and (2) that, under Rule 26(b)(3), opinion work product did not apply to parties. Although the Commissioner

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[4] *See* ESI Protocol attached as Exhibit 3 to the Motion for Determination of Designation of RESP013284 – RESP013288 and RESP078899 – RESP078900, filed July 13, 2018 ("Privilege Motion").

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ultimately found that portions of the Disputed Documents should be disclosed based upon a substantial need, she erred in initially finding that the opinion work product doctrine even applied.

Moreover, irrespective of any finding of an applicable privilege, Respondents' conduct during the course of this litigation, including since the August 29, 2018 hearing, constitutes a waiver of the same. Respondents have allowed non-parties, American West Development, Inc. ("AWDI") and/or other affiliates or entities comprising of the American West Group (collectively the "American West Group"), to not only possess the many boxes comprising Lubbers' file for the SCIT, but also to go through these records. Although the Discovery Commissioner found there was a common interest, thereby precluding waiver, such a determination was clearly erroneous when one considers that the Discovery Commissioner inappropriately extended this narrow waiver exception to AWDI and/or the American West Group when considering: (1) this is a probate action where Respondents have been sued in their individual and fiduciary capacities for breach of fiduciary duty; (2) the American West Group's entities were not signatories under the Purchase Agreement; (3) the American West Group entities are not parties to this litigation; and (4) Respondents have repeatedly distanced their fiduciary capacities themselves from these entities.

In addition, at the August 29 hearing, Petitioner learned that Respondents had no apparent pre-disclosure protocol for inadvertent disclosure of potentially privileged information. Indeed, when asked by the Discovery Commissioner, Respondents failed to enunciate any internal procedures to avoid inadvertent disclosures. This failure became especially evident when Petitioner realized that Respondents re-disclosed the Group 1 Documents (the "Redisclosed Documents)[5] ***on the same day that they sought to claw back the original production as "clearly" privileged.***

As Respondents are the ones asserting privilege, they are required to prove that these records fall within the narrow confines of the protection and, even if a privilege applied, they did not waive

[5] *See* Excerpt of Respondents Second Supplement to Initial Disclosures of Witness and Documents Pursuant to NRCP 16.1 attached hereto as **Exhibit 4**, p. 270 (showing production of RESP0088918-RESP0088917 identified as "corr.note.memo.pdf"); *compare* the Redisclosed Documents RESP0088954-RESP0088958 attached hereto for *in camera* review as **Exhibit 5** *with* **Exhibit 2**.

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it. They have failed to make any such showing. Respectfully, the Discovery Commissioner's findings that the Disputed Documents *may* be protected is not enough to allow the Respondents to create yet another discovery roadblock in this litigation.

For the reasons set forth in greater detail herein, Petitioner respectfully requests that this Court grant this Objection and strike or amend the following portions of the Report and Recommendation:

> THE COMMISSIONER FURTHER HEREBY FINDS that, as detailed further below, certain of the Disputed Documents are protected by the attorney-client privilege. *See* **Exhibit 1**, at p. 2:16-17.
>
> THE COMMISSIONER FURTHER HEREBY FINDS that, as detailed further below, even if the Disputed Documents are protected by the attorney-client privilege certain of them (or portions thereof) are subject to disclosure under the "fiduciary exception" to the extent that said documents pertain to the administration of The Scott Lyle Graves Canarelli Irrevocable Trust (the "SCIT"). *Id.* at p. 2:18-22.
>
> ...
>
> THE COMMISSIONER FURTHER HEREBY FINDS that Petitioner's request for an accounting in the Initial Petition did not automatically create and adversarial relationship between Petitioner and Lubbers...However, Mr. Lubbers, being a lawyer, was sophisticated enough to know he could have some potential exposure and was concerned the parties may be headed toward litigation. *Id.* at p. 3:10-14.
>
> ...
>
> THE COMMISSIONER FURTHER HEREBY FINDS that Lubbers anticipated litigation at the time the Initial Petitioner was filed and at the time the Disputed Documents were prepared. *Id.* at p. 3:23-25.
>
> ...
>
> THE COMMISSIONER FURTHER HEREBY FINDS that RESP0013284 appears to be handwritten notes that the Commissioner assumes Lubbers made contemporaneous with a teleconference he had with his lawyers on or about October 14, 2013. *Id.* at p. 4:12-15.
>
> THE COMMISSIONER FURTHER HEREBY FINDS that RESP0013284 is probably protected by the attorney-client privilege, but it nonetheless falls under the "fiduciary exception" and NRS 49.115(5) because it deals with Lubbers' preparation of an accounting for the SCIT, which is for the benefit of Petitioner. *Id.* at p. 4:16-19.
>
> THE COMMISSIONER FURTHER HEREBY FINDS that, to the extent RESP0013284 may be considered work product because it was created in anticipation of litigation, it falls under the exception of substantial need since

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there is no other reasonable way for Petitioner to obtain the information contained therein from Lubbers. *Id.* at 79:5-7.

...

THE COMMISSIONER FURTHER HEREBY FINDS that RESP0013285 is a typed document with handwritten notes. The handwritten date is consistent with the date Lubbers consulted with his lawyers and the notes reflect the types of things one would discuss with his/her attorney. The typed notes, therefore, appear to be an attorney-client communication. *Id.* at p. 4:27-5:3.

...

THE COMMISSIONER FURTHER HEREBY FINDS that from the beginning of RESP0013285, including the handwritten notes, to the indented paragraph starting with the word "1st" is considered work product and potentially protected under the attorney-client privilege without an applicable exception. *Id.* at p. 5:7-10.

...

THE COMMISSIONER FURTHER HEREBY FINDS that while certain portions of RESP0013285 may constitute opinion work product, the Factual Statements constitute ordinary work product. To the extent the Factual Statements are intertwined with opinion work product, there is nonetheless substantial need to have this information disclosed as Petitioner has no other reasonable way to obtain the information referenced in the Factual Statements. *Id.* at p. 5:15-19.

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

THE COMMISSIONER FURTHER HEREBY FINDS that the second sentence of the paragraph starting with "[w]hether" through and including the paragraph starting with the work "annual" is subject to disclosure.... Said portion of RESP013285 is factual in nature, and there is substantial need to have this information disclosed as Petitioner has no other reasonable way for Petitioner to obtain the same.... To the extent this portion of RESP013285 may be protected under the attorney/client privilege, it nonetheless falls under the "fiduciary exception" because the topics are administrative in nature – e.g. management of the SCIT – and are otherwise factual in nature. *Id.* at p. 5:25-6:4.

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

THE COMMISSIONER FURTHER HEREBY FINDS that RESP013286 and 13287 do not appear to contain factual information related to the SCIT, and as such, should be clawed back. *Id.* at p. 6:9-11.

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THE COMMISSIONER FURTHER HEREBY FINDS that it is unclear when Lubbers composed the notes labeled RESP0013288 because there is no date on them, *id.* at 77:17-18, 81:12-15, 82:16-21, but they appear to contain facts about the SCIT and the petition for an accounting, not Lubbers' opinions. *Id.* at p. 6:13-16.

THE COMMISSIONER FURTHER HEREBY FINDS that to the extent RESP013288 is considered work product, it falls under the exception of substantial need and contains facts as opposed to an opinion. *Id.* at p. 6:22-24.

THE COMMISSIONER FURTHER HEREBY FINDS that American West Development, Inc. or any of its affiliates' possession of Lubbers' files does not constitute a waiver of the attorney/client privilege and/or the work product doctrine based on the common interest doctrine. *Id.* at p. 7:3-6.

...

IT IS FURTHER RECOMMENDED that with respect to RESP0013285:

(1) from the beginning of RESP0013285, including the handwritten notes, to the indented paragraph starting with the word "1st" shall be redacted,

...

(4) the final paragraph on RESP0013285 shall be redacted.

IT IS FURTHER RECOMMENDED that RESP0013286 and 13287 shall be clawed back. *Id.* at p. 8:18-9:13.

Petitioner further requests that any amendments to the above-mentioned provisions of the Report and Recommendation be consistent with the following:

1. RESP013285 (the "Typed Notes") contain facts and are not protected;

2. The Group 1 Documents are not protected by the attorney-client privilege; in the alternative, if the attorney-client privilege applied to any portion of the Group 1 Documents, that protection was waived by the voluntary disclosure to AWDI and/or the American West Group;

3. It is not supported by available evidence that Lubbers personally anticipated litigation in 2013;

4. The Disputed Documents are not protected by the work product doctrine;

5. To the extent any portion of the Disputed Documents is found to be work product, it is ordinary work product and Petitioner has substantial need for disclosure of the same; in the alternative, if any portion of the Disputed Documents is found to be opinion work product, this Court must determine there is a compelling need for these records;

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6. That protection was waived by the voluntary disclosure to AWDI and/or the American West Group and is not subject to the common interest doctrine; and

7. Respondents waived any applicable privilege to the Disputed Documents as a result of their reckless production of the same.

II. STATEMENT OF FACTS

As this Court is well aware, this case is a probate matter concerning the administration of the SCIT and Respondents' conduct both before and after the fire sale of the SCIT's assets. All parties and this Court are well-versed in the facts of this case following numerous hearings and the parties' prior briefing on these matters. Petitioner does, however, supplement the relevant facts for this Objection.

A. IN 2012 AND 2013, THERE WAS HOSTILITY BETWEEN PETITIONER AND THE CANARELLIS, BUT NOT BETWEEN PETITIONER AND LUBBERS.

Petitioner's lack of hostility with Lubbers in 2012 and 2013 is confirmed by documents upon which Respondents rely so heavily in prior briefing to haphazardly demonstrate that Lubbers' anticipated litigation.

1. The Dispute Arose Between Petitioner and the Canarellis in 2012.

While Petitioner concedes there was hostility between ***himself and the Canarellis*** at around the time Petitioner retained counsel in June 2012, said hostility did not extend to Lubbers. Indeed, at this time Lubbers was merely acting as the Independent Trustee and liaison between the Canarellis (who were the then serving Family Trustees) and Petitioner. Lubbers also acted as the Canarellis' counsel in their capacities as the Family Trustees at such time; consequently, Lubbers, individually, could not have subjectively anticipated litigation given his limited power as Independent Trustee and Petitioner's genuine fondness for him.

A letter from Petitioner's counsel, dated November 14, 2012, confirms that the purported "threatened litigation," if any, was ***limited to only those obligations assigned to the Family***

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Trustees, i.e. ***the Canarellis*** at that time.[6] If litigation was indeed "threatened" by November 2012, its scope was ***limited to*** issues concerning the Canarellis' unreasonable interpretation of the HEMS standard and to request accountings for the SCIT, all of which were functions of the Family Trustees and not the Independent Trustees. Respondents have failed to introduce any evidence that Lubbers believed that the "litigation" referenced in the November 14, 2012 letter was directed at him, individually, and/or in his capacity as Independent Trustee of the SCIT.

2. The Initial Petition Did Not Assert Claims Against Lubbers.

On September 30, 2013, approximately four (4) months after Lubbers accepted the appointment as Family Trustee, Petitioner filed a petition ("Initial Petition") requesting Lubbers to: (1) provide an inventory; (2) provide an accounting; (3) to conduct a valuation of the Purchase Price as expressly required under the Purchase Agreement; and (4) to provide Petitioner with all information relating to the Purchase Agreement ("Requested Relief"). This request was directed as Lubbers **solely** because he was by then the only serving Family Trustee and Independent Trustee of the SCIT.

In the Opposition to the Privilege Motion, Respondents erroneously relied on the Initial Petition to claim that litigation was anticipated against Lubbers by September 2013; however, this logic fails based upon a plain reading of the Initial Petition. Any allegations of wrongdoing ***were directed solely against the Canarellis during their tenure as Family Trustees*** between February 24, 1998 and May 24, 2013. No claims were asserted against Lubbers (or the Canarellis for that matter); rather, Petitioner only sought the Requested Relief. 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."

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[6] *See* November 14, 2012 letter from Mr. Solomon attached Exhibit 2 to Respondents' Opposition to Motion for Determination of Designation of RESP013284 – RESP013288 and RESP078899 – RESP078900 and Countermotion for Remediation of Improperly Disclosed Attorney-client Privileged and Work Product Protected Materials ("Opposition to the Privilege Motion"), filed August 10, 2018.

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B. THE DISPUTED DOCUMENTS.

On June 27, 2017, Petitioner filed the Surcharge Petition wherein he asserted various claims including breach of fiduciary duty against all of the Respondents. Since such filing, Petitioner has undergone extensive efforts to recover discovery from the Respondents. To facilitate the production, Petitioner executed an ESI Protocol on December 12, 2017, providing procedures for the production of electronically stored information, including the process for clawing back privileged documents. In the event a party disputes another's efforts to claw back documents based on privilege, the party must do as follows:

> If any party disputes the privilege claim ("Objecting Party"), that Objecting Party shall object in writing by notifying the Producing Party of the Dispute and the basis therefore. The parties thereafter shall meet and confer in good faith regarding the disputed claim within seven (7) court days after service of the written objection. In the event that the parties do not resolve their dispute, the Objecting Party may bring a motion for a determination of whether a privilege applies within ten (10) court days of the meet and confer session.[7]

Respondents have taken advantage of this provision on several occasions to claw back documents, including the following groups of documents that Petitioner disputes and are subject to the instant Objection.

1. The Group 1 Documents (RESP013284-RESP013288).

Respondents claim that the Group 1 Documents are protected by both the attorney-client privilege and the work product doctrine.[8] The Group 1 Documents were produced in Respondents' initial production of documents on December 15, 2017 as "Handwritten notes" and was represented to be part of Lubbers' hard file.[9] This Bates range comprises four (4) pages of handwritten notes, one of which has the date October 14, 2013 handwritten on them ("the Handwritten Notes") and

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[7] *See* ESI Protocol *supra* note 4, at Section 21.

[8] *See* June 5, 2018 letter from Ms. Brickfield ("June 5 Letter") attached as Exhibit 4 to the Privilege Motion.

[9] *See* Excerpt of Edwards Lubbers, Lawrence Canarelli, and Heidi Canarelli's Initial Disclosures of Witnesses and Documents Pursuant to NRCP 16.1 attached hereto as **Exhibit 6.**

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one (1) typed page with the October 14, 2013 date handwritten in the margin, namely RESP013285 (the "Typed Notes"). It is not entirely clear if Lubbers actually created these notes as they do not show the author on their face; however, Respondents represented that the Typed Notes were prepared by Lubbers **before** his October 14, 2013 conference call with his counsel at that time, the law firm of Lee Hernandez, Landrum & Garofalo ("Lee Hernandez").[10]

On May 16, 2018, Petitioner filed a supplement to the Surcharge Petition and attached the Typed Notes as an exhibit. On June 5, 2018, almost three (3) weeks later, Respondents clawed back such document, claiming it was "clearly an attorney-client privileged and attorney work product-protected document" that was inadvertently produced. *See supra* note 8. Petitioner disputed such claims and, in response, Respondents asserted that "the privileged nature of this document is self-evident."[11] Unconvinced, Petitioner filed the Privilege Motion.

2. The Group 2 Documents (RESP78899-RESP78900).

Respondents' claim that the Group 2 Documents are protected by only the work product doctrine.[12] The Group 2 Documents were produced by Respondents on April 6, 2018. These pages are dated December 19, 2013 written in the margins and appear to comprise Lubbers' handwritten notes from a meeting with Stephen Nicolatus, Petitioner, Mark Solomon, Robert Evans, Don Campbell, Hunter Campbell and Mr. Williams. The Group 2 Documents were part of a larger document file, namely, RESP078884 – RESP078932, and appeared to also include attorneys' notes.[13] Respondents sought to claw back such documents, however, following an exchange

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[10] *See* Declaration of J. Colby Williams, Esq. ("Williams Decl.") attached to the Opposition to Privilege Motion, ¶ 12.

[11] *See* June 12, 2018 letter from Ms. Brickfield ("June 12 Letter") attached as Exhibit 6 to the Privilege Motion.

[12] *See* Transcript of the August 29, 2018 hearing attached hereto as **Exhibit 7**, at p. 62:21-24 (Mr. Williams: "In my complaint on those is not… that they're attorney/client privileged, either. It was only work product.").

[13] Ms. Dwiggins contacted Mr. Williams to discuss the same, who thereafter confirmed that several pages contained multiple attorneys' notes, including his own, and that he would review the

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between the Parties, Petitioner agreed to the claw back of the vast majority of documents. The Group 2 Documents prepared by Lubbers remained disputed and subject to the Privilege Motion.

C. THE AMERICAN WEST GROUP HAD POSSESSION OF LUBBERS' FILE BOTH BEFORE AND AFTER PRODUCTION TO PETITIONER.

Discovery in this matter has disclosed that AWDI employees had access to the Disputed Documents both before and after these records were turned over to Respondents' counsel, thus effectively waiving both the attorney-client privilege and the work product doctrine. These facts are undisputed. Indeed, in an email from Tina Goode, the Director of Corporate Administration with AWDI, she acknowledged receipt of the boxes from Ms. Brickfield's office and reviewing the contents thereof. 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 . . . [14]

It is unknown what specific individuals at AWDI also reviewed Lubbers' personal file and the purposes thereof;[15] although it is apparent (and Respondents have not denied) that Respondents never implemented any procedures segregating and/or protecting these records for confidentiality.

D. RESPONDENTS HAVE RECKLESSLY CONDUCTED DISCOVERY, HAVING PRODUCED THE HANDWRITTEN NOTES AND TYPED NOTES (RESP013284-RESP013288) AT LEAST TWICE.

Since the Parties completed their initial briefing as to the Disputed Documents, Petitioner further learned of the reckless nature in the Respondents' handling of discovery. During the August

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entirety of these records for further privileged documents. A few days later, on June 18, 2018, Respondents' counsel advised that the entirety of RESP078884 – RESP078932 would need to be clawed back as work product because the production included notes prepared by attorneys as well as notes taken by Mr. Lubbers "during the pendency of this action." Mr. Williams confirmed the same at the August 29, 2018 hearing. *See* **Exhibit 7**, at p. 62:7-24.

[14] *See* November 18, 2017 email from Ms. Goode attached as Exhibit 12 to the Privilege Motion.

[15] *See* **Exhibit 7**, at p. 107:15-17 (Discovery Commissioner: "Mr. Williams, who went through the documents?" Mr. Williams: "Your Honor, I can't tell you who went through—they—they cited—Tina Goode.").

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29, 2018 hearing, Respondents could not enunciate the protocol undertaken to prevent inadvertent disclosure of protected documents.

Discovery Commissioner:	What safeguards were in place when you produced these documents to make sure once you did a production there wasn't an inadvertent disclosure, what did you do?
Mr. Williams:	I would start with the ESI protocol, Your Honor, which --
Discovery Commissioner:	***That puts the burden on the other side. What would you do?*** *Id.* at p. 67:3-9.
...	
Discovery Commissioner:	I'm just trying to understand, Respondent's counsel, ***what did you all do to ensure -- did you just rely on the ESI protocol, well, they'll let us know?*** But how would they --
Mr. Williams:	No.
Discovery Commissioner:	-- know that? Because it's identified as, you know, you've produced it, but how would they know what it is? *Id.* at p. 68:8-14.

Further, since the hearing, Petitioner discovered that Respondents produced the Group 1 Documents a second time. In fact, these documents were produced *the same day* Ms. Brickfield claimed that the Group 1 Documents were "*clearly an attorney-client privileged and attorney work product-protected document*," Respondents *reproduced an exact copy of these documents*.[16] On November 2, 2018, upon Petitioner discovering the same during a document review, Ms. Dwiggins contacted Mr. Williams and advised him of the same. Ms. Dwiggins further suggested that he review the remainder of that particular document file to ensure there were no additional records that needed to be clawed back. While Mr. Williams thereafter sent an email seeking to claw back *only the Typed Notes.*[17] To date, no other documents in the particular document have been clawed back, despite the fact that it also contains another copy of the Handwritten Notes.

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[16] *See* **Exhibit 4**, at p. 270 (showing production of RESP0088918-RESP0088969 identified as "corr.note.memo.pdf"); *compare* **Exhibit 5** *with* **Exhibit 2**.

[17] *See* November 2, 2018 email from Mr. Williams attached hereto as **Exhibit 8** (providing "notice of [their] request to claw back Bates Nos. RESP0088955.").

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III. LEGAL ARGUMENT

A. RESPONDENTS HAVE THE HEAVY BURDEN OF DEMONSTRATING THAT THE DISPUTED DOCUMENTS ARE PROTECTED BY PRIVILEGE.

It is undisputed that Respondents have the "heavy burden" of establishing that the attorney-client privilege and the work product doctrine exist.[18] Indeed, the Nevada Supreme Court previously noted in *Whitehead v. Nevada Comm'n on Judicial Discipline*, 110 Nev. 380, 414-415, 873 P.2d 946, 968 (1994) that "[b]ecause both the work product and the attorney-client privileges: obstruct[ ] the search for truth and because [their] benefits are, at best, 'indirect and speculative,' [they] ***must be*** '***strictly confined within the narrowest possible limits*** consistent with the logic of [their] principles.'"

B. RESPONDENTS HAVE FAILED TO PROVE THAT ANY OF THE RECORDS ARE PROTECTED BY ATTORNEY-CLIENT PRIVILEGE.

Nevada codified the attorney-client privilege under , which provides, in part, that "the communications must be between an attorney and client, for the purpose of facilitating the rendition of professional legal services, and be confidential."[19] "it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." 341.341.

The Discovery Commissioner's finding that ***any*** portion of the Group 1 Documents are protected by the attorney-client privilege is clearly erroneous because: (1) it is based on minimal

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[18] *See* Opposition to the Privilege Motion at pp. 15:13-14 and 16:3-4; *see also Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 627 (D. Nev. 2013) (Citations omitted) ("There is no dispute that the party asserting the privilege must make a *prima facie* showing that the privilege protects the information the party intends to withhold."); *LightGuard Sys., Inc. v. Spot Devices, Inc.*, 281 F.R.D. 593, 598 (D. Nev. 2012) ("As in the case of the attorney-client privilege, the party claiming the protection bears the burden of demonstrating the applicability of the work product doctrine.") (citations omitted).

[19] *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court in & for County of Clark*, 399 P.3d 334, 341 (Nev. 2017), *reh'g denied* (Sept. 28, 2017) (citing NRS 49.095).

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and even conflicting support submitted by Respondents; and (2) the Commissioner speculated that Lubbers communicated the documents to, or otherwise discussed them with, his counsel.

1. Respondents Provided No Evidence That the Typed Notes Were Ever Communicated to Counsel.

Despite Respondents' initial claim in written correspondence that the Group 1 Documents are "Mr. Lubbers' notes from his meeting with his then counsel, David Lee and Charlene Renwick." *See supra* note 11. Mr. Williams subsequently provided a self-serving declaration in support of the Opposition to the Privilege Motion, wherein he stated that "[i]n anticipation of the call with attorneys Lee and Renwick, Lubbers prepared type-written notes." *See supra* note 10, at ¶ 12. Even if such a self-serving claim was true, that does not automatically render them privileged under the attorney-client privilege. While Mr. Williams fails to articulate the manner in which he has personal knowledge of the same (similar to Ms. Brickfield in her correspondence), the Typed Notes are nonetheless preparatory communications based upon Mr. William's declaration.[20]

Many jurisdictions refuse to extend the attorney-client privilege to merely preparatory communications.[21] Rather, the information must be transmitted to counsel and the party claiming the privilege must prove the same.[22] For instance, in , 447 F.Supp.2d 1131 (Haw. 2006), Defendant Rolls-Royce Corporation ("RRC") inadvertently produced a document that contained handwritten notes of an RRC employee that were prepared to assist counsel in the defense of an action. [illegible]. The court noted that while the notes can constitute communication by a client to legal counsel, "RRC,

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[20] Mr. Williams' declaration is more likely the scenario in light of the fact that both Mr. Williams and Mr. Brickfield state that the Handwritten Notes were taken by Lubbers during his conference call with Lee and Renwick. It is very unlikely that Lubbers would take written and typed notes at the same time.

[21] *See Centeno Supermarkets, Inc. v. H.E. Butt Grocery Co.*, 1987 WL 42402, *5 (W.D. Tex. 1987) ("Defendant has not found authority to support its position that the gathering of information prior to the establishment of the attorney-client relationship should be privileged.").

[22] *See Chevron U.S.A. Inc v. United States*, 83 Fed. Cl. 195 (2008) (handwritten notes of a non-attorney were not subject to the attorney work-product privilege or attorney-client privilege, where there was no indication or affidavit confirming that notes were conveyed to an agency attorney for any purpose.).

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however, ***has not provided any information regarding how the document was transmitted to counsel.***" *Id.* . Thus, the court could not find them confidential and therefore not protected under the attorney-client privilege. *Id.* confidential and therefore not protected under the attorney-client privilege. *Id.*

Further, in *People v. Gutierrez*, 200 P.3d 847, 867-68 (Cal. 2009), a defendant contended that documents seized from his cell were protected by the attorney-client privilege because he intended to show the documents to his counsel. The court rejected this argument, noting that "the intent to show a document to a lawyer does not transform a document into one covered by the attorney-client privilege."[23] *See also Duttle v. Bandler & Kass*, 127 F.R.D. 46, 52 (S.D. N.Y. 1989) (although it was evident that legal advice would later be sought concerning the issues discussed in the meeting notes, the court found that "discussions that anticipate a privileged communication are not themselves privileged.").

There is no evidence that the Typed Notes were even created by Lubbers,[24] let alone "communicated" by him to Lee Hernandez resulting in protection under the law.[25] Rather, the Typed Notes were produced within Lubbers' hard file within the folder entitled "Corresp, Notes & Memos."[26] Lee Hernandez has not even represented that the Typed Notes were ever transmitted to them or even that this document was in their files. Consequently, the Discovery Commissioner committed clear error in finding that the Typed Notes were protected by the attorney client privilege. Irrespective of whether Lubbers intended to provide this document to his counsel

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[23] *Id.* at 868 (citing *Zurich Am. Ins. Co. v. Superior Court* 155 Cal.App.4th 1485, 1498, 66 Cal.Rptr.3d 833(2007).

[24] *See In re Monsanto Co.,* 998 S.W.2d 917 (Tex.App. 1999) (finding that the attorney-client privilege and work product doctrine did not apply to reports, notes or memos that did not identify the author or recipient of the same.).

[25] *See Angst v. Mack Trucks, Inc.*, 1991 WL 86931 (E.D.Pa. 1991) (finding that a handwritten copy of notes prepared for personal use were not protected by the attorney-client privilege, in contrast to a typed copy of the same notes that were produced to secure an attorney).

[26] *See* Cover sheet entitled "Corresp, Notes & Memos" labeled with Bates No. RESP0013262 attached hereto as **Exhibit 9**.

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(assuming *in arguendo* he did), intent is simply not enough to garner protection over the same, let alone speculation.

2. There Is No Evidence That the Typed Notes Were Discussed with Counsel, for Legal Comment or Otherwise.

Even if Respondents could somehow demonstrate that Lee Hernandez possessed a copy of the Typed Notes, an attorney's mere possession of a client's preparatory notes also does not automatically constitute privilege of the same.[27] In *United States v. Davita, Inc.*, 301 F.R.D. 676, 679 (N.D.Ga. 2014), the plaintiffs challenged defendants' withholding of documents on the grounds of attorney-client privilege and work product and moved to compel production of the same. The court noted that copies of draft business documents that were simply distributed to an attorney without a request for legal comment or advice were not entitled to a privilege if the same document existed apart from an attorney/client communication. *Id.* at 683.

Further, in *Lee v. Condell*, 208 So. 3d 253 (Fla. Dist. Ct. App. 2016), a co-defendant moved to compel the production of another defendant's personal notes. The co-defendant learned of these notes when the defendant stated during his deposition that he prepared the notes for his personal use and although he did not give his attorney a copy of the notes, he discussed them with her. *Id.* at 258. The trial court found that the notes "did not reflect any conversations Lee had with his counsel or any trial strategy his attorneys shared with him" and merely contained Lee's "recitation and musings concerning certain facts of the case." *Id.* at 256. Indeed, the trial court found that "[e]ven a cursory review of the notes reflects that the notes were a stream of consciousness rather than notes for a strategy session or done while taking notes during a conversation with another person." *Id.* at 257. Thus, the trial court determined that no privilege existed and the notes were subject to discovery. The appellate court agreed with the trial court that these notes were not a "communication" and were therefore not protected from disclosure. *Id.* at 258.

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[27] *See Ratliff v. Davis Polk & Wardwell,* 354 F.3d 165, 170–71 (2d Cir.2003) (observing that discovery rules do not "permit a person to prevent disclosure of any of his papers by the simple expedient of keeping them in the possession of his attorney" (quoting *Colton v. United States,* 306 F.2d 633, 639 (2d Cir.1962)) (internal quotation marks omitted)).

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Beyond the self-serving declaration by Mr. Williams, Respondents have submitted no evidence other than Lee Hernandez's billing statements and the declarations of Lee and Renwick.[28] However, this evidence is completely devoid of any indication that Lubbers discussed any portion of the Typed Notes with them during the October 14, 2013 telephone call. Specifically, the billing statement merely shows that the October 13 phone call lasted only about 19-24 minutes (0.6 hours) and discussed "responses to petitions."[29] In light of the fact that there were three (3) separate petitions filed on three (3) separate trusts, it is almost impossible, if not impossible, to discuss the same and the substance of the Typed Notes in less than 24 minutes.[30] This is supported when one considers the Handwritten Notes in connection with the billing entry. There are three (3) pages of the Handwritten Notes, one for each of the three (3) trusts that were subject to the three (3) separate petitions. It is apparent from the Handwritten Notes what was specifically discussed during that phone call. It is also consistent with the relief sought in the petitions. In light of the complexity of this matter, it is difficult to fathom that Lee and Renwick can substantively remember with any specificity what was discussed, but also that they were even able to discuss this and two other complex matters in less than half an hour during a telephone call almost five (5) years ago.

Noticeably absent from those notes are any references to the distributions requests by Petitioner from the SCIT, denial thereof or any other facts surrounding the sale. Indeed, the declarations of Lee and Renwick are also devoid of the same. *See supra* note 28. Nor do the

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[28] *See* Opposition to the Privilege Motion, Declaration of David Lee and the Declaration of Charlene Renwick ("Lee Decl. and Renwick Decl.") attached as Exhibit 4 and the Lee Hernandez billing statements attached as Exhibit 5.

[29] Respondents have further represented that multiple petitions were discussed during the call. *See* June 12 Letter *supra* note 11. (stating that portions of the October 14, 2013 notes "correspond directly to sections of Scott Canarelli's ***petitions***.") (Emphasis added).

[30] Copies of the cover pages for the Petitions to Assume Jurisdiction filed in the other trust matters are attached as Exhibits 2 and 3 to the Reply to Respondents' Opposition to Motion for Determination of Designation of RESP013284 – RESP013288 and RESP078899 – RESP078900 and Countermotion for Remediation of Improperly Disclosed Attorney-client Privileged and Work Product Protected Materials ("Reply to the Privilege Motion"), filed August 24, 2018.

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declarations state that either one of the attorney's reviewed their file, notes or any other document other than the billing entry. *Id.*

Despite the lack of evidence demonstrating that the Typed Notes were "communicated," Respondents expect this Court to assume that it was communicated because "the notes reflect the types of things one would discuss with his/her attorney." *See* **Exhibit 1**, at p. 5:1-2. Such a finding, in and of itself, is speculative. This, coupled with Lee and Renwick's declarations based on "memory," fail to meet the heavy burden of proving the Typed Notes are privileged. Accordingly, the Discovery Commissioner committed clear error, thus warranting a finding that the Typed Notes are not privileged in any manner.

3. The Discovery Commissioner Erroneously Made Numerous Speculative and Contradictory Findings.

Throughout the August 29, 2018 hearing, the Discovery Commissioner made several assumptions and speculations regarding the circumstances under which Lubbers authored the Group 1 Documents. Despite making a definitive finding that "certain of the Disputed Documents ***are*** protected by the attorney-client privilege," *id.* at p. 2:16-17 (Emphasis added), the Discovery Commissioner noted on several occasions that some of the notes ***may*** or ***probably*** were prepared before, during or after a call Lubbers purportedly had with his counsel on October 14, 2013 even though Respondents produced no evidence to substantiate the privilege.

> I think they were ***probably contemporaneous*** or at least ***perhaps prepared*** immediately following the call and some of them ***may have been prepared in advance*** of the call to -- to set forth the areas that Mr. Lubbers wanted to discuss with his initial lawyer.[31]

The Discovery Commissioner further noted that she did not know whether these notes were even communicated to counsel.

> So Ms. Dwiggins raises an interesting issue, which is ***there's no indication that they were actually sent to the lawyer, or were they prepared contemporaneously with the phone call*** with the lawyer, were they in

[31] *See* **Exhibit 7**, at p. 33:1-4.

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preparation of the phone call with the lawyer to address the petition? ***We don't know***.[32]

Despite these comments and the uncertainty expressed in her own findings,[33] the Discovery Commissioner still found that the attorney-client privilege applied to both the Handwritten and Typed Notes. Such a protection over the entirety of these records is clearly erroneous based upon the lack of evidence that the Typed Notes were ever provided to Lee Hernandez or that their contents were ever discussed with counsel.

4. Respondents Have Also Set Forth Conflicting Evidence as to the Protected Status of the Group 1 Documents and Have Selectively Disclosed the Circumstances Under Which These Records Were Created.

As mentioned *supra*, Mr. Williams represents that Lubbers prepared the Typed Notes "[i]n anticipation of the call with attorneys Lee and Renwick." *See supra* note 10. However, unless Lubbers previously explained why he prepared these documents, Mr. Williams cannot have personal knowledge of the circumstances under which Lubbers prepared these notes because he was not Respondents' counsel at that time. Although Respondents provided a declaration from Lee and Renwick, *see supra* note 28, they made no such similar assertion as to the circumstances for the Typed Notes' creation.

To overcome Petitioner's critique that Lee Hernandez's billing entries and declarations were overly general, Respondents' counsel claimed that Lubbers' counsel cannot testify to what was previously discussed with them as that would constitute a waiver. *See* **Exhibit 7**, at p. 33:23-25. This claim, however, is self-serving as it effectively allows Mr. Williams to selectively waive privileged material (i.e. statements by Lubbers concerning the circumstances for the creation of the

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[32] *Id.* at p. 32:22-33:1 (Emphasis added).

[33] *See e.g.* **Exhibit 1**, at p. 5:5-6 ("It is unclear who typed RESP0013285, however, the Commissioner believes the handwritten portion was authored by Lubbers."); and p. 6:13-14 ("[I]t is unclear when Lubbers composed the notes labeled RESP0013288 because there is no date on them.").

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Typed Notes) and forego having to actually prove the privileged nature of these documents.[34] If this Court were to accept Mr. Williams argument, it would essentially nullify a major element of 49.095 (i.e. that there was even a communication).[35]

C. RESPONDENTS HAVE FAILED TO PROVE THAT ANY OF THE RECORDS ARE PROTECTED BY THE WORK PRODUCT DOCTRINE.

Wynn Resorts, Ltd. provides for the work product doctrine which, similar to 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.'"[36]In determining whether materials were prepared in anticipation of litigation, Nevada has adopted the "because of" test.[37] *Wynn* indicates that, "[u]nder the 'because of' test, documents are prepared in anticipation of litigation when 'in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation.'" *Id* at 348. When determining whether the "because of" test has been met, the Court further adopted the "totality of circumstances" standard, *id.,* which the *Wynn* court noted as follows:

> [T]he court should "look[ ] to the context of the communication and content of the document to determine whether a request for legal advice is *in fact* fairly implied, taking into account the facts surrounding the creation of

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[34] *See Oasis Int'l Waters, Inc. v. United States,* 110 Fed. Cl 87 (2013) (holding that waiver of the attorney-client privilege extends to all communications of the same subject matter "to prevent the 'selective waiver of the privilege,' which 'may lead to the inequitable result that the waiving party could waive its privilege for favorable advice while asserting its privilege on unfavorable advice,' ***thereby using the privilege 'as both a sword and a shield'***") (quoting *See In re EchoStar Commc'ns Corp.,* 448 F.3d 1294, 1299 (Fed.Cir. 2006)) (Emphasis added).

[35] Case law in other jurisdictions has further required counsel to prove a document was transmitted irrespective of any alleged waiver concerns. *See e.g. supra* note 22.

[36] *Wynn Resorts, Ltd.*, 399 P.3d at 347 (Citations omitted). The Nevada Supreme Court has previously recognized that federal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when this jurisdiction examines its rules. *See Nelson v. Heer* (Jan. 25, 2006), *as modified* (Jan. 25, 2006) (Citation omitted).

[37] *Wynn Resorts, Ltd.*, 399 P.3d at 347–48 (Citations omitted).

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> the document and the nature of the document." … Lastly, the court should consider "whether a communication explicitly sought advice and comment."[38]

There is further what the federal court calls "a temporal and a motivational component" of the work product doctrine, providing that:

> [A]t the time the document was prepared, the party claiming the doctrine's protection must "have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable." ... In addition, the party "must demonstrate that in light of the nature of the document and the factual situation of the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation."[39]

Here, the totality of the circumstances confirms that none of the Disputed Documents 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. In spite of the circumstances surrounding the period that Lubbers prepared the Disputed Documents, the Discovery Commissioner erroneously found that Lubbers anticipated litigation. Similar to her findings on the attorney-client privilege, such a finding was based on mere speculation and Respondents provide little if any support in favor of applying the protection.

For example, the Discovery Commissioner noted at the August 29, 2018 hearing that "certainly someone in Mr. Lubbers' position ***could have anticipated litigation***," *see* **Exhibit 7**, at p. 82:2-4 (Emphasis added), that the Commissioner "***suspect[ed] he was concerned,***" *id.* at p. 87:22-88:3(Emphasis added), and that she felt Lubbers "***perceived that there was potentially a problem here or there***" *id.* at p. 87:22-88:3(Emphasis added). All of these musings, without adequate support from Respondents, culminated into findings of the subjective beliefs of a man who, tragically, is no longer with us to testify as to his beliefs at the time he created these records.

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[38] *Wynn Resorts, Ltd.*, 399 P.3d at 348 (quoting *In re CV Therapeutics,* 2006WL 1699536, *4 (N.D.Cal. June 16, 2006)).

[39] *OOIDA Risk Retention Grp., Inc. v. Bordeaux*, 2016 WL 427066, *5 (D. Nev. Feb. 3, 2016) (Citations omitted).

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1. **The Group 1 Documents.**

The Discovery Commissioner's speculation of Lubbers' concerns does not take into consideration the tenets of trust proceedings. 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). The fact that Petitioner filed the Initial Petition regarding the ***administration*** of the SCIT does not mean that it was adversarial 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 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.***

Respondents have also failed to identify any allegations of wrongdoing levied specifically against Lubbers at that time. Indeed, the excerpts relied upon by Respondents in their Opposition to the Privilege Motion 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* Initial Petition at ¶ A.10);
- "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.* at ¶ A.13);
- "...***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

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the Irrevocable Trust's management or its assets despite serving as Independent Trustee since 2005." (*Id.* at ¶ A.1 at 5); 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.* at ¶ A.20).

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. 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. Consequently, given that portions of the Group 1 Documents purportedly "correspond directly to sections of Scott Canarelli's petitions," *see supra* note 11, which as shown above did not foster an adversarial relationship between Petitioner and Lubbers, these documents cannot constitute work product.

2. The Group 2 Documents.

As previously mentioned, the Group 2 Documents relate to a meeting attended by Lubbers, Lubbers' counsel, Petitioner, Petitioner's counsel and Nicolatus. *See* **Exhibit 3**. At the time said meeting occurred Petitioner had only filed the Initial Petition which, in addition to requesting an accounting sought a valuation of the SCIT's interests sold pursuant to the express terms of the Purchase Agreement. Petitioner lacked sufficient information as to the Purchase Agreement at the time the Initial Petition was filed and, therefore, absolutely no allegations of wrongful conduct or claims were asserted against *either* Lubbers or the Canarellis. Petitioner simply requested information to which he was entitled to as a beneficiary of the trust and to which Lubbers not only had an obligation to provide but which Lubbers agreed to provide to Petitioner.

Given Nicolatus and third parties' attendance, this December 2013 meeting was not controversial in any manner whatsoever and solely related to the neutral valuation of the "Purchased Entities" that Nicolatus was appointed to appraise. Consequently, in December, 2013, Lubbers was merely acting as the SCIT's Family Trustee and fulfilling his obligation under the Purchase Agreement to obtain an independent valuation. These notes likely would have been created in a

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substantially similar form regardless of the prospect of litigation. For this reason, the work product doctrine does not apply.

D. THE DISCOVERY COMMISSIONER'S FINDINGS WITH RESPECT TO OPINION WORK PRODUCT ARE CLEARLY ERRONEOUS.

In addition to the Commissioner's erroneous findings that any privilege applies to the Disputed Documents, Petitioner alternatively disputes any finding in the Report and Recommendation that references or otherwise alludes to any portion of the Disputed Documents constituting work product, ordinary or opinion. *See e.g.* **Exhibit 1**, at p. 5:15-19. Indeed, the Discovery Commissioner was otherwise not sure whether any portion of the Disputed Documents contained opinions or thought processes.[40] The Commissioner, however, noted that Lubbers was not analyzing it from an attorney's perspective.[41] Despite these statements and her own observation that NRCP 26(b)(3) **does not include a party** under opinion work product, *id.* at p. 109:19-104:1, *see infra*, the Discovery Commissioner ultimately determined that portions of the Disputed Documents would be protected as opinion work product for those "opinions that ***may arguably be contained***" therein. *Id.* at p. 35:10-13. Such contradictory statements (and the potential request for additional briefing, *id.* at p. 54:17-18), in addition to the legal reasoning set forth below, demonstrates that the Discovery Commissioner's findings regarding the applicability of the opinion work product are clearly erroneous; alternatively, if this Court determines that the Disputed Documents constitute work product, it should ***only*** designate the Disputed Documents as ordinary work product.

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[40] *See* **Exhibit 7**, at p. 35:10-13 (Discovery Commissioner: "I know that ***there is an issue on whether or not some of the notes actually contained his opinions or thought processes***. I'm not saying they didn't, but he wasn't analyzing it from the perspective of being a lawyer.") (Emphasis added).

[41] *Id.; see also* p. 37:23-24 (Discovery Commissioner: ***"[F]or it to be opinion work product, he would have to be the lawyer*** in the relationship. ***He's not***, he's the trustee.") (Emphasis added).

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1. Lubbers' Mental Impressions, *If Any*, Are Contained Within the Disputed Documents Do Not Constitute Opinion Work Product; Therefore Petitioner Only Needs to Show There Is Substantial Need for the Same.

Opinion work product under ***only applies*** to the mental impressions, conclusions, opinion, or legal theories of an attorney and **not to a client/party**. The two (2) types of work product, ordinary and opinion, differ from one another in that "[o]rdinary work product includes raw factual information, while opinion work product includes the mental impressions, conclusions, opinions, or legal theories of an attorney or representative concerning litigation"[42] and "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."[43]

While a party may prepare its own ordinary work product, Rule 26(b)(3) does not include parties among those that may create opinion work product, specifically providing as follows:

> [T]he 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.

The rules for statutory interpretation apply to the Nevada Rules of Civil Procedure,[44] and Nevada follows the maxim *expressio unius est exclusio alterius*, the expression of one thing is the

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[42] *Cung Le v. Zuffa, LLC*, 321 F.R.D. 636, 641 (D. Nev. 2017).

[43] *In re Grand Jury Subpoena Dated July 6, 2005 Subpoena*, 510 F.3d at 180, 183–184 (2d Cir. 2007) ("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.") (citations omitted). recordings were opinion work product.") (citations omitted). *See also Phillips*, 290 F.R.D. at 634 ("Opinion work product, an attorney's mental impressions, conclusions, opinions or legal theories, is only discoverable when counsel's mental impressions are at issue and there is a compelling need for disclosure.").

[44] *Logan v. Abe*, 131 Nev. Adv. Op. 31, 350 P.3d 1139, 1141-42 (2015) (quoting *Webb v. Clark County School District,* 125 Nev. 611, 618, 218 P.3d 1239, 1244 (2009)).

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exclusion of another.[45] In this instance, it is unambiguous that while may protect ordinary work product prepared by or for a party or a party's representative, it only protects the opinion work product of "an attorney or other representative of a party." Although courts have noted that this rule of interpretation creates "only 'a presumption that ... all omissions should be understood as exclusions,'"[46] "is a product of logic and common sense, properly applied only when it makes sense as a matter of legislative purpose."[47]

Respondents failed to introduce any evidence whatsoever that Lubbers believed his notes contained his "mental impressions." Respondents' contention to the contrary are based upon conclusory statements and speculation, which, as a matter of law, are not sufficient to meet the "heavy burden of demonstrating the applicability of the [opinion work product]." Notwithstanding, the Typed Notes contains facts that are not protected on either the work produce doctrine or attorney client privilege. Accordingly, the Discovery Commissioner properly held the factual portions of the Typed Notes were not protected; however, she erred in finding that the factual statements were intertwined with opinion work product.

2. <u>In the Alternative, There is Compelling Need for Disclosure of the Disputed Documents.</u>

Alternatively, in the event this Court were to determine that a party may create opinion work product and/or any portion of the Disputed Documents consist of opinion work product, this Court should still make a finding that there is a compelling need for disclosure of the same. Similar to above, Lubbers' death creates a "compelling need" for disclosure under NRCP 26(b)(3) because Lubbers was a material witness in this case and is no longer able to testify. The fact that the

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[45] *State v. Javier C.*, 128 Nev. 536, 541, 289 P.3d 1194, 1197 (2012) (citing *Cramer v. State, DMV,* 126 Nev. 388, 394, 240 P.3d 8, 12 (2010)).

[46] *Nev. Rest. Servs., Inc. v. Clark Cnty.*, 981 F. Supp. 2d 947, 963 (D. Nev. 2013), *aff'd,* 638 Fed. Appx. 590 (9th Cir. 2016) (quoting *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9th Cir.2005).

[47] *Nev. Rest. Servs., Inc.*, 981 F. Supp. 2d at 963–64 (quoting *United States v. Bert*, 292 F.3d 649, 652 n. 12 (9th Cir.2002)).

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Canarellis are able to testify is of no consequence. Lubbers memorialized his personal knowledge on material facts in this case and such facts should be subject to disclosure. Petitioner has effectively been hamstringed in discovery as he can no longer depose Lubbers as to issues that were expressly discussed in the Disputed Documents. The factual statements made by Lubbers in the Typed Notes are **admissions by a party opponent** that demonstrate fraud and breach of fiduciary duties on the part of Respondents, or primarily the Canarellis. There is absolutely no other available means for Petitioner to obtain Lubbers' testimony of his personal knowledge of the factual circumstances surrounding the Purchase Agreement and/or any of the other facts relating to the issues set forth in the Surcharge Petition and Supplement thereto. Denying Petitioner the ability to use Lubbers' admissions will thwart his ability to prove fraud, conspiracy, fraudulent concealment, *etc.* and otherwise unfairly prejudice Petitioner. Consequently, Lubbers' death creates a "compelling need" for disclosure of the Disputed Documents, primarily the clear facts set forth in the Typed Notes.

Based on above, the Discovery Commissioner's findings that any portions of the Disputed Documents constitute work product[48] are clearly erroneous, however, to the extent any portion of the Disputed Documents is work product, this Court must find that it is ordinary work product and Petitioner has substantial need for disclosure of the same. Alternatively, if any portion of the Disputed Documents are found to be opinion work product, this Court must determine there is a compelling need for these records.

E. IF THERE WAS ANY APPLICABLE PRIVILEGE, LUBBERS WAIVED IT.

1. Privilege Waiver Generally.

In addition to proving that a privilege even applies to the Disputed Documents, Respondents further have the burden of demonstrating that they have not waived that privilege.[49]

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[48] *See* **Exhibit 1,** at pp. 4:20-23, 5:7-10, 5:15-19, 5:25-6:4, 6:22-24.

[49] *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 25 (9th Cir. 1981) (Citations omitted).

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2. AWDI's Possession of Lubbers' Boxes Demonstrate Waiver of the Privilege.

Lubbers waived any potential privilege associated with the Disputed Documents because said notes were in the possession of a non-party, AWDI. Specifically, the Disputed Notes were contained within Lubbers' hard file that, after being provided to Dickinson Wright, were returned to AWDI in November, 2017, not Lubbers personally. Contrary to Respondents' contention, the file was not provided to AWDI after Lubbers' death for "safekeeping."[50] The documents were provided to AWDI approximately six (6) months prior to Lubbers' passing.

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. *See supra* note 14. Irrespective of the fact that the email potentially references a document other than the Disputed Documents, the fact of the matter is that the AWDI had possession of Lubbers' hard file contained within multiple boxes and went through the same. Indeed, during multiple meet and confers in this matter, Respondents represented that Lubbers' hard files consisted of at least 7 to 9 boxes. It can be reasonably inferred – and Respondents have not disputed -- that the boxes returned to AWDI did in fact contain the Disputed Documents since the Group 1 Documents were produced the following month in December. [51]

"[T]he purpose of the attorney-client privilege is to protect confidential communications"[52] and, as previously stated, "[a] communication is 'confidential' if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." The purpose for the privilege ceases if the communications are disclosed

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[50] *See* Opposition to Privilege Motion, at p. 25:19.

[51] The email Ms. Goode located on the deferral of principal payments (*see supra* note 14) was within 600 pages away from Group 1 Documents; thus, evidencing that the Disputed Documents were, in fact, contained within the boxes in AWDI's possession.

[52] *Cung Le*, 321 F.R.D. at 652 (citing Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *8 Federal Practice & Procedure: Civil* § 2024 at 531 (3d ed 1998)).

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voluntarily to a third person. *Id.* Moreover, the work product doctrine "exists 'to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent.'"[53] Such a protection rightfully is waived where the voluntary disclosure "has substantially increased the opportunities for potential adversaries to obtain the information."[54]

There is no question, nor should there be, that AWDI is not a party in this action or encompassed within the Lubbers' relationship with his counsel at that time. Under no circumstances is it "reasonably necessary for the transmission of the communication"[55] that any AWDI employee be in possession of the Disputed Documents. To the extent the Disputed Documents, including the Typed Notes, can arguably be considered privileged, such privilege was waived when the Disputed Documents were turned over to a third party not encompassed within the attorney-client privilege. Accordingly, AWDI's possession of the Disputed Documents destroys any arguable confidentiality related to the same and warrants this Court's finding that the Disputed Documents are discoverable for all purposes in this litigation.

3. The Discovery Commissioner Erred by Finding a "Common Interest" Between Lubbers and AWDI.

In finding that Respondents had not waived the work product doctrine, the Discovery Commissioner improperly found a common interest between Lubbers and AWDI. The Discovery Commissioner, in clear error, made this finding simply because Lubbers was a co-party with the Canarellis as Trustees of the SCIT.

> Which is if you send the documents to America West, and this is where I think there -- there is a very -- American West, I'm sorry -- I think that there is a very -- this is a very complicated and difficult issue, because ***there is no question in my mind that Mr. Lubbers stood in relationship with the***

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[53] *Cotter v. Eighth Judicial Dist. Court in & for Cnty. of Clark*, 134 Nev. Adv. Op. 32, 416 P.3d 228, 232 (2018) (quoting *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980) (Emphasis omitted).

[54] *Cung Le*, 321 F.R.D. at 651–52 (citing [illegible] (citing Charles A. Wright, Arthur R. Miller & Richard L. Marcus, 8 *Federal Practice & Procedure*: Civil 2d § 2024 (1994) at 369 & n.52)).

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

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> ***Canarellis and that they were on the same side for some of these particular issues.*** And frankly, that's in part why we have the petition.[56]

Such a finding is clearly erroneous because while Lubbers may have had a common interest with the Canarellis, that did not extend to AWDI or the American West Group overall.

The Nevada Supreme Court has adopted "the common interest rule" which "allows attorneys to share work product with third parties that have common interest in litigation without waiving the work-product privilege."[57] Although the common interest is not limited to co-parties and does not require a written agreement,[58] it is still "***a narrow exception to the rule of waiver***."[59] The Nevada Supreme Court described the rule's application as follows:

> 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."[60]

The federal court has further noted that a common interest "'may be implied from conduct and situation, such as attorneys exchanging confidential communications from clients who are or potentially may be codefendants or have common interests in litigation.'"[61] For instance, in *Cotter*, the appeal related to a court order requiring a former CEO to produce emails between his counsel and shareholders' counsel that allegedly contained work product in a consolidated breach of

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[56] *See* **Exhibit 7**, at p. 106:15-21. (Emphasis added).

[57] *Cotter v. Eighth Judicial Dist. Court in & for Cnty. of Clark*, 134 Nev. Adv. Op. 32, 416 P.3d 228, 230 (2018).

[58] *Id.* at 232 (quoting *Am. Tel. & Tel. Co.*, 642 F.2d at 1299) (citing *United States v. Gonzalez,* 669 F.3d 974, 979 (9th Cir. 2012)).

[59] *Resilient Floor Covering Pension Fund v. Michael's Floor Covering, Inc.*, C11-5200 JSC, 2012 WL 3062294, at *6 (N.D. Cal. July 26, 2012) (quoting *Pecover v. Electronic Arts, Inc.*, 2011 WL 6020412, *2(N.D. Cal. Dec. 2, 2011) (Emphasis added).

[60] *Cotter*, 416 P.3d at 232 (quoting *Am. Tel. & Tel. Co.*, 642 F.2d at 1299) (Emphasis added).

[61] *Gonzalez,* 669 F.3d at 979.

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fiduciary duty action brought by the CEO and shareholders against members of the corporation's board of directors.[62]

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 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, it was briefed at great length 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, LLC ("SJA") and AWDI have adamantly and repeatedly argued that they are separate and distinct in all respects. Indeed, when Petitioner propounded requests for production seeking documentation relating to the Purchased Entities and other entities, the Canarellis asserted that the documents requested from entities cannot be produced by Canarellis in their capacities as trustees simply because Larry also serves as an officer of such entities.[63] 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.[64]

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[62] *Cotter,* 416 P.3d at 231.

[63] *See* Opposition to Motion to Compel Lawrence and Heidi Canarelli's Responses to Scott Canarelli's Request for Production of Documents, ("Opposition to Motion to Compel the Canarellis"), filed on May 29, 2018, p. 11:10-14; *see also* p. 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**.") (emphasis added).

[64] *Id.* at p. 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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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 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 in selling the SCIT's interests. At no point during the SCIT's 20-year existence was AWDI a fiduciary or otherwise owed Petitioner a fiduciary duty in the context of 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 for about eight (8) months (until this Court ruled against them) that they should not be compelled to produce documentation under the premise that they are non-parties. Indeed, 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.[65] 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.[66]

While AWDI's contentions have no bearing on whether Petitioner is entitled to obtain discovery from it, such contentions nonetheless demonstrate that there exist no common issues between it and Respondents. The "common legal interest" does not attach merely because Petitioner issued

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[65] *See* Non-Party Opposition to American West Development, Inc.'s Motion to Compel American West Development, Inc.'s Responses to Subpoena Duces Tecum, filed August 6, 2018, p. 3:2-4.

[66] *Id.* at pp. 7:10, 12:12-15 (Emphasis added).

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subpoenas *duces tecums* to AWDI and the Purchased Entities and Respondents have failed to cite any legal authority to the contrary.[67]

Indeed,throughout this litigation, the Canarellis have distanced their capacities as Former Trustee from their capacities with the American West Group.[68] Respondents' counsel even acknowledged in a prior hearing that they do not represent AWDI and essentially had no control of AWDI's actions.

> And[sic] entity that we don't represent, American West Development, Inc., represented they separate counsel, filed a motion to reopen its bankruptcy proceedings. ***We did not file that motion. We did not tell them to file the motion. We were told the motion was being filed***, was how it happened. They did that over there.[69]

Despite such contentions, Respondents seek to have it both ways. They cannot distance the actions by AWDI or the American West Group entities to avoid discovery, while at the same time claim that there is enough of a common interest to preclude disclosure. If they have such little control over AWDI or the American West entities as they previously claim, Respondents could not

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[67] The fact that Larry is an executive of AWDI is of no consequence. Jeffrey Canarelli, Scott's brother, is also an executive of AWDI and participated in the "Friday meetings" during the relevant time period, wherein the Purchase Agreement and the SCIT were discussed. Jeffrey Canarellis purchased a portion of the SCIT's interests in the Purchased Entities vis-a-via- his irrevocable trust and his interest in SJA. If this Court were to adopt Respondents' contention that the Siblings Trusts share a common interest with AWG, then essentially this Court would be finding the Sellers and Buyers under the Purchase Agreement share a common interest with each other, along with each and every single entity subject to the sale and all other entities compromising the "American West Group."

[68] *See e.g.* Opposition to Motion to Compel Canarellis, at p. 17:24-25("The Canarellis properly objected to such Requests as any role Larry may occupy in those other entities is distinct from his capacity as a former trustee of the SCIT.").

[69] *See* March 29, 2018 hearing transcript attached hereto as **Exhibit ??**, p. 13:16-21 (Emphasis added). Despite this purported lack of control over AWDI, Respondents have also represented that "Larry and Mr. Evans are AWG executives." *See* Opposition to Privilege Motion, at p. 25:23-24.

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guarantee that the entities would not disseminate information in their possession, thereby substantially increasing the opportunities for an adversary to obtain the information. [70]

Respondents thereafter flip their position to contend that AWDI is somehow part of the "legal team" tasked "to facilitate the rendition of legal advice" on behalf of Respondents, thereby protecting the Disputed Documents from disclosure. Assuming *arguendo* the validity of such contention, the Group 1 Documents 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] made to keep the information confidential and not widely disclosed."[71] While certain individuals may have served as Lubbers' agent for limited purposes relating to Lubbers' administration of the SCIT, -- e.g. preparation of the accountings – Lubbers entire file relating to matters above and beyond such limited purposes does not fall within the confines of the common interest doctrine. This is especially true since these same "agent(s)" also served as agents for the Siblings Trusts, the Purchased Entities and the entire American West Group.

Notwithstanding, Respondents argued before the Discovery Commissioner that "[i]t doesn't matter if I gave work product protected materials to everyone at AWDI, as long as they didn't turn it over to my adversary." *See* **Exhibit 7**, at p. 107:20-22. 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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[70] *See Am. Tel. & Tel. Co.*, 642 F.2d at 1299–300 ("So long as transferor and transferee anticipate litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts. Moreover, with common interests on a particular issue against a common adversary, the transferee is not at all likely to disclose the work product material to the adversary. When the transfer to a party with such common interests is conducted under a guarantee of confidentiality, the case against waiver is even stronger.")..").

[71] *Wynn Resorts*, 399 P.3d at 341. The fact that Lubbers' boxes were stored at AWDI following the litigation 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."

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Regardless of the number of times Respondents assert contradicting arguments to preclude the disclosure of the Disputed Documents, the fact of the matter is that there is no litigation anticipated against AWDI, AWG, the Purchased Entities or any other AWG entity. Nor is there any potential claim against anyone other than Respondents that relate to Respondents' actions as the Former Trustees of the SCIT. Consequently, there is clearly no "strong common interest in sharing the fruit of the trial preparation efforts."

Given the focus of Petitioner's claims (i.e. against Respondents in their fiduciary capacities), Respondents inattentive transfer of purportedly privileged documents to an uninterested non-party, as well as Respondents' ever-changing relationship with AWDI and the American West Group, this Court should overrule the Discovery Commissioner's finding as to common interest, *see* **Exhibit 1**, at p. 7:3-6, and make a new finding that there is no such relationship warranting an exception to the waiver of the work product doctrine.

4. Respondents' Handling of Production Has Been Reckless, and Constitutes Waiver.

The ESI Protocol that governs this matter precludes a Party from disputing an asserted privilege based upon "inadvertent production." *See supra* note 4, at Section 21. As demonstrated throughout this Objection, Respondents' failure to implement minimal safeguards to avoid dissemination of protected material does not constitute mere "inadvertence," but rather, sheer recklessness. For these reasons, in the event this Court finds that any portion of the Disputed Documents are protected by privilege, said privilege was waived as a result of Respondents' reckless, as opposed to inadvertent, disclosure of the same.

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Nevada case law has not discussed what constitutes "inadvertent disclosure."[72] However, prior to implementing a rule regarding inadvertent disclosures and waiver,[73] federal courts considered this issue at length (even in circumstances similar to this matter where a party discloses the same privileged material on several occasions). Specifically, said courts noted that while "inadvertent disclosures are, by definition, unintentional acts," there are instances where disclosures may occur "***of such extreme or gross negligence as to warrant deeming the act of disclosure to be intentional.***"[74] In determining whether disclosure was so extreme and/or severe, the courts applied the following balancing test:

> (1) the reasonableness of the precautions taken to prevent the disclosure, (2) the time taken to rectify the error, (3) the scope of the discovery, (4) the extent of the disclosure, and (5) the overriding issue of fairness.[75]

The party that is claiming a disclosure was inadvertent has the burden of proving it was such.[76] For example, in *irth Solutions, LLC v. Windstream Communications, LLC*, 2018 WL 575911 (S.D. Ohio 2018), several months after the defendants first produced purportedly privileged documents and while simultaneously arguing that the court should allow them to clawback the same, the

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[72] Although the Nevada statute only provides for waiver as a result of a parties' voluntary disclosure, *see* 104 Nev. 508, 513, 761 P.2d 849, 852 (1988), *overruled on other grounds by Diaz v. Eighth Judicial Dist. Court ex rel. County of Clark*, 116 Nev. 88, 993 P.2d 50 (2000), *overruled on other grounds by Aspen Fin. Services, Inc. v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 129 Nev. 878, 313 P.3d 875 (2013)(citing). In this case the Parties previously agreed that they "may only contest the asserted privileges on ground other than the inadvertent production of such document(s)." *See* ESI Protocol attached hereto as **Exhibit ??**, Section 21. When interpreting a contract or agreement, the contract will be enforced as written if the language is clear an unambiguous. *Am. First Fed. Credit Union v. Soro* (citing *Davis v. Beling,*128 Nev. 301, 321,)). 278 P.3d 501, 515 (2012)).

[73] *See* Fed.R.Evid. 502(b).

[74] *Fed. Deposit Ins. Corp. v. Marine Midland ss Realty Credit Corp.*, 138 F.R.D. 479, 482 (E.D. Va. 1991) (Emphasis added).

[75] *Sanner v. Bd. of Trade of City of Chicago*, 181 F.R.D. 374, 379 (N.D. Ill. 1998).

[76] *Harmony Gold U.S.A., Inc. v. FASA Corp.*, 169 F.R.D. 113, 116 (N.D. Ill. 1996) (citing *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., Inc,* 132 F.R.D. 204, 207 (N.D.Ind.1990).

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defendant reproduced the privileged documents. *Id.* at *1. Although there was a clawback agreement, the plaintiff argued that the agreement did not apply "because he believed the disclosure resulted from more than mere inadvertence." *Id.* The court ultimately found that the clawback agreement "did not contain language that would have eliminated the duty of pre-production review or provided for non-waiver regardless of the care taken by the producing party;" however, even if it did, allowing attorneys to agree to a clawback irrespective of the care they took during production "***would undermine the lawyer's responsibility to protect the sanctity of the attorney-client privilege***." *Id.* at *12. Consequently, the court concluded that defense counsel had been "completely reckless" for failing to familiarize themselves with documents that "contain obviously privileged material on their face," and counsel "produced the exact same documents again—while simultaneously asking [the] Court to protect its privilege." *Id.* at *13-14.

Similarly, in *Eigenheim Bank v. Halpern*, 598 F. Supp. 988 (S.D.N.Y. 1984), a document was inadvertently produced and first identified as privileged in a prior and substantially similar suit again in another suit in response to a discovery request. *Id.* at 989-90. The court found that defendants' procedure for maintaining the document's confidentiality was "so lax, careless, inadequate or indifferent to consequences' as to constitute a waiver."[77] The court further noted that while the first production in the prior litigation may warrant a finding of inadvertence, "***[a] second bite of the apple, however, defendants cannot have***." *Id.*

Here, like in *irth* and *Eigenheim Bank*, ***Respondents' recklessly produced the Disputed Documents on two (2) separate occasions***, including reproducing the documents simultaneously when trying to "claw back" the first production. It is undisputed that Respondents produced the Group 1 Documents on December 15, 2017 in their initial NRCP 16.1 Disclosures. Notwithstanding, Respondents did not seek to claw back the Group 1 Documents for almost six (6) months, and even only then upon Petitioner using the document in briefing. Specifically, Petitioner

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[77] *Id.* at 990 (quoting *Data Systems of New Jersey, Inc. v. Philips Business Systems, Inc.*, No. 78 Civ. 6015, slip op. (S.D.N.Y. Jan. 8, 1981) (*quoting National Helium Corp. v. United States,* No. 158-75, slip op. at 3-4 (U.S.Ct. Claims Feb. 2, 1979)). No. 158-75, slip op. at 3-4 (U.S.Ct. Claims Feb. 2, 1979)).

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referenced and attached the Typed Notes as an exhibit to his Supplemental Petition that was filed on May 18, 2018; even so, it took Respondents nearly three (3) weeks, until June 5, 2018, to attempt to claw back said document.[78]

Despite Respondents' own assertions that the Group 1 Documents are "clearly" privileged, ***Respondents redisclosed the documents in their Second Supplemental Disclosures***, on June 5, 2018, the same day that Respondents initially sought to claw back the Group 1 Documents.[79] This blunder is even more conspicuous when only a week later, on June 12, 2018, Respondents reiterated their demand to claw back the Group 1 Documents asserting that the documents' privileged status was "self-evident." *See supra* note 11.

The multiple productions of the Group 1 Documents are not merely isolated incidents. On June 14, 2018, Petitioner again notified Respondents that they had disclosed documents that appeared to be counsel's notes.[80] The Parties came to realize that not only did Respondents produce over forty (40) pages of notes prepared by Respondents' Counsel, the pdf file was listed in their own database with the name "undated attorney notes." This production of RESP078884 – RESP078932 (spawning the Parties' dispute as to the Group 2 Documents herein) further illuminates the utter carelessness and lack of accountability by Respondents as to discovery.

In spite of privileged documents being produced on multiple occasions, Respondents still inexplicably did not undergo any apparent effort to reanalyze their prior disclosures. From June to November 2018, approximately five (5) months, Respondents did not submit a single request to

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[78] Respondent's failure to claw back the Disputed Documents 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 the Disputed Documents and were not claiming privilege. Indeed, in February 2018 (3 months after the Disputed Documents were disclosed), Respondents' counsel sought to claw back certain disclosed documents from Petitioner that were Bates Numbered RESP013471-13473, which were only a couple of hundred pages away from the Group 1 Documents).

[79] *See* **Exhibits 2** and **5**.

[80] *See* June 14, 2018 email from Ms. Dwiggins attached hereto as **Exhibit 10**.

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Petitioner to claw back any additional documents, thereby implying that either Respondents made no effort to review their disclosures or that they reviewed the same and there were no other records that would need to be pulled back to preserve privilege.

Respondents' failure is evidenced by the fact that **Petitioner again** informed Respondents on November 2, 2018, that it has reproduced the Typed Notes. During such conversation, Petitioner also encouraged Respondents to re-review their productions, including the document file contained the Typed Notes, to ensure that such file did not also contain other documents asserted to be privileged and to avoid this issue from continuing to arise in the future. Despite such an opportunity, Respondents elected to claw back **only** the Typed Notes, despite the fact that the Handwritten Notes were contained within the same document file.[81] To date, Respondents have not attempted to claw back the second production of the Handwritten Notes or any additional documents. Such conduct invariably implies that, regardless of the clear evidence that there was a substantial issue with their pre-disclosure review, Respondents have failed to reassess their productions, even after it was brought to their attention.

Notwithstanding the foregoing, Respondents have failed to introduce any evidence and/or explanation in the form of a declaration as to how and/or why the disclosure of the Disputed Documents (and other documents) constitutes mere "inadvertence" and/or what steps they have undertaken to ensure that other potentially privileged documents are not disclosed in the future. Rather, Respondents expect Petitioner to do their job for them (i.e. review Respondents' disclosures and advise them of potential privileged documents) and rely solely on the ESI Protocol. Indeed, during the August 29, 2018 hearing, the Discovery Commissioner herself noted that claw back provisions only work if a party acts promptly and if the parties "are constantly reviewing [their]

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[81] *See supra* note 17 ("I am following up on our telephone conversation this afternoon wherein we discussed several topics, one of which was your notification to me that the Ed Lubbers' type-written notes originally produced as RESP0013285 have also been produced at Bates No. RESP0088955. As you know, we contend the notes are privileged and were inadvertently produced. Petitioner disagrees, and the parties are presently litigating the privilege dispute before the Court. In any event, for completeness, we hereby provide notice of our request to clawback Bates No. RESP0088955 pursuant to Paragraph 21 of the parties' ESI Protocol.").

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materials" to claw back inadvertent productions. *See* **Exhibit 7**, at p. 61:14-18. The Discovery Commissioner further asked Respondents' counsel numerous questions such as "[w]hat safeguards were in place when you produced these documents to make sure once you did a production there wasn't an inadvertent disclosure," and "Respondents' counsel, what did you all do to ensure – did you just rely on the ESI protocol." Unfortunately, Respondents were unable to provide any substantive response to the Discovery Commissioner's numerous inquiries.

Respondents' repeated production of privileged documents is perplexing in light of their contentions that the documents are "clearly" privileged, *see supra* note 8, and such protections are "self-evident." *See supra* note 11. Respondents also delayed production of written discovery for months, claiming to need time to conduct a comprehensive review prior to disclosure.[82] Respondents even went so far as to accuse Petitioner of ethical violations for not bringing the Group 1 Documents to Respondents' attention sooner. *Id.*

Respondents conduct throughout this litigation confirms that not only did they fail to adequately review records prior to disclosure,[83] but they failed to re-review their disclosures after they discovered that they had disclosed, and clawed back, potentially privileged documents in February 2018. The fact that the Parties executed an ESI Protocol that contained a claw back provision was not a license for Respondents' counsel to simply disclose records without regard for their obligations to protect privileged information. In light of Respondents' conduct, this Court should not be satisfied by any hollow claims that their productions of privileged material were the result of mere "inadvertence."[84] For these reasons, Petitioner requests that, should this Court

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[82] *See* February 9, 2018 letter from Mr. Schwarz attached hereto as **Exhibit 11** ("[Y]ou no doubt appreciate the amount of time and effort involved in reviewing over 75,000 pages of documents.").

[83] It is important to note that Respondents previously claimed that their review of voluminous records caused the delay and piecemeal disclosures. *Id.*

[84] *See Harmony Gold U.S.A., Inc.*, 169 F.R.D. at 116 ("Standing alone, Harmony Gold's self-serving declarations that their disclosures were inadvertent are insufficient to satisfy its burden.").).

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entertain any argument that the Disputed Documents are privileged, it should find that such protections have been waived by the reckless manner that Respondents have handled discovery.

IV. CONCLUSION

For the above reasons, Petitioner respectfully requests that this Court grant the Objection. Petitioner further requests that this Court strike or amend portions of the Report and Recommendation so they are consistent with the following:

1. The Typed Notes contain facts and are not protected;

2. The Group 1 Documents are not protected by the attorney-client privilege; in the alternative, if the attorney-client privilege applied to any portion of the Group 1 Documents, that protection was waived by the voluntary disclosure to AWDI and/or the American West Group;

3. It is not supported by available evidence that Lubbers personally anticipated litigation in 2013;

4. The Disputed Documents are not protected by the work product doctrine;

5. To the extent any portion of the Disputed Documents is found to be work product, it is ordinary work product and Petitioner has substantial need for disclosure of the same; in the alternative, if any portion of the Disputed Documents is found to be opinion work product, this Court must determine there is a compelling need for these records;

6. That protection was waived by the voluntary disclosure to AWDI and/or the American West Group and is not subject to the common interest doctrine; and

7. Respondents waived any applicable privilege to the Disputed Documents as a result of their reckless production of the same.

DATED this 17th day of December, 2018.

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BY: _____
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CERTIFICATE OF SERVICE

PURSUANT to NRCP 5(b), I HEREBY CERTIFY that on December 17, 2018, I served a true and correct copy of the **PETITIONER'S OBJECTION TO THE DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS ON (1) THE MOTION FOR DETERMINATION OF PRIVILEGE DESIGNATION, (2) THE SUPPLEMENTAL BRIEFING ON APPRECIATION DAMAGES** to the following in the manner set forth below:

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[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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DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of THE SCOTT LYLE GRAVES CANARELLI IRREVOCABLE TRUST, dated February 24, 1998.	Case No.: P-13-078912-T Dept. No.: XXVI/Probate

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

Hearing Date: August 29, 2018
Hearing Time: ~~2:00~~ 1:30 p.m.

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

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

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

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

Jennifer L. Braster
Andrew J. Sharples

Attorney for the Special Administrator for the Estate of Edward C. Lubbers: Liane K. Wakayama[1]

I.
FINDINGS

A. Motion for Determination of Privilege Designation

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

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

1. Attorney/Client Privilege

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

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

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

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

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

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

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

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

2. Attorney Work Product

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

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

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

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

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

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

3. Documents Bates Numbers RESP0013284-13288

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

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

i. *RESP0013284*

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

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

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

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

ii. *RESP0013285*

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

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

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

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

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

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

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

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

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

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

iii. *RESP0013286 and RESP0013287*

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

iv. *RESP0013288*

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

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

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

4. No Waiver

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

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

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

5. Documents Bates Numbered RESP0078899-78900

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

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

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

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

B. Supplemental Briefing on Appreciation Damages.

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

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

THE COMMISSIONER FURTHER HEREBY FINDS that if the Court finds that there was a breach of fiduciary duty, then the amount of any distribution from the Purchased Entities[2] post March 31, 2013 to the Siblings' Trust is relevant and discoverable. *Id.* at 117:17-19, 138:5-12, 141:24-25, 142:3-5.

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

II.
RECOMMENDATIONS

A. Motion for Determination of Privilege Designation

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

IT IS FURTHER RECOMMENDED that with respect to RESP0013285:

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

(1) from the beginning of RESP0013285, including the handwritten notes, to the indented paragraph starting with the word "1st" shall be redacted, *id.* at 109:21-110:1;

(2) the indented paragraph starting with the word "1st" through and including the first sentence of the following paragraph that starts with "[w]hether" and ends with "happened" is subject to production, *id.* at 101:19-24, 103:20-22, 104:5-16, 110:5-16;

(3) the second sentence of the paragraph starting with "[w]hether" up through and including the paragraph starting with the word "annual" is subject to production, *id.* at 110:5-16;

(4) the final paragraph on RESP0013285 shall be redacted. *Id.* at 94:15.

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

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

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

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

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

B. Supplemental Briefing on Appreciation Damages.

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

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

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

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

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

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

DATED this 5 day of December, 2018.

DISCOVERY COMMISSIONER

Submitted by:

By: _____

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Philip R. Erwin, Esq. (11563)
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Counsel for Respondents Lawrence Canarelli, Heidi Canarelli and Edward Lubbers

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

Approved as to form and content by:

By: _____
Jennifer L. Braster (#9982)
Andrew J. Sharples (#12866)
NAYLOR & BRASTER
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Las Vegas, Nevada 89145

Counsel for non-parties American West Development, Inc., Lawrence Canarelli and Heidi Canarelli, as trustees of The Alyssa Lawren Graves Canarelli Irrevocable Trust, The Jeffrey Lawrence Graves Canarelli Irrevocable Trust, and The Stacia Leigh Lemke Irrevocable Trust

Approved as to form and content by:

By: _____
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Jeffrey P. Luszeck (#9619)
Tess E. Johnson (#13511)
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Attorneys for Petitioner

NOTICE

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

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

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

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

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

__J__ Electronically served counsel on Dec 10, 2018, pursuant to N.E.F.C.R. Rule 9.

By Natalie Tam
Commissioner Designee

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

ORDER

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

____ The parties having waived the right to object thereto,

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

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

* * *

AND

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

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

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

Dated this _____ day of _____, 20_____.

_____
DISTRICT COURT JUDGE

EXHIBIT 2

IN CAMERA

RESP013284 – RESP013288

EXHIBIT 2

EXHIBIT 3

IN CAMERA

RESP078899 – RESP078900

EXHIBIT 3

EXHIBIT 4

EXHIBIT 4

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Counsel for Respondents

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of: SCOTT LYLE GRAVES CANARELLI IRREVOCABLE TRUST, dated February 24, 1998.	Case No: P-13-078912-T Dept. No: 26

EDWARD LUBBERS, LAWRENCE CANARELLI, AND HEIDI CANARELLI'S SECOND SUPPLEMENT TO INITIAL DISCLOSURES OF WITNESSES AND DOCUMENTS PURSUANT TO NRCP 16.1

Edward C. Lubbers, Individually and in his Representative Capacity as former Family Trustee and/or the Independent Trustee ("Lubbers")[1] of the Scott Lyle Graves Canarelli Irrevocable Trust dated February 24, 1998, and Lawrence Canarelli ("Larry") and Heidi Canarelli ("Heidi," and together with Larry, the "Canarellis") former Family Trustees of the Scott Lyle Graves Canarelli Irrevocable Trust Dated February 24, 1998 (the "Trust"), (collectively, "Respondents"), by and

[1] Lubbers died on April 2, 2018, and a suggestion of death upon the record has not yet been filed in this matter. By providing the following supplemental disclosure, Lubbers is not waiving any rights, remedies, or objections.

6372.	**Scott LGC.pdf**	**RESP0088894-RESP0088896**
6373.	**WF - 1099 acct 8800-4476.pdf**	**RESP0088897**
6374.	**RE: Canarelli Irrevocable Trust.msg**	**RESP0088898**
6375.	**Cankids.pdf**	**RESP0088899-RESP0088917**
6376.	**corr. note. memo.pdf**	**RESP0088918-RESP0088969**
6377.	**corr. note. memo.pdf**	**RESP0088970**
6378.	**Dickinson Wright.pdf**	**RESP0088971**
6379.	**Irrevocable Account 2013.pdf**	**RESP0088972-RESP0089012**
6380.	**Objection to Accounting.pdf**	**RESP0089013-RESP0089039**
6381.	**Scott AWH Note.pdf**	**RESP0089040-RESP0089042**
6382.	**Scott LGC LLC.pdf**	**RESP0089043-RESP0089071**
6383.	**Scott LGC LLC.pdf**	**RESP0089072**
6384.	**Scott note to Acy.pdf**	**RESP0089073-RESP0089074**
6385.	**Scott Proposed investments.pdf**	**RESP0089075-RESP0089076**
6386.	**Scott Proposed investments.pdf**	**RESP0089077**
6387.	**Scott Proposed investments.pdf**	**RESP0089078-RESP0089082**
6388.	**Scott Proposed investments.pdf**	**RESP0089083-RESP0089090**
6389.	**Scott Trust. Budget and Cash.pdf**	**RESP0089091-RESP0089109**
6390.	**Scott Trust. Budget and Cash.pdf**	**RESP0089110-RESP0089111**
6391.	**Solomon cod desp 2012.pdf**	**RESP0089112-RESP0089185**
6392.	**01_2015 SCOTTTAXES 0617.pdf**	**RESP0089186-RESP0089285**
6393.	**07_SCOTT 2014 TAXES.pdf**	**RESP0089286-RESP0089677**
6394.	**1037_SCIT'16.pdf**	**RESP0089678**
6395.	**122_SCIT'16.pdf**	**RESP0089679**
6396.	**138_SCIT'16.pdf**	**RESP0089680**
6397.	**154_SCIT'16.pdf**	**RESP0089681**
6398.	**170_SCIT'16.pdf**	**RESP0089682**
6399.	**184_SCIT'16.pdf**	**RESP0089683**
6400.	**199_SCIT'16.pdf**	**RESP0089684**
6401.	**214_SCIT'16.pdf**	**RESP0089685**
6402.	**231_SCIT'16.pdf**	**RESP0089686**

6517.	**Certificate (CS 2005 Investments).pdf**	**RESP0091190-RESP0091250**
6518.	**Certificate (EH 2002).pdf**	**RESP0091251-RESP0091307**
6519.	**Certificate (Green Valley Aurora).pdf**	**RESP0091308-RESP0091368**
6520.	**Certificate (Green Valley East).pdf**	**RESP0091369-RESP0091425**
6521.	**Certificate (GVR King, LLC).pdf**	**RESP0091426-RESP0091486**
6522.	**Certificate (Tower Road Farms).pdf**	**RESP0091487-RESP0091544**
6523.	**2012 invoices, spreadsheets relating to trust administration**	**RESP0091545-RESP0091809**
6524.	**2013 invoices, spreadsheets relating to trust administration**	**RESP0091810-RESP0092078**
6525.	**2014 invoices, spreadsheets relating to trust administration**	**RESP0092079-RESP0092110**

Discovery is ongoing, and Respondents reserve the right to supplement, amend, correct, or otherwise modify this document and this list of documents as additional documents are identified and obtained through discovery. Further, Respondents reserve the right to use as exhibits any and all documents listed by other parties related to this matter.

III. INSURANCE AGREEMENTS

Not applicable.

DATED this 5th day of June 2018.

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EXHIBIT 5

IN CAMERA

RESP088954 – RESP088958

EXHIBIT 5

EXHIBIT 6

EXHIBIT 6

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DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of:	Case No: P-13-078912-T Dept. No: 26
SCOTT LYLE GRAVES CANARELLI IRREVOCABLE TRUST, dated February 24, 1998.	

EDWARD LUBBERS, LAWRENCE CANARELLI, AND HEIDI CANARELLI'S INITIAL DISCLOSURES OF WITNESSES AND DOCUMENTS PURSUANT TO NRCP 16.1

Edward C. Lubbers, Individually and in his Representative Capacity as former Family Trustee and/or the Independent Trustee ("Lubbers") of the Scott Lyle Graves Canarelli Irrevocable Trust dated February 24, 1998, and Lawrence Canarelli ("Larry") and Heidi Canarelli ("Heidi," and together with Larry, the "Canarellis") former Family Trustees of the Scott Lyle Graves Canarelli Irrevocable Trust Dated February 24, 1998 (the "Trust"), (collectively, "Respondents"), by and through their counsel, the law firms of Campbell & Williams and Dickinson Wright PLLC, hereby provide the following Initial Disclosures pursuant to NRCP 16.1.

///

445.	Independent Contractor Agreement	RESP0013184-13191
446.	Independent Contractor Agreement	RESP0013192-13196
447.	Independent Contractor Agreement	RESP0013197-13208
448.	Brokerage Disclosure Agreement	RESP0013209-13214
449.	Brokerage Disclosure Agreement	RESP0013215-13229
450.	Lead Paint Disclosure	RESP0013230-13231
451.	Acknowledgement, Consent, Release and Indemnification Agreement	RESP0013232-13235
452.	Letter	RESP0013236-13237
453.	Indoor Soccer field brochure	RESP0013238-13239
454.	cover sheet	RESP0013240-13240
455.	Delinquent Debt Verification Notice	RESP0013241-13246
456.	Personal Budget Scott Canarelli Family	RESP0013247-13250
457.	Personal Budget Scott Canarelli Family	RESP0013251-13254
458.	Personal Budget Scott Canarelli Family	RESP0013255-13258
459.	cover sheet	RESP0013259-13259
460.	Change of Salary form	RESP0013260-13261
461.	cover sheet	RESP0013262-13262
462.	Email	RESP0013263-13267
463.	Parts of a court document	RESP0013268-13269
464.	Letter	RESP0013270-13277
465.	Handwritten notes	RESP0013278-13278
466.	Scott Lyle Graves Canarelli Irrevocable Trust and the Scott Canarelli Protection Trust Financial Information Documents	RESP0013279-13280
467.	Financials	RESP0013281-13283
468.	Handwritten notes	RESP0013284-13288
469.	Handwritten notes	RESP0013289-13293
470.	Attorney Invoice	RESP0013294-13295
471.	Canarelli Outstanding Obligations	RESP0013296-13299
472.	cover sheet	RESP0013300-13300
473.	Attorney Invoice	RESP0013301-13303
474.	cover sheet	RESP0013304-13304
475.	Copy of outside of envelope	RESP0013305-13305
476.	Scott Lyle Graves Irrevocable Trust Second Accounting of Successor Trustee December 31, 2014	RESP0013306-13322
477.	Email	RESP0013323-13331
478.	cover sheet	RESP0013332-13332
479.	Settlement Note Amortization Table	RESP0013333-13334
480.	The Cankids Investments, LLC Balance Sheet 2016	RESP0013335-13343
481.	The Cankids Investments, LLC Balance Sheet 2017	RESP0013344-13352
482.	Corporate Structure sheet	RESP0013353-13354
483.	Scott Canarelli Irr Trust Settlement Payments	RESP0013355-13357
484.	Scott Canarelli Settlement	RESP0013358-13359
485.	Letter	RESP0013360-13408
486.	Letter	RESP0013409-13411
487.	Bullet Points/Memo	RESP0013412-13414

IV. INSURANCE AGREEMENTS

Not applicable.

DATED this 15th day of December 2017.

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Attorneys for Respondents

EXHIBIT 7

EXHIBIT 7

RTRAN

DISTRICT COURT

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-T DEPT. XXVI/Probate

BEFORE THE HONORABLE BONNIE BULLA,
DISCOVERY COMMISSIONER

WEDNESDAY, AUGUST 29, 2018

TRANSCRIPT OF PROCEEDINGS RE:
ALL PENDING MOTIONS AND ADDITIONAL BRIEFING

APPEARANCES:

For the Petitioner:	DANA ANN DWIGGINS, ESQ. TESS E. JOHNSON, ESQ. JEFFREY P. LUSZECK, ESQ.
For the Trustee/Respondent(s):	JON COLBY WILLIAMS, ESQ. ELIZABETH BRICKFIELD, ESQ. PHILIP R. ERWIN, ESQ. JOEL Z. SCHWARZ, ESQ.
For the Nonparty Witnesses:	JENNIFER L. BRASTER, ESQ. ANDREW J. SHARPLES, ESQ.
For the Special Administrator:	LIANE K. WAKAYAMA, ESQ.

RECORDED BY: FRANCESCA HAAK, COURT RECORDER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. WILLIAMS: Correct.

DISCOVERY COMMISSIONER: Okay.

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

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

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

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

DISCOVERY COMMISSIONER: I -- I agree with you.

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

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

MR. WILLIAMS: Sure.

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

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

MR. WILLIAMS: But, Your Honor --

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

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

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

MR. WILLIAMS: But you talked about mental impressions and

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

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

DISCOVERY COMMISSIONER: Right.

MR. WILLIAMS: Wait a second --

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

MR. WILLIAMS: I didn't --

DISCOVERY COMMISSIONER: And the opinion work product --

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

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

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

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

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

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

MR. WILLIAMS: They then --

MS. DWIGGINS: -- different situation.

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

DISCOVERY COMMISSIONER: Don't interrupt, please.

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

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

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

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

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

MR. WILLIAMS: Right.

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

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

MR. WILLIAMS: Your Honor --

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

MR. WILLIAMS: Which set?

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

MR. WILLIAMS: Nicolatus's?

DISCOVERY COMMISSIONER: Yeah.

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

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

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

DISCOVERY COMMISSIONER: I broke them into --

MR. WILLIAMS: -- the public record.

DISCOVERY COMMISSIONER: -- two different groups.

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

DISCOVERY COMMISSIONER: Okay.

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

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

told you, unless you're doing a transcription of the entire interview. There's no distinction there.

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

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

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

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

MS. DWIGGINS: And I have not argued that.

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

So with respect to the production --

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

MR. WILLIAMS: Oh, I --

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

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

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

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

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

MR. WILLIAMS: Well --

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

DISCOVERY COMMISSIONER: Right. He's not.

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

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

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

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

MR. WILLIAMS: It is true, Your Honor.

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

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

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

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

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

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

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

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

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

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

MR. WILLIAMS: Okay.

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

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

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

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

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

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

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

MR. WILLIAMS: Uh-huh.

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

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

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

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

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

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

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

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

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

against Mr. Lubbers individually was filed.

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

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

So --

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

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

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

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

MS. DWIGGINS: And your --

DISCOVERY COMMISSIONER: On this particular document.

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

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

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

DISCOVERY COMMISSIONER: And I disagree with you.

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

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

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

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

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

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

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

MR. WILLIAMS: Right.

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

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

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

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

DISCOVERY COMMISSIONER: Okay.

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

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

DISCOVERY COMMISSIONER: Want me to see if we have

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

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

DISCOVERY COMMISSIONER: Okay.

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

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

MR. WILLIAMS: Okay.

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

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

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

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

I'm skipping a sentence.

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

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

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

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

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

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

MS. DWIGGINS: He was the liaison between us.

MR. WILLIAMS: What would Mr. Lubbers expect?

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

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

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

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

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

MR. WILLIAMS: Right.

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

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

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

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

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

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

MR. WILLIAMS: Asset Protection Trust.

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

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

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

The last paragraph, not relevant, protect it.

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

MR. WILLIAMS: Your -- Your Honor --

DISCOVERY COMMISSIONER: It is not opinion.

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

DISCOVERY COMMISSIONER: Well, belief is not an opinion.

MR. WILLIAMS: Your Honor, but starting --

ultimately sell.

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

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

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

MR. WILLIAMS: Uh-huh.

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

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

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

MR. WILLIAMS: The one with the four lines?

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

MR. WILLIAMS: Right.

DISCOVERY COMMISSIONER: And everything underneath

DISCOVERY COMMISSIONER: No, I know that.

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

DISCOVERY COMMISSIONER: All right.

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

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

MR. WILLIAMS: Right.

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

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

MS. DWIGGINS: I understand --

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

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

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

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

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

Mr. Williams, who went through the documents?

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

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

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

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

DISCOVERY COMMISSIONER: Well, that cuts against you too.

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

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

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

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

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

MR. WILLIAMS: No, you're --

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

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

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

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

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

back as opinion work product.

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

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

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

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

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

you've had to review, more importantly.

MR. SCHWARZ: Thank you to your staff.

DISCOVERY COMMISSIONER: Thank you.

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

/ / /

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.

Shawna Ortega, CET*562

EXHIBIT 8

EXHIBIT 8

Allie Carnival

From: Colby Williams <jcw@cwlawlv.com>
Sent: Friday, November 2, 2018 5:03 PM
To: Dana Dwiggins; Jeffrey P. Luszeck; Tess E. Johnson; Erin L. Hansen; Terrie Maxfield
Cc: Elizabeth Brickfield; Joel Z. Schwarz; Phil Erwin
Subject: Clawback Request

Dana,

I am following up on our telephone conversation this afternoon wherein we discussed several topics, one of which was your notification to me that the Ed Lubbers' type-written notes originally produced as RESP0013285 have also been produced at Bates No. RESP0088955. As you know, we contend the notes are privileged and were inadvertently produced. Petitioner disagrees, and the parties are presently litigating the privilege dispute before the Court. In any event, for completeness, we hereby provide notice of our request to clawback Bates No. RESP0088955 pursuant to Paragraph 21 of the parties' ESI Protocol. I understand Petitioner disputes our position, but agrees to sequester the document pursuant to the parties' agreement. We will also undertake a further review of Respondents' production to determine whether any other documents (including those that are the subject of the pending privilege dispute) were included as part of this or other productions.

Please advise if I have incorrectly summarized our discussion. Thank you for the notification.

Regards,
Colby

J. Colby Williams, Esq.
Campbell & Williams
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Las Vegas, Nevada 89101
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Email: jcw@cwlawlv.com

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EXHIBIT 9

EXHIBIT 9

[redacted]

Scott

Contact, works + memos

CONFIDENTIAL

EXHIBIT 10

EXHIBIT 10

Allie Carnival

From: Dana Dwiggins
Sent: Thursday, June 14, 2018 10:08 AM
To: J. Colby Williams
Cc: Jeffrey P. Luszeck; Erin L. Hansen
Subject: Call this morning

Colby,

Do you have time to call me sometime between 10:30 and 11:30 for about 10 minutes? I will need you to be near a computer and able to access your disclosures electronically. It is a potentially important issue involving privilege.

I would request no one other than you and possibly Phil be on the call.

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www.facebook.com/sdfnvlaw
www.linkedin.com/company/solomon-dwiggins-&-freer-ltd-

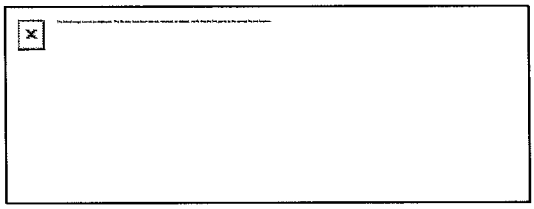

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EXHIBIT 11

EXHIBIT 11

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February 9, 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:

This letter addresses: (1) your February 6, 2018 letter regarding the deposition of Ed Lubbers and the Second Amended Notice of Taking Deposition of Edward Lubbers issued on February 6, 2018; (2) your separate February 6, 2018 letter regarding Respondents' document productions and responses to Petitioners' requests for production of documents; and (3) your February 7, 2018 letter regarding electronically-stored information.

1. Edward Lubbers Deposition

In a meeting on January 23, 2018, Colby Williams advised you that Mr. Lubbers had a series of medical appointments scheduled for the first week of February, and based upon the outcome of those appointments, we expected to have a better sense of Mr. Lubbers' availability and ability to sit for a deposition. Then, during a call on January 31, 2018, Mr. Williams reaffirmed that Mr. Lubbers' availability and ability to appear for deposition would depend upon the recommendations of his treating health professionals. Mr. Williams also conveyed that despite Mr. Lubbers' health issues, there was no immediate health concern necessitating an expedited deposition.

Despite the foregoing, on February 6, 2018, you noticed Mr. Lubbers' deposition for February 20, 2018. Since we know you are familiar with the notice requirements of NRCP 30(b)(1), and in light of the prior discussions summarized above, we are at a loss as to why you have proceeded in such a manner, and we respectfully request that you retract the untimely and unnecessary deposition notice.

Mr. Williams spoke with Mr. Lubbers today, and we are advised that Mr. Lubbers will continue to receive treatment for his cancer and certain side-effects from radiation, and he is scheduled for PET scan on March 15, 2018 which is intended to assess the status of his cancer. He is continuing to rebuild his strength and stamina, and does not feel he can prepare for and give a deposition at present. He therefore proposes scheduling his deposition for the last week of March.

2. Respondents' Document Productions and Responses to Requests for Production

On or about October 17, 2017, Petitioner served Ed Lubbers with sixty eight (68) requests for production. On or about November 2, 2017, Petitioner served Larry and Heidi Canarelli with seventy one (71) requests for production. On December 15, 2017, Respondents served objections and responses to all one hundred thirty nine (139) of Petitioner's requests and produced: (1) Documents Bates Nos. RESP0000001-0012179, which as we have discussed are the documents previously provided to Petitioner as the "accounting Dropbox"; and (2) Documents Bates Nos. RESP0012177- 0018799, which were additional discoverable hard copy documents. On or about January 19, 2018, both Mr. Lubbers and the Canarellis served supplemental objections and responses to Petitioner's requests for production, and Respondents produced documents Bates Nos. 0018800-37926, which are additional discoverable hard copy documents. On or about February 2, 2018, Mr. Lubbers served his second supplemental objections and responses to Petitioner's requests for production, and Respondents produced documents Bates Nos RESP0037927-45337, which are additional discoverable hard copy documents.

Respondents are presently preparing what they hope will be the last supplemental production of hard copy documents and an accompanying third supplemental objections and responses to Petitioner's requests for production by Mr. Lubbers. There are over 30,000 pages of documents in the supplemental production, and respondents expect the supplemental production will be served by early next week at the latest.

In your February 6, 2018 letter, you make a number inaccurate statements and unfounded accusations regarding Respondents' document productions and discovery responses. Although Petitioner has only made minimal disclosures despite your representation that he is, and has been, in possession of a "substantial portion of the records that [Respondents] have produced," you no doubt appreciate the amount of time and effort involved in reviewing over 75,000 pages of documents and then tying those documents to one hundred thirty nine requests for production.

Now that Respondents are close to concluding the extensive production of hard copy documents, they can shift their focus to electronically-stored information as discussed further below, and Respondents will continue to supplement their productions and responses to Petitioner's requests for production in as timely a manner as possible just as they have done to

date. If, despite the foregoing, you insist on filing a motion to compel as threatened in your February 6, 2018 letter, please be advised that Respondents will request attorneys' fees and costs pursuant to NRCP 37(a)(3)(B) for Petitioner's vexatious and frivolous filing.

3. Respondents' Production of ESI

This firm and the Campbell & Williams firm represent Larry and Heidi Canarelli and Edward Lubbers – the Respondents in this matter – and not American West Development, Inc. or the other numerous non-party entities upon whom Petitioner has attempted to conduct discovery. Those entities, as you are aware, are represented by Jennifer Braster, Esq., whom is being copied on this letter. You will need to address any requests for searches and production of non-party ESI with Ms. Braster.

As for Respondents' ESI, it is our understanding that Heidi Canarelli has only used a personal aol email account and she had only minimal, if any, pertinent email communications. As such, it should not be necessary to run search terms against her email account, and we will obtain, review, and produce all discoverable, non-privileged emails in native format per the ESI protocol.

With respect to Larry Canarelli, we are not presently aware of any personal email accounts with discoverable information regarding the claims or issues in this case, and we are confirming that is the case. As for Mr. Canarelli's work email account, we are determining the extent of discoverable information in that account and, provided that it is not so voluminous as to necessitate search terms, we will obtain, review, and produce all discoverable, non-privileged emails in native format per the ESI protocol.

Lastly, we already have started the process of gathering Mr. Lubbers' ESI – both documents and emails – from the designated files which we previously discussed. We anticipate those files will contain the vast majority, if not all, of Mr. Lubbers' discoverable ESI, and we are using outside vendor Litigation Discovery Group to extract Mr. Lubbers' ESI. To be sure there are no inadvertently misfiled or unfiled discoverable documents or emails, we will have LDG run the following search terms (proposed in your February 7, 2018 letter) for records relating to the SCIT against Mr. Lubbers' email and all files, including any cloud-based and local storage:

"Scott Trust"
"Scott Lyle Graves Canarelli Irrevocable Trust"
SCIT
"Scott Irr* Trust"
"The Scott LG Canarelli Irrv. Trust"
"Scott L. Graves Canarelli Irrv"
"The Scott LG Canarelli Irr. Trust"

We cannot agree to the remaining search terms proposed in your letter for a multitude of reasons. In particular, the remaining "SCIT" terms are so overbroad that they will return far more irrelevant results than any non-duplicative, discoverable documents. The remainder of the proposed search terms are overbroad; pertain to documents that are not in Mr. Lubbers' possession, custody, or control; seek documents which are not relevant and are not reasonably calculated to lead the discovery of admissible evidence; and/or seek information regarding non-parties and therefore need to be addressed with Jennifer Braster.

We anticipate LDG will complete the ESI extraction next week, at which point we will review all of the collected documents for discoverability, privilege, and responsiveness to Petitioner's requests for production. Once we have completed that review, we will produce all discoverable, non-privileged documents in native format per the terms of the ESI protocol and we will supplement Respondents' responses to Petitioner's requests for production to the extent there are responsive documents. While we cannot project a date when this process will be completed until we know the volume of ESI to be reviewed and produced, we hope to be finished with Mr. Lubber's production by the end of this month.

If you wish to discuss any of the foregoing issues regarding Respondents, Mr. Williams and I can be available for a call the morning of February 15, 2018. Ms. Braster is unavailable next week, but she can generally be available for a discussion regarding any issues involving her clients starting February 20, 2018.

Thank you for your attention to this matter.

Sincerely,

Joel Z. Schwarz

JZS:hd

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

12

Electronically Filed
1/14/2019 8:02 PM
Steven D. Grierson
CLERK OF THE COURT

OPP

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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: Hearing Time:

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

Petitioner Scott Canarelli ("Petitioner"), 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 Opposition to Respondents Lawrence Canarelli and Heidi Canarelli (collectively the "Canarellis") and Frank Martin, Special Administrator of the Estate of Edward C. Lubbers' ("Lubbers") (collectively with the Canarellis, the "Respondents") Objections, In Part, to Discovery Commissioner's Report and Recommendations on Motion for Determination of Privilege Designation ("Respondents' Objection").

This Opposition is 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

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TRUST AND ESTATE ATTORNEYS

the Court may entertain at the time of hearing.

DATED this 14 day of January, 2019.

SOLOMON DWIGGINS & FREER, LTD.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

First and foremost, the Discovery Commissioner did ***not*** definitively find that the "Disputed Documents"[1] were protected under the attorney-client privilege or the work product doctrine. To the contrary, the Discovery Commissioner was inconsistent both during the August 29, 2018 hearing and in the provisions of the Discovery Commissioner's Report and Recommendation on (1) the Motion for Determination of Privilege Designation; and (2) the Supplemental Briefing on Appreciation Damages ("Report and Recommendation"). Given that Respondents primarily object to the Report and Recommendation as to applicable privilege exceptions and Petitioner has contemporaneously objected as to the application of the privileges, this Court must first analyze whether Respondents have even met their burden to uphold such protections, if any, over the Disputed Documents. Quite simply, they have not.

[1] Similar to those terms used in Petitioner's Objection to the Discovery Commissioner's Report and Recommendation on (1) the Motion for Determination of Privilege Designation, (2) the Supplemental Briefing on Appreciation Damages ("Petitioner's Objection"), filed December 17, 2018, the term "Disputed Documents" refers collectively to documents identified by Bates Nos. RESP013284 – RESP013288 (the "Group 1 Documents") and RESP078899 – RESP078900 (the "Group 2 Documents"). In addition, the Group 1 Documents contains handwritten pages (the "Handwritten Notes") and a typed page identified as Bates RESP0013285 (the "Typed Notes"). The Group 1 Documents and the Group 2 Documents are attached to Petitioner's Objection, as Exhibits 2 and 3, respectively.

However, even if this Court does find that Respondents have met that burden, there are still applicable "exceptions" under the circumstances that warrant the disclosure of the Disputed Documents. As to the Group 1 Documents, Petitioner is entitled to disclosure based upon the "fiduciary exception" and common interest doctrine that this Court has recognized as multiple occasions in other matters. Notwithstanding its name, the fiduciary exception is not an exception to the attorney-client privilege but rather determines who falls within the class of individuals who should wield the protection and from whom they can withhold privileged material. Given that Lubbers was acting as Petitioner's fiduciary when the Group 1 Documents were prepared by him, Petitioner and Lubbers both were protected by the attorney-client privilege and could withhold the documents from others, but not themselves.

In addition, Respondents mistakenly assert that the Disputed Documents constitute opinion work product, therefore can only be disclosed for compelling (not substantial) need. However, while NRCP 26 does protect the mental impressions of attorneys and party representatives, the rule ***does not*** include parties under the same umbrella of opinion work product. Indeed, if Nevada courts adopted such a position, it would create an absurd result whereby parties could avert discovery of their opinions and understandings of the case. Regardless, the Disputed Documents contain facts and the mere act of enunciating a fact in a purportedly privileged document does not preclude Petitioner's discovery of the same.

Alternatively, if this Court does find that a party can create opinion work product and that the Disputed Documents contain Lubbers' mental impressions, it should still redact portions of the documents. The facts contained within the Typed Notes are not inextricably intertwined within any alleged work product as the numerous portions of the Typed Notes are independent of each other. Thus, clawing back the entirety of a document without considering redaction is an improper determination that prejudices the Petitioner.

This Court is more than qualified to make an unbiased determination as to applicable privileges for the Disputed Documents and there is no precedent requiring another district court

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judge to make these rulings. Therefore, as stated in greater detail below, Petitioner respectfully requests that this Court deny Respondents' Objection.

II. RESPONSE TO FACTUAL SUMMARY

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

Respondents again are attempting to muddle the distinction between the Canarellis and Lubbers to persuade this Court that any hostility Petitioner had for the Canarellis should extend to Lubbers as well. While they try to set forth "evidence" that Lubbers anticipated litigation in 2012 and 2013, including but not limited to an allegation by Petitioner in November, 2012 that the conduct toward him was "*per see* bad faith" or that Lubbers noted on an American West Group meeting agenda that litigation was threatened,[2] Respondents fail to enunciate in what capacity Lubbers received the letter or prepared the agenda.

As mentioned in greater detail in Petitioner's Objection,[3] the November 14, 2012 letter sent to Lubbers (which contains the "bad faith" comment) was sent to Lubbers in the limited capacity as: (1) the Canarellis' legal counsel in their capacities as the Family Trustees; and (2) a liaison between the Canarellis and Petitioner. While Lubbers was then serving as the Independent Trustee, his duties were so limited that no liability could be imposed upon him since he did not exercise discretion of any such powers.[4] Thereafter, when Petitioner filed the petition on September 30, 2013 (the "Initial Petition") four (4) months after Lubbers accepted the appointment as Family Trustee, Petitioner only sought certain requested relief, namely that Lubbers: (1) provide an inventory; (2) provide an accounting; (3) conduct a valuation of the Purchase Price as expressly required under the Purchase Agreement; and (4) provide Petitioner with all information relating to

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[2] *See* Respondents' Objection, p. 16:3-8.

[3] *See* Petitioner's Objection, at Sec I(A).

[4] *See* Trust Agreement for the SCIT attached as Exhibit 1 to the Exhibits to the Surcharge Petition, filed June 29, 2017, Sections 4.02, 6.09, and 6.10.

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the Purchase Agreement. Petitioner did not assert claims against any of the Respondents and, to the extent the Initial Petition could be construed as alleging wrongful conduct, such claims were aimed solely at the Canarellis and their conduct, not Lubbers.[5]

The manner in which Lubbers interacted with Petitioner from September 2013 until Petitioner filed the Surcharge Petition on June 27, 2017 further evidences that Lubbers, himself, did not interpret the Initial Petition to include claims against him. Specifically, during this time period, Petitioner and Lubbers regularly met for breakfast to discuss the SCIT because Lubbers indicated that it was required under the SCIT. Immediately upon Petitioner filing the Surcharge Petition, however, Lubbers promptly terminated these meetings, stating to Petitioner that he couldn't meet with a man who was suing him. Consequently, Lubbers' own conduct demonstrates that he did not subjectively anticipate litigation as early as 2013.

Despite the foregoing, Respondents contend that Lubbers anticipated litigation without any evidentiary support. Simply because a beneficiary requests information and raises potential concerns regarding certain aspects of the trust administration to a trustee does not automatically create an adversarial or hostile Relationship. Accordingly, Respondents cannot meet their burden of proof on merely *de minimus* evidence and speculations of Lubbers' "thoughts" in 2013.

B. Respondents' Contention That the Typed Notes Were Prepared in Anticipation of His Teleconference with David Lee and Charlene Renwick Is Speculative, Self-serving and Unsupported by the Evidence.

Notwithstanding Respondents' failure to demonstrate that Lubbers subjectively anticipated litigation, Respondents fail to establish that Group 1 Documents are protected by the attorney-client privilege. The self-serving statements provided in Mr. Williams' declaration and Ms. Brickfield's letter that Lubbers prepared the Typed Notes in anticipation of a call with counsel should be disregarded outright. Not only were neither one of them Lubbers' counsel at the time he

[5] *See e.g.* Petitioner's Objection, p. 21:19-22:4 (citing Initial Petition, ¶¶ A. 1, A.10, A.13, and A.20).

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purportedly prepared the Typed Notes,[6] but neither have set forth the "basis" of their purported personal knowledge of the circumstances under which Lubbers' prepared such notes.

Moreover, Respondents' heavy reliance on the declarations of David Lee ("Lee") and Charlene Renwick ("Renwick") (collectively "the Declarations") and the law firm of Lee Hernandez, Landrum & Garofalo's ("Lee Hernandez") billing statements are not sufficient to permit Respondents' obstruction of the Petitioner's search for the truth.[7] The Declarations, at best, are vague and not credible based upon the totality of the circumstances; specifically: (1) the Declarations are solely based upon Lee or Renwick's recollection of an event five (5) years earlier after simply reviewing their billing entries; and (2) the billing entries disclose a call on October 14, 2013 lasting only 0.6 hours, or about 19-24 minutes, wherein responding to multiple petitions was discussed by Lubbers and counsel;[8] This latter point is significant in light of the fact that at the time of such call there were three (3) separate petitions pending in relation to three (3) separate trusts. This Court is well aware of the complex nature of the SCIT and the claims surrounding the Purchase Agreement. It is unfathomable that Lubbers and Lee Hernandez covered the substance of all three (3) petitions, which include the specific provisions of each trust and relief requested in the petition, **and** the substance of the Typed Notes in less than 24 minutes. Indeed, Lubbers' Handwritten Notes support the fact that the Typed Notes were not discussed. The Handwritten Notes were taken by Lubbers during the October 14, 2013 call and contain three (3) pages. Each

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[6] *See* Substitution of Attorneys, filed December 11, 2013.

[7] *See Whitehead v. Nevada Comm'n on Judicial Discipline*, 110 Nev. 380, 414-415, 873 P.2d 946, 968 (1994) ("Because both the work product and the attorney-client privileges: obstruct[ ] the search for truth and because [their] benefits are, at best, 'indirect and speculative,' [they] ***must be*** '***strictly confined within the narrowest possible limits*** consistent with the logic of [their] principles.'") (Emphasis added).

[8] *See* Declaration of David Lee ("Lee Decl.") attached to the Respondent's Opposition to the Motion for Determination of Privilege Designation of RESP01328-RESP013288 and RESP078899-RESP078900 ("Privilege Motion"), filed August 10, 2018, ¶ 7 (Emphasis added); and Declaration of Charlene Renwick ("Renwick Decl.") attached to the Opposition to the Privilege Motion, ¶ 6. *See also* June 12, 2018 letter from Ms. Brickfield attached as Exhibit 6 to the Privilege Motion, filed July 13, 2018.

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page of the Handwritten Notes relates to each of the three (3) trusts and pending petitions in relation to such trusts. The Handwritten Notes relating to the SCIT are completely devoid of those portions of the Typed Notes that the Discovery Commissioner found contain facts and were not protected. In fact, no portion of the Handwritten Notes appear to correspond with the Typed Notes. Additionally, a simple review of the Handwritten Notes demonstrates that it is unfathomable that each of the statements contained therein plus the Typed Notes were discussed in less than 24 minutes.

Further, the Declarations do not support Respondents' contention that the Typed Notes were discussed during the call. For instance, when discussing the October 14, 2013 call, Lee merely states that, after reviewing his firms billing records, he had a call with Lubbers and the general subject matter was responding to the petitions.[9] Lee further broadly states:

> 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.

Id. at ¶ 7. With respect to Renwick's own recollection of the call, her declaration is largely identical to Lee's declaration.[10] In light of the complexity of this matter, it is difficult to believe that either Lee or Renwick can substantively remember what was discussed during a conversation from over five (5) years ago. Lee and Renwick's scant "memory" coupled with other self-serving statements and the argument that "the notes reflect the types of things one would discuss with his/her attorney,"[11] is not sufficient to meet the heavy burden of proving the Typed Notes are privileged under the attorney-client privilege.

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[9] *See* Lee Decl., at ¶¶ 6-7.

[10] *See* Renwick Decl., at ¶ 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.").

[11] *See* Report and Recommendation, at p. 5:1-2.

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Irrespective of the foregoing, there is absolutely no evidence that Lubbers sent a copy of the Typed Notes to Lee Hernandez. Assuming *arguendo* that Lubbers did discuss the substance of the Typed Notes with his attorney, only the conversation is privileged and not the actual document.

C. Respondents Shift Blame for Their Own Failure to Protect Privileged Material.

Respondents further use their Objection as another opportunity to focus away from their own shortcomings and accuse Petitioner of improperly executing the procedures under the ESI Protocol. Contrary to Respondents' claim that Petitioner, "[w]ith no forewarning," included the Typed Notes in his Supplemental Petition, filed May 15, 2018, it is undisputed that Respondents produced this document over six (6) months prior[12] and that they did not seek to claw back the same prior to June 5, 2018. In fact, even after Petitioner filed the Supplemental Petition, it took Respondents another three (3) weeks to even request to claw back the Typed Notes.[13]

Ironically, the same day Respondents sought to claw back the Group 1 Documents and accused Petitioner's counsel of ethical violations, **Respondents produced the Typed Notes yet again**. Petitioner's Counsel brought it to Respondents' attention on or about November 2, 2018 and specifically stated that the entire document group should be reviewed. Still, Respondents have not clawed back any document other than the Typed Notes. This is true despite the fact that such disclosure also contains the Handwritten Notes.

While Respondents indirectly imply that Petitioner should have sought their permission prior to using the Typed Notes as an exhibit, the Discovery Commissioner herself asked Respondents how Petitioner would have ever known that these documents were "inadvertently produced."[14] As the Discovery Commissioner recognized, it is not Petitioner's obligation to review Respondents' disclosures for them. Petitioner's conduct was not an act in defiance of the ESI

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[12] *See* Respondents' Objection, p. 5:4-6.

[13] *See* June 5, 2018 letter from Ms. Brickfield attached as Exhibit 4 to the Privilege Motion.

[14] *See* Excerpt of the August 29, 2018 hearing transcript attached hereto as **Exhibit 1**, at p. 48:8-10 (Discovery Commissioner: "But how could you fault her for the other set of notes? What about those would have stood out to her to call you?"); *see also Id.* at p. 69:8-17.

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Protocol but rather based on the rightful assumption that, given Respondents' conduct, i.e. their production of these records and exercise of the claw back provision for other documents, Respondents purposefully disclosed the Group 1 Documents.

Respondents then highlight that Petitioner properly followed the ESI Protocol with respect to the Group 2 Documents that were disclosed on April 6, 2018. However, the circumstances there varied from the Group 1 Documents and Respondents noticeably omit such differences in the Respondents' Objection. Unlike the Group 2 Documents that appeared to be Counsel's notes, the privileged nature of the Group 1 Documents was not "self-evident" to Petitioner as Respondents claim.[15] Upon realizing that counsel's notes may have been disclosed, Petitioner alerted Respondents of the same. This is not, as Respondents attempt to portray, a scenario where Petitioner has selectively chosen when to follow the ESI Protocol but one where Petitioner had a real concern that Respondents produced their own attorney's notes.

III. LEGAL AGREEMENT

A. This Court Must First Determine Whether Any Privileges Apply to the Disputed Documents.

Respondents' Objection focuses on whether the Discovery Commissioner erred when she found there were applicable exceptions to the asserted privileges. As set forth in Petitioner's Objection, the Discovery Commissioner committed error when she made conflicting findings that the attorney-client privilege and/or the work product doctrine applied to the Disputed Documents. On numerous instances throughout the August 29, 2018 hearing, the Discovery Commissioner waivered as to her factual findings and, in fact, only applied exceptions to the extent that the ***privileges may have applied to the Disputed Documents***. Findings based upon speculation and assumptions are not sufficient to find the application of the privileged and, consequently, are clearly erroneous.[16]

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[15] *See* June 12, 2018 letter by Ms. Brickfield attached as Exhibit 6 to the Privilege Motion.

[16] Respondents improperly cited to an unpublished opinion, *In re Hanson*, 2008 WL 6113446 (Nev. 2008), to deter this Court from revising the Discovery Commissioner's findings. *See*

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Notwithstanding, Respondents' recollection of the outcome at the August 29, 2018 hearing further twists statements made by the Discovery Commissioner as dicta into definite findings that the attorney-client privilege and/or the work product doctrine applied to the Disputed Documents. The transcript of the August 29, 2018 hearing, however, demonstrates that the Discovery Commissioner did not affirmatively and consistently state that the privileges applied, subject to exceptions. Rather, the Discovery Commissioner merely found that, to the extent a privilege ***may*** apply, there are exceptions permitting disclosure.[17]

The Discovery Commissioner's statements and findings are based upon assumptions and speculations regarding the circumstances under which Lubbers authored the Group 1 Documents. Specifically, it was noted that some of the notes ***may*** or ***probably*** were prepared before, during or after a call Lubbers purportedly had with his counsel on October 14, 2013. When contemplating whether the privilege applied, the Discovery Commissioner stated as follows:

> So Ms. Dwiggins raises an interesting issue, which is ***there's no indication that they were actually sent to the lawyer, or were they prepared contemporaneously with the phone call*** with the lawyer, were they in preparation of the phone call with the lawyer to address the petition? ***We don't know***. I think they were ***probably contemporaneous*** or at least ***perhaps prepared*** immediately following the call and some of them ***may have been prepared in advance*** of the call to -- to set forth the areas that Mr. Lubbers wanted to discuss with his initial lawyer.

Objection, p. 9:23-10:2. Given that NRAP 36(c)(3) provides that a party may only cite an unpublished disposition "for persuasive value" when "issued by the Supreme Court on or after January 1, 2016," this Court must not consider this legal support when making a ruling.

[17] *See e.g.* Report and Recommendation, p. 2:18-22 ("THE COMMISSIONER FURTHER HEREBY FINDS that, as detailed further below, ***even if the Disputed Documents are protected by the attorney-client privilege*** certain of them (or portions thereof) are subject to disclosure under the "fiduciary exception" to the extent that said documents pertain to the administration of The Scott Lyle Graves Canarelli Irrevocable Trust (the "SCIT").") (Emphasis added); *Id.* at p. 4:23-23 ("THE COMMISSIONER FURTHER HEREBY FINDS that, ***to the extent RESP0013284 may be considered work product*** because it was created in anticipation of litigation, it falls under the exception of substantial need since there is no other reasonable way for Petitioner to obtain the information contained therein from Lubbers.") (Emphasis added); *Id.* at p. 5:20-24 ("THE COMMISSIONER FURTHER HEREBY FINDS that ***to the extent the Factual Statements are contained within an attorney-client privileged communication***, they nevertheless fall under the "fiduciary exception" and NRS 49.115(5) because the topics are administrative in nature – e.g. management of the SCIT – and are otherwise factual in nature.") (Emphasis added).

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See **Exhibit 1**, at p. 32:22-33:1 (Emphasis added). In fact, the Discovery Commissioner could not even definitively find whether Lubbers even prepared some of the Disputed Documents.

> But [the Typed Notes], I don't know who typed this document. I think the notes on ***it appear to be Lubbers'***. I'm not a handwriting expert, but they do appear to be his. ***I don't know if he is actually responding to something that was sent to him***. It says Scott analysis, so ***I don't know who's doing the analysis***. I don't know if he's doing this analysis as a lawyer, if he in fact typed the notes. Does anyone really know the answer to that question of who typed this document? Do we know?

Id. at p. 88:6-13 (Emphasis added). The Discovery Commissioner further made numerous assumptions about what Lubbers may have perceived over five (5) years ago.

> But I also agree that if we look at the work product aspect of it, certainly someone in Mr. Lubbers' position could have anticipated litigation.

Id. at p. 82:2-4.

> I think the test is what Lubbers perceived. ***I think he perceived*** that there was potentially a problem here or there…

Id. at p. 88:2-3 (Emphasis added). Thus, Respondents' claim that "[t]he Discovery Commissioner found the subject notes to be protected by the attorney-client privilege and work product doctrine, at least in part," is not supported. Without a definitive finding that the privilege applies, the Discovery Commissioner should have never considered "exceptions" to the privileges.

Consequently, this Court must first determine whether the privilege even applies before it considers any exceptions thereto; therefore, this Court should consider Petitioner's Objection prior to considering the arguments set forth in Respondents' Objection. To this end, Petitioner hereby incorporates by reference the Objection to Report and Recommendation filed by Petitioner on December 17, 2018, as if fully set forth herein.

B. <u>The Nevada Supreme Court Would Likely Recognize a "Fiduciary Exception" to the Attorney-Client Privilege as This Court Has on Repeated Occasions.</u>

Respondents cite to unpublished opinion cited by the Discovery Commissioner during the August 29, 2018 hearing, *Marshall, v. Eighth Judicial Dis. Ct.*, 128 Nev. 915, 381 P.3d 637 (2012) (unpublished), *see* **Exhibit 1**, at p. 31:10-16, asserting that *Marshall* merely noted that the issue as

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to the existence of a fiduciary exception was unresolved.[18] While NRAP 36(c)(3) precludes the use of this unpublished opinion as persuasive authority, since Respondents have cited it to purportedly demonstrate that Nevada has not adopted the fiduciary exception, Petitioner must respond to Respondents' claims. In *Marshall*, the Nevada Supreme Court analyzed an order requiring a trustee's attorney to produce documents within the attorney's possession related to the administration of the trust, the trustor or the estate.[19] Although the Court ultimately denied writ relief for production of the documents, it did imply a fiduciary exception applies to a trustee by stating that a beneficiary's right to a trustee's attorney's file "flows from the trustee's fiduciary duties to the beneficiary, casting the beneficiary as client…" *Id.* at *2.

1. Fiduciary Exception Under Common Law.

Respondents' contention that the first opportunity to brief the fiduciary exception was in response to the Discovery Commissioner raising it *sua sponte* at the August 29, 2018 hearing is entirely misleading and not accurate.[20] The parties previously briefed the "fiduciary exception" in this matter in connection with Petitioner seeking the disclosure of Lubbers' communications with Daniel T. Gerety, C.P.A.[21] Although such briefing was in relation to the accountant versus attorney client privilege, it nonetheless dealt with the fiduciary exception and the law set forth in *Riggs*.

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[18] *See* Respondents' Objection, p. 12:17-13:10.

[19] *Marshall* at *1.

[20] *See* Objection at p. 10, wherein Respondents' contend "this is Respondents first opportunity to brief the issue as the Discovery Commissioner raised it *sua sponte* at the August 29, 2018 hearing."

[21] *See* Edward C. Lubbers' (1) Opposition to Motion to Compel Disclosure of Daniel T. Gerety's CPA Records Relation to the Administration of the Scott Lyle Graves Canarelli Irrevocable Trust; and (2) Countermotion for Protective Order ("Opposition Motion to Compel"), filed February 12, 2018, Section II (B).

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It is undisputed that a fiduciary has a duty of full disclosure to a beneficiary.[22] Encompassed within this duty is the duty to provide the beneficiaries with opinions given to the trustee to carry out its fiduciary duties during the administration of a trust.[23] This Court has repeatedly recognized such fiduciary duty. In so doing, this Court has adopted the common law's recognition of an exception to privilege when a trustee obtains advice "***related to the exercise of fiduciary duties***."[24] Indeed, in most of the jurisdictions in which this question has arisen, courts have given the trustee's reporting duties precedence over the attorney-client privilege.[25]

A case on point is *Riggs National Bank v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976), which this Court, along with the Discovery Commissioner has applied in multiple cases.[26] In *Riggs*, a trustee had a legal memorandum prepared in anticipation of potential tax litigation on behalf of the

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[22] *See* NRS 165.180 ("This chapter does not abridge the power of any court of competent jurisdiction to require testamentary or nontestamentary trustees to file an inventory, to account, to exhibit the trust property, ***or to give beneficiaries information or the privilege of inspection of trust records and papers*** . . .").

[23] *See* BOGERT'S TRUSTS AND TRUSTEES 2D § 961; RESTATEMENT OF TRUSTS 2d § 173. *See also* RESTATEMENT (THIRD) OF TRUSTS § 82 (2007) ("[A]dvice obtained in the trustee's fiduciary capacity concerning decisions or actions to be taken in the course of administering the trust is discoverable by a beneficiary to prevent breach of trust or enforce the beneficiary's rights).

[24] *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165, 131 S. Ct. 2313, 2318 (2011) (Emphasis added) ("In such cases, courts have held, the trustee cannot withhold attorney-client communications from the beneficiary of the trust.").

[25] *Hoopes v. Carota*, 142 A.D.2d 906, 911, 531 N.Y.S.2d 407 (1988) *aff'd*, 74 N.Y.2d 716, 543 N.E.2d 73 (1989) ("defendant failed to advance a basis upon which the attorney-client privilege should appropriately be extended to the information plaintiffs sought here, and failed to cite any factors or circumstances, apart from the existence of an attorney-client relationship, which Supreme Court should have weighed in his favor in ruling on the motion to compel."); *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co.*, 543 F. Supp. 906, 909 (D.D.C. 1982) ("When an attorney advises a fiduciary about a matter dealing with the administration of an employees' benefit plan, the attorney's client is not the fiduciary personally but, rather, the trust's beneficiaries."); *Torian's Estate v. Smith*, 263 Ark. 304, 314, 564 S.W.2d 521, 526 (1978) ("Here the appellant executor, in consulting with the attorney Spears, was necessarily acting for both itself as executor and for the beneficiaries under the will.").

[26] *See e.g. In the Matter of the Testamentary Trust of George A. Steiner,* Case No. P041337-E*; and In the Matter of the Charles E. and Dorothy L. Cook 1995 Family Trust*, Case No. P-11-071394-T.

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trust. *Id.* at p. 710. Thereafter, the beneficiaries filed a surcharge claim against the trustee concerning the same subject matter and sought the production of the same legal memorandum. *Id.* The trustee asserted privilege on the grounds of attorney-client and work product privileges contending that the legal memorandum was the result of confidential communications between him and his attorneys to secure legal assistance relating to potential litigation. *Id.*

The Court disagreed with the trustee and held that the legal memorandum was not protected by the attorney-client privilege, placing great emphasis on the fiduciary nature of the trustee's relationship to the beneficiaries. Specifically, the Court stated:

> As a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client in the sense that He is personally being served. And, the beneficiaries are not simply incidental beneficiaries who Chance to gain from the professional services rendered. The very intention of the communication is to aid the beneficiaries. ***The trustee here cannot subordinate the fiduciary obligations owed to the beneficiaries to their own private interests under the guise of attorney-client privilege.*** The policy preserving the full disclosure necessary in the trustee-beneficiary relationship is here ***ultimately more important than the protection of the trustees' confidence in the attorney for the trust.***

Id. at 712-14 (Emphasis added). With regard to the work product doctrine, the *Riggs* court also found that the work product doctrine did not preclude the memorandum's disclosure, holding that:

> To permit the work product privilege to shield the memorandum from the beneficiaries ***would contravene the policy of full disclosure which is essential in the trustee-beneficiary relationship***...[T]he beneficiaries are entitled to know what the trustees did, that is, what legal opinion was sought on their behalf and what was done in light of that opinion on their behalf.

Id. at 716. Accordingly, the *Riggs* court ordered the production of the legal memorandum, which would fill a needed factual gap not otherwise available with the same degree of accuracy. *Id.*

2. <u>The Fiduciary Exception Is Not an "Exception" but an Extension of the Privilege Over a Protected Class.</u>

Notwithstanding a trustee's fiduciary obligation of disclosure, Respondents attempt to convince this Court to ignore the fiduciary exception because it is a facet of common law and Nevada's privileges are statutory.[27] Specifically, Respondents claim that the exclusion of the

[27] *See* Respondents' Objection, at p. 10:17-13:10.

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fiduciary exception under the statutory exceptions provided under NRS 49.115 means such an exception does not exist in Nevada as a matter of law. Respondents' contention, however, is based upon a fundamental misunderstanding of the fiduciary exception.

The term "fiduciary exception" is a misnomer. It is not an actual "exception" to the attorney-client privilege. Rather, the Courts that have applied such exception have held that the privilege **does not apply at all** vis-a-via a beneficiary when the Trustee retains an attorney to assist in his or her fiduciary obligations.[28] Indeed, the Courts make such ruling on the notion that either: (1) the beneficiary is the real client; or (2) the advice is being sought for the benefit of the beneficiary.[29] Unlike an "exception" to the privilege, when applying the fiduciary exception, Courts have limited the disclosure to the *only* the beneficiaries. In such instances, the privilege still exists vis-a-via third parties. As such, the fiduciary exception is better described as a definition of who falls within the class that is protected by the privilege than an actual exception to the same. This Court expressly recognized the same in *In re: Trust of George A. Steiner* when it expressly stated and held that the analysis of the fiduciary exception is not whether it is an exception to the codified privilege, but whether "the beneficiaries are in the class of people that are intended to be protected."[30]

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[28] *See United States v. Mett*, 178 F.3d 1058, 1063 (9th Cir. 1999) (noting that the fiduciary exception is not actually an "exception" to the attorney-client privilege but "merely reflects the fact that, at least as to advice regarding plan administration, a trustee is not 'the real client' and thus never enjoyed the privilege in the first place."

[29] *See Riggs Nat. Bank of Washington, D.C.*, 355 A.2d at 711 ("[T]he ultimate or real clients were the beneficiaries of the trust, and the trustee... in his capacity as a fiduciary, was, or at least should have been, acting only on behalf of the beneficiaries in administering the trust."); *Jicarilla Apache Nation*, 131 S. Ct. at 2333 ("If the advice was rendered for the benefit of the beneficiary and not for the trustee in any personal capacity, the 'real client' of the advice is the beneficiary.").

[30] *See* Excerpts of Hearing Transcript for Case No. P041337, dated June 25, 2013, attached to the Gerety Reply as Exhibit 9. Although this opinion in *In re: Trust of George A. Steiner* is not precedent, **Respondents have previously cited to this case in support of their inaccurate statement that "Judge Sturman expressly declined to use the *Riggs* test.**" *See* Opposition Motion to Compel, p. 12 n. 31 (Emphasis added).

In light of the fiduciary exception as a class identifier as opposed to an exception to the privilege, Respondents' case law is completely distinguishable from the instant matter. In *State ex rel. Tidvall v. Eighth Judicial Dist. Ct.*, 91 Nev. 520, 539 P.2d 456 (1975), the Nevada Supreme Court found that the bank superintendent had an absolute right to exercise privilege against the disclosure of bank examination reports.[31] However, the relationship between the parties in *Tidvall* was not that of a trustee and beneficiary but rather an alleged debtor's subpoena duces tecum to a bank superintendent, a non-party to the action. The bank superintendent did not owe the debtor a separate duty. In contrast, Lubbers owed Petitioner fiduciary duties, including the duty to disclose and furnish information to Petitioner. Consequently, Respondents' reliance on the case law cited in the Objection has no application to the issue presently before this Court.

3. The Factors Set Forth in *Riggs* Weigh in Favor of Applying the Fiduciary Exception.

The *Riggs* court enunciated several factors to determine whether records in question should be allowed: (1) the purpose for which it was prepared; (2) the party or parties for whose benefit it was procured; and (3) what litigation was then pending or threatened.[32] All favor the fiduciary exception's application as to the Group 1 Documents and the Discovery Commissioner did not commit err is applying the fiduciary exception.

As previously mentioned, at the time Lubbers conferred with Lee Hernandez on October 14, 2013, Petitioner had only filed the Initial Petition, which sought an accounting to which he was entitled and that was previously denied *by the Canarellis*, a valuation pursuant to the terms of the Purchase Agreement and information relating to the sale. While the Initial Petition including allegations of potentially wrongdoing, such allegations ***were directed solely against the Canarellis during their tenure as Family Trustees*** between February 24, 1998 and May 24, 2013. This request was directed at Lubbers, not because Petitioner asserted Lubbers was culpable, but ***solely*** because he was by then the only serving Family Trustee and Independent Trustee of the SCIT. In fact,

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[31] 91 Nev. at 525, 539 P.2d at 459.

[32] *Riggs Nat'l Bank of Wash., D.C.*, 355 A.2d at 711.

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Lubbers had only been the Family Trustee for about four (4) months at the time the Initial Petition was filed; therefore, he was not yet required to account for his tenure as the Family Trustee.

The two remaining factors also weigh in Petitioner's favor. Because there was no cause of action pending or even threatened in 2013, Lubbers' consultation with Lee Hernandez was for the purpose of administering the SCIT and responding to Petitioner's requests. This included providing an inventory and accounting for the SCIT, conducting a valuation of the Purchase Price per the terms of the Purchase Agreement and providing Petitioner with all information relating to the Purchase Agreement. For this reason, the consultation was for the Petitioner's benefit, not for Lubbers' defense of his actions as Family Trustee. Therefore, the Discovery Commissioner properly applied the fiduciary exception in holding that the Group 1 Documents were not privileged and Petitioner was entitled to disclosure of the same.

4. The Statutory Exception Set Forth Under NRS 49.115.

Irrespective of the fiduciary exception, a statutory exception does, in fact, apply under these circumstances. Pursuant to NRS 49.115, an exception to the statutory attorney-client privilege applies to matters of a common interest. The relevant statute provides as follows:

> There is no privilege under NRS 49.095 or 49.105:
> ...
> 1. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.[33]

Indeed, the Discovery Commissioner has previously found that in the matter entitled *In the Matter of the Testamentary Trust of George A. Steiner* that, "as a result of the fiduciary relationship by the trustee to the beneficiary, ***a common interest*** exists that protects the confidentiality of information disclosed to the beneficiaries."[34] The Discovery Commissioner further stated,

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[33] NRS 49.115(5).

[34] Respondents previously relied upon this Court's prior ruling in *In the Matter of the Testamentary Trust of George A. Steiner*. *See* Opposition to Motion to Compel. Petitioner refuted such contention, however, in its Reply, filed February 23, 2018 (*see* Discovery Commissioner's

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> The Discovery Commissioner believes it is improper for the Co-Trustees to invoke the attorney-client privilege for legal advice regarding the administration of the G.A. Steiner Trust ("Trust") because such advice was for the benefit of the Trust and not the Co-Trustees individually [citations omitted]. As such, the Discovery Commissioner finds that any legal advice regarding the administration of the Trust obtained by the Co-Trustees, in any capacity, is not protected by the attorney-client privilege and must be produced . . . [35]

Following an objection to the foregoing report and recommendation, this Court expressly stated that the ultimate question is whether the beneficiary is entitled to the information and whether the trustee has an obligation to disclose it pursuant to statute and its fiduciary duties. In so finding, this Court recognized that the analysis of the fiduciary exception is not whether it is an exception to the codified privilege, but whether "the beneficiaries are in the class of people that are intended to be protected."[36]

Similarly, the communication Lubbers may have had with counsel on or about October 14, 2013 also falls squarely within the exception set forth under the NRS 49.115(5). The Initial Petition was not adversarial and no claims were asserted against Lubbers. As previously stated, Lubbers' own conduct evidenced that he did not consider the Initial Petition adversarial against him. Lubbers continued to meet Petitioner for breakfast on a regular basis following the filing of the Initial Petition until June 2017. Lubbers terminated the meetings after Petitioner filed the Surcharge Petition asserting claims against him. Indeed, when Lubbers terminated these meetings, he expressly stated to Petitioner that he could not sit across the table from someone who was suing him.

The "advice" Lubbers sought from Lee Hernandez directly related to the relief sought in the Initial Petition, namely providing an accounting, obtaining a valuation pursuant to the terms of the Purchase Agreement and providing information to Petitioner related thereto. As Petitioner's

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Report and Recommendation from the *Steiner* matter attached thereto as Exhibit 8) (Emphasis added).

[35] *See id.,* Discovery Commissioner's Report and Recommendation from the *Steiner* matter.

[36] *See supra* note 30.

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trustee, Lubbers was required to provide this information to Petitioner. Disclosure of this information is an administrative aspect of the SCIT and, therefore, by definition, not adversarial. This is further evidenced by the fact that Lubbers never filed an objection to the Initial Petition; but rather the parties entered into a Stipulation and Order. As such, as of October 2013, a common interest existed between Lubbers and Petitioner relating to Lubbers' administration of the SCIT and his duty to disclose information relating to the Purchase Agreement and the financial transactions of the SCIT. Consequently, the exception enunciated under NRS 49.115(5) applies to the Group 1 Documents.

C. Any Privilege that May Have Existed Was Waived When Lubbers Turned Over His Files to AWDI and Its Employees.

As set forth in detail in Petitioner's Objection, Section E, Lubbers waived any potential privilege associated with the Disputed Documents because said notes were in the possession of a non-party, AWDI. Petitioner incorporates by reference the entirety of Section E of his objection as it fully set forth herein and relies upon the same in contending that, to the extent this Court finds that the Disputed Documents are subject to any protection, such protection was waived by Lubbers.

D. The Heightened Protections Provided to Opinion Work Product Under Rule 26 Does Not Apply to Parties.

Respondents further contending that Petitioner is not entitled to the Disputed Documents because he must show more than substantial need under the work product doctrine given that these records are opinion work product.[37] In so contending, Respondents completely ignore the fact that assuming *arguendo* that such documents constitute opinion work product, Petitioner has nonetheless demonstrated a compelling need.

Notwithstanding, Respondents misinterpret the relevant court rules to create an interpretation of the rule that would be untenable for litigation. As provided in greater detail in

[37] Petitioner previously briefed the differences between opinion and ordinary work product in Petitioner's Objection, Sec. III(D)(1), which is incorporated herein by reference.

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Petitioner's Objection, *id.*, the Nevada Rules of Civil Procedure do not extend opinion work product's "almost absolute immunity from discovery"[38] to a party. While NRCP 26 may protect ordinary work product prepared by or for a party or a party's representative, it only protects the opinion work product of "an attorney or other representative of a party."[39] It is further illogical to extend opinion work product to a party's mental impressions since, under NRCP 26, a party may conduct discovery regarding "any matter, not privileged, which is relevant to the subject matter involved in the pending action."[40] Rule 26 further provides that a party may conduct discovery "by one or more of the following...methods: depositions...; written interrogatories; production of documents ... under Rule 34 ...; and requests for admission."[41] All of these methods undoubtedly will ask for a party's mental impressions and/or opinions because such information could be relevant to discovery.

As referenced *infra*, Lubbers would have been compelled to testify to the facts contained within the Typed Notes, including the history of distributions to Petitioner from the SCIT. Lubbers had personal knowledge of the facts as trustee of the SCIT. The fact that Lubbers utilized the word "belief" in the Typed Notes is of no consequence. Respondents' contention that Lubbers' "beliefs" should be protected under the heightened standard is contrary to the plain language of the Nevada Rules of Civil Procedure and is otherwise nonsensical.

E. Opinion Work Product Protects Mental Impressions, Not Facts.

To protect 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

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[38] *See* Respondents' Objection, p. 18:7-9 (citing *Laxalt v. McClatchy*, 116 F.R.D. 4328, 441 (D. Nev 1987).

[39] NRCP 26(b)(3).

[40] NRCP 26(b)(1).

[41] NRCP 26(a).

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to pending or anticipated litigation."[42] Respondents' contention that the Disputed Documents 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]."[43]

As stated in the Privilege Motion, the Typed Notes contains the following **facts** surrounding the distributions and Purchase Agreement, namely: (1) the distribution requests were initially denied; (2) why the requests were denied; (3) the distribution requests were subsequently acquiesced to; (4) why the requests were acquiesced to; (5) the sale was being contemplated; and (6) that Petitioner was not notified of the sale.[44] There is no dispute that the circumstances surrounding distributions made, or not made, to Petitioner are factual and nature and subject to disclosure. The fact that a portion of such notes contain the word "belief" is of no consequence for the reasons set forth herein and in Petitioner's Objection. The ultimate question is that whether Lubbers would be required to answer questions during a deposition relative to the exercise of the Family Trustees' discretion to make distributions to Petitioner. The answer is unequivocally yes. This is equally true with respect to the remainder of the Typed Notes that the Discovery Commissioner found contained facts and were subject to disclosure. The fact that the document may also contain information that *may* be subject to a privilege does render facts that are otherwise discoverable not subject to disclosure. The law is clear that factual material embedded in a document that may otherwise protected does not receive a heightened degree of protection under opinion work product.[45] Accordingly, this Court should affirm the Discovery Commissioner's

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[42] *In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d 180, 183-84 (2d Cir. 2007) (quoting *In re Grand Jury Subpoenas Dated Mar. 19, 2002 & Aug. 2, 2002,* 318 F.3d at 386 (quoting *Gould, Inc. v. Mitsui Mining & Smelting Co.,* 825 F.2d 676, 680 (2d Cir.1987))).

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

[44] *See* the Typed Notes included with the Group 1 Documents attached as Exhibit 2 to the Petitioner's Objection.

[45] *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

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recommendation that the portion of the Typed Notes containing facts (as defined by the Discovery Commissioner) are subject to disclosure.

F. Alternatively, the Disputed Documents May Be Redacted to Protect Privileged Information.

The Discovery Commissioner correctly determined that at least portions of the Typed Notes contained facts, not Lubbers' opinions, and elected to redact the records as opposed to precluding disclosure.[46] Thus, *even if* Lubbers, as a party, can create opinion work product, and it was contained within the Disputed Documents, Petitioner is not altogether barred from disclosure of the same. 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."[47] Limitations on redactions include instances where the privileged and non-privileged information are "inextricably intertwined."[48] Privileged and non-privileged information

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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").

[46] *See* Report and Recommendation, at p. 8:18-9:11.

[47] *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 containing facts and to redact those that are opinion work product). Federal jurisdictions have also found that a court may order redaction of privileged material contained in a document with both privileged and non-privileged material and permit disclosure of the document with the non-privileged information. *See, e.g., U.S. v. Christensen*, 828 F.3d 763, 803 (9th Cir. 2015).

[48] *See Hopkins v. U.S. Dept. of Housing and Urban Development*, 929 F.2d 81, 85-6 (2d Cir. 1991); *see also Resolution Trust Corp. v. Diamond*, 773 F.Supp. 597, 601 (S.D. N.Y. 1991); *see also U.S. v. Chevron*, 1996 WL 264769, at *5 (N.D. Cal. Mar. 13, 1996).

are "inextricably intertwined" where "…such disclosure would 'compromise the confidentiality of deliberative information that is entitled to protection…'"[49]

In this case, the Discovery Commissioner elected to redact a portion of the Typed Notes, but to otherwise refuse Respondents' attempts to claw back the entire document. This is because the various sections of the Typed Notes are independent of each other.[50] The facts contained therein is not "inextricably intertwined" with otherwise privileged information and there is no risk that disclosure of certain information within the Typed Notes would reveal the substance of privileged information. Thus, to the extent there *may be* opinion work product (which Petitioner disputes), redaction is a wholly proper and the Discovery Commissioner properly so found.

G. Depositions for Individuals Other Than Lubbers Does Not Overcome Substantial or Compelling Need.

In Respondents' Objection as well as other briefing, Respondents have tried to shield themselves for their own misconduct and further dodge Lubbers' testimony by contending that Petitioner can simply depose other parties to recover the same information.[51] Not only is Respondents' contention contrary to the law, it is extremely prejudicial to Petitioner.

Lubbers was a material witness in this case. The factual portion of the Typed Notes go to the heart of Petitioner's claims asserted in the Surcharge Petition and Supplemental Surcharge Petition. There is simply no way to replace the gap in material evidence resulting from Lubbers' tragic death. Regardless of whether the Canarellis or other individuals have personal knowledge of an aspect of the case, their knowledge does not necessarily match nor is equivalent to Lubbers' testimony. Lubbers could have testified on a vast range of material and substantive issues in this litigation, including but not limited to: (1) the circumstances of the Canarellis' resignation as Family Trustees; (2) his acceptance as the successor Family Trustee; (3) his execution of the

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[49] *Hopkins*, 929 F.2d at 85 (*quoting EPA v. Mink*, 410 U.S. 73, 92 (1973)).

[50] *See* the Typed Notes included with the Group 1 Documents attached as Exhibit 2 to the Petitioner's Objection.

[51] *See e.g.* Respondents' Objection, p. 20:25-26.

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Purchase Agreement; (4) his reasoning for executing the Purchase Agreement; (5) the due diligence he conducted, if any; (6) his knowledge on the business and forecasts; and (7) distributions requests and responses thereto. The list of issues is extensive. Testimony on these subjects from someone other than Lubbers is nothing more than mere speculation and extremely prejudicial.

It is especially prejudicial in light of the fact that Petitioner has asserted claims against the Canarellis for fraud, fraudulent misrepresentation and other wrongful conduct. Indeed, Petitioner has already demonstrated that the representations set forth in the Purchase Agreement were not accurate, including the fact that distributions were precluded by the terms of the loan documents or that the lender would not allow distributions to the SCIT. In light of Petitioner's claims and the evidence thus far discovered, Respondents' contention that Larry Canarelli or Bob Evans can provide testimony in lieu of disclosing admissions made by Lubbers is completely disingenuous. For six (6) months Respondents precluded Lubbers' deposition for going forward by causing unnecessary delay and providing excuse after excuse. Now that Petitioner is unable to depose Lubbers, Respondents seek to preclude disclosure of Lubbers' rendition of the facts in this case and admissions made by him. No matter how Respondents attempt to rephrase the issue, Petitioner has been exceedingly prejudiced by Respondents' failure to produce Lubbers' for deposition prior to his death, thereby creating not only a substantial need, but also a compelling need, for his notes and records.

H. <u>This Court Is Fully Capable of Reviewing the Disputed Documents.</u>

Respondents have further implied that this Court is unable to make unbiased rulings with regard to the privileged nature, if any, of the Disputed Documents.[52] Respondents' insinuation and/or request that *another* District Court Judge review the Disputed Documents is inconsistent with Nevada law. Indeed, the Nevada Supreme Court has repeatedly ordered district courts to review purportedly privileged documents *in camera* to determine whether documents are protected

[52] *See* Objection, p. 5 n. 1.

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by privilege.[53] If the Nevada Supreme Court was concerned that a district court would be "unwillingly taint[ed]"[54] by reviewing purportedly privileged documents (as Respondents' contend), it would have expressly ruled any and all *in camera* reviews must be conducted by another judicial officer. It did not do so.

Respondents have previously cited to *Lund v. Myers*, 305 P.3d 374 (Ariz. 2013) in support of having another judge review privileged materials and/or seeking the reviewing judge's recusal from the matter.[55] While it is true that the *Lund* opinion provides that 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," it ***did not*** create a strict requirement that another judicial officer must review the purportedly privileged documents *in camera* and/or that a judge must recuse itself if it has reviewed privileged communications. To the contrary, the Arizona Supreme Court stated that the **district court at issue should merely "*consider*"** whether reviewing the purportedly privileged documentation would be so prejudicial to justify recusal. Here, Respondents have failed to explain how the review of Disputed Documents

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[53] *See, e.g., Las Vegas Sands v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 69, 331 P.3d 905, 913–14 (2014) (holding that "the district court should resolve any disputes regarding Sands' privilege log by conducting an *in-camera* review of the purportedly privileged documents to determine which documents are actually protected by a privilege."). Most recently, in *Cotter v. Eighth Jud. Dist. Ct.*, 134 Nev. Adv. Op. 32 (May 3, 2018), the Nevada Supreme Court issued a "writ instructing the district court to refrain from compelling disclosure of the emails until it reviews the emails in camera to evaluate whether they contain impressions, conclusions, opinions, and legal theories of counsel, as required pursuant to the work-product doctrine." *See also Mitchell v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 131 Nev. Adv. Op. 21, 359 P.3d 1096, 1105 (2015) (granting writ and directing the district court to review the doctor-patient records in camera and enter such orders respecting their production); *Wardleigh v. District Court*, 111 Nev. 345, 347 (1995) ("In the event the parties are unable to agree on the voluntary delivery of such documents, if any, or the nature of such documents, the district court should issue an order for the court's *in camera* inspection of the legal files."); *Goode v. Shoukfeh*, 943 S.W.2d 441, 448 (Tex.1997) ("Generally, a trial court conducts an *in camera* inspection to determine if a document is in fact privileged. If it is not privileged, then it may become evidence that the factfinder may consider. If the document is privileged, it is not subject to discovery and may not be considered by the factfinder, even when the factfinder is the trial court.") (Emphasis Added).

[54] *See* Objection, p. 5 n. 1.

[55] *See* August 13, 2018 letter from Mr. Williams attached hereto as **Exhibit 2**.

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would be prejudicial, let alone how it would rise to the level requiring this Court's recusal if reviewed. Indeed, this Court is in the best position to review the documents and make a ruling. This matter is complex and very intensive factually. Requesting a court unfamiliar with this Case to make substantive rulings on material issues in this case is too risky and prejudicial.

Any insinuation that this Court would not be impartial after receiving the Disputed Documents is, frankly, an insult to this Court. In light of the foregoing, Petitioner respectfully requests that this Court disregard any argument/request by Respondents' Counsel that another district court judge must hear any motion relating to not only the Disputed Documents but any applicable privilege.

IV. CONCLUSION

For the above reasons, Petitioner Scott Canarelli respectfully requests that this Court deny Respondents. Objection.

DATED this 14 day of January, 2019.

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CERTIFICATE OF SERVICE

PURSUANT to NRCP 5(b), I HEREBY CERTIFY that on January 14, 2019, I served a true and correct copy of the **OPPOSITION TO RESPONDENTS' OBJECTIONS, IN PART, TO DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS ON MOTION FOR DETERMINATION OF PRIVILEGE DESIGNATION** 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

RTRAN

DISTRICT COURT

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-T DEPT. XXVI/Probate

BEFORE THE HONORABLE BONNIE BULLA,
DISCOVERY COMMISSIONER

WEDNESDAY, AUGUST 29, 2018

TRANSCRIPT OF PROCEEDINGS RE:
ALL PENDING MOTIONS AND ADDITIONAL BRIEFING

APPEARANCES:

For the Petitioner:	DANA ANN DWIGGINS, ESQ. TESS E. JOHNSON, ESQ. JEFFREY P. LUSZECK, ESQ.
For the Trustee/Respondent(s):	JON COLBY WILLIAMS, ESQ. ELIZABETH BRICKFIELD, ESQ. PHILIP R. ERWIN, ESQ. JOEL Z. SCHWARZ, ESQ.
For the Nonparty Witnesses:	JENNIFER L. BRASTER, ESQ. ANDREW J. SHARPLES, ESQ.
For the Special Administrator:	LIANE K. WAKAYAMA, ESQ.

RECORDED BY: FRANCESCA HAAK, COURT RECORDER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. WILLIAMS: Correct.

DISCOVERY COMMISSIONER: Okay.

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

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

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

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

DISCOVERY COMMISSIONER: I -- I agree with you.

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

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

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

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

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

MR. WILLIAMS: The typed notes?

DISCOVERY COMMISSIONER: Yeah.

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

DISCOVERY COMMISSIONER: I mean, there is a --

MS. DWIGGINS: -- fiduciary exception applied.

DISCOVERY COMMISSIONER: Huge production.

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

DISCOVERY COMMISSIONER: Which court applied that the fiduciary exception?

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

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

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

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

MR. WILLIAMS: No.

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

MR. WILLIAMS: So --

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

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

DISCOVERY COMMISSIONER: I know you negotiated it.

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

DISCOVERY COMMISSIONER: All you have to do is notify.

MR. WILLIAMS: Right.

DISCOVERY COMMISSIONER: You don't have a clawback

against Mr. Lubbers individually was filed.

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

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

So --

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

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

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

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

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

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

DISCOVERY COMMISSIONER: Okay.

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

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

DISCOVERY COMMISSIONER: Want me to see if we have

you've had to review, more importantly.

MR. SCHWARZ: Thank you to your staff.

DISCOVERY COMMISSIONER: Thank you.

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

/ / /

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.

Shawna Ortega, CET*562

EXHIBIT 2

EXHIBIT 2

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

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

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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

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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.

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DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of: SCOTT LYLE GRAVES CANARELLI IRREVOCABLE TRUST, dated February 24, 1998.	Case No.: P-13-078912-T Dept. No.: 26

RESPONDENTS' OPPOSITION TO PETITIONER'S OBJECTION TO THE DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS ON (1) THE MOTION FOR DETERMINATION OF PRIVILEGE DESIGNATION, (2) THE SUPPLEMENTAL BRIEFING ON APPRECIATION DAMAGES

Respondents Lawrence and Heidi Canarelli (the "Canarellis") and Frank Martin, Special Administrator of The Estate of Edward C. Lubbers, as former family trustees of the Scott Canarelli Irrevocable Trust (the "Trust"), ("Lubbers" and together with the Canarellis, "Respondents"), by and through their counsel, the law firms of Campbell & Williams and Dickinson Wright PLLC, hereby file their Opposition to Petitioner Scott Canarelli's ("Petitioner") Objections to the Discovery Commissioner's Report and Recommendations on the Motion for Determination of Privilege Designation.

Case Number: P-13-078912-T

DATED this 14th day of January, 2019.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Court should overrule Petitioner's Objections to the Discovery Commissioner's findings and conclusions that Lubbers' inadvertently produced notes are protected, in part, by the attorney-client privilege and the work-product doctrine. Petitioner's lengthy Objection consists entirely of Petitioner's unsupported speculation, refusal to acknowledge the evidence presented to the Discovery Commissioner, and erroneous legal arguments. Because Petitioner has failed to demonstrate any clear error or that any factual finding is unsupported by evidence, the Court should affirm the Discovery Commissioner's findings that Lubbers' notes are protected.

First, the Discovery Commissioner did not err in finding that Lubbers' typed notes[1] are protected by the attorney-client privilege. Lubbers' typed notes are privileged as long as the notes were prepared in order to obtain legal advice and the information was actually communicated to counsel. Here, the typed notes are dated the same date Lubbers participated in a telephone call with his attorneys. On the face of the notes, Lubbers begins by asking three questions seeking legal advice. Lubbers then states his "belief" regarding how the Court might view this case and identifies issues in the litigation where he thinks there may be "risk." In addition, Lubbers' attorneys confirmed that they spoke to Lubbers on that particular day about the exact types of information that were contained in the notes, demonstrating that the information was actually communicated to counsel. Given this evidence, which Petitioner simply chooses to disregard, the Discovery Commissioner's findings are supported by the evidence and are not clearly erroneous.

Second, in light of the totality of the circumstances, Petitioner's typed notes are protected by the work-product doctrine. Beginning no later than November 14, 2012, Petitioner took an adverse and hostile position towards Lubbers and the Canarellis. He accused Lubbers of bad faith and threatened to initiate litigation if Lubbers did not comply with his demands. When

[1] Throughout his forty-page Objection, Petitioner only specifically address one page of Lubbers' notes (Bates No. RESP13285).

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Lubbers did not agree with Petitioner, Petitioner followed through with his threats and initiated this litigation. In Petitioner's Initial Petition, he alleged that Lubbers violated his fiduciary duties to Petitioner. In response, and in anticipation of a meeting with counsel, Lubbers prepared his typed notes which, as noted above, contain Lubbers' mental impressions regarding the litigation and his thoughts as to how Respondents should respond. Based on the totality of the circumstances, Petitioner's argument that the Discovery Commissioner erred is untenable.

Finally, Petitioner argues that Lubbers waived any privilege or protection because (1) the disputed notes were allegedly in the possession of third party American West Development, Inc. ("AWDI"), and (2) Lubbers' counsel was allegedly reckless in inadvertently disclosing the notes during discovery. Petitioner's unsupported arguments must be rejected.

First, Petitioner's argument that AWDI possessed the notes is highly misleading. There is no evidence in the record whatsoever that Lubbers' notes were ever actually reviewed by anyone at AWDI. Moreover, contrary to Petitioner's unsupported assumptions, the documents Petitioner refers to were merely stored at the building location for AWDI, which is where Respondent Larry Canarelli maintains his office. And, even if Lubbers' notes were part of these files, they were reviewed by Tina Goode, who has provided assistance to Larry Canarelli with respect to this litigation. Thus, there is simply no evidence to support Petitioner's speculative argument.

Second, Petitioner argues for the first time before this Court that Respondents waived the privilege because they were allegedly reckless in their document production. The Nevada Supreme Court has made it clear that district courts will not consider a new argument that was not first decided by the Discovery Commissioner. Because Petitioner never raised this argument before the Discovery Commissioner, it must be rejected. Moreover, Petitioner's argument is unsupported and contrary to reality. There can be no doubt that Respondents took reasonable precautions to protect their attorney-client privileged and work-product protected documents. Nevertheless, Respondents were faced with a monumental task of producing hundreds of thousands of pages of documents. Given the massive amount of documents at issue in this case,

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it is not surprising that a comparative handful of pages were inadvertently produced. Petitioner's argument has no support under Nevada law or the facts of this case.

II. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner's Objection includes a lengthy section titled "Statement of Facts," which primarily consists of Petitioner's unsupported arguments and speculation as opposed to a recitation of fact that is supported by evidence. (Petitioner's Objections at 6-11.) Respondents will fully address Petitioner's arguments and speculation in Section IV below.

With respect to the relevant and supportable facts, Respondents provided a detailed factual background in their underlying Opposition filed on August 10, 2018, which is incorporated herein by this reference. Rather than repeat that entire factual background here, Respondents will merely summarize the essential facts and discuss any other relevant facts in connection with their response to Petitioner's substantive arguments.

A. Petitioner Threatens Lubbers with Litigation and Accuses Him of Bad Faith

In May 2012, Petitioner retained the law firm Solomon Dwiggins & Freer to assist him in resuming distributions from the Trust, which Petitioner alleged had been stopped due to "hostility" on the part of his parents, Larry and Heidi. (Sept. 30, 2013, Petition (the "Initial Petition") ¶¶ A.13-A.14, Exhibit 1 to Respondents' Opp'n to the Motion for Determination of Privilege Designation (the "Opp'n to Privilege Mot."), on file herein.)

On November 14, 2012, Petitioner's counsel sent a letter to Lubbers threatening litigation in the event Lubbers did not accede to Petitioner's demands for distributions, which Petitioner's counsel stated were "non-negotiable." (Nov. 14, 2012, Letter, Exhibit 2 to the Opp'n to Privilege Mot.) In that letter, Petitioner also explicitly accused Lubbers of "per se bad faith." *Id.*

On November 15, 2012, the day after receiving Petitioner's threatening letter, Lubbers prepared and sent an Agenda for the weekly meeting that was regularly conducted with Larry and Bob Evans at the offices of The American West Home Building Group. One Agenda item is

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identified as "Scott-lawsuit threatened," which confirms that Lubbers anticipated potential litigation at that time.[2] (Exhibit 4 to the Opp'n to Privilege Mot.)

B. Petitioner Files this Lawsuit and, in Response, Lubbers Retains Counsel and Creates the Group 1 Notes (Bates Nos. RESP013284-RESP013288)

Consistent with his prior threats, Petitioner filed his Initial Petition on or about September 30, 2013. (Exhibit 1 to the Opp'n to Privilege Mot.) The Initial Petition contained a number of adversarial allegations against the Canarellis and Lubbers, who was Family Trustee at the time, including that "the Family Trustee violated the fiduciary obligations due and owing to Petitioner[.]" *Id.* ¶ C.6. Petitioner further alleged that Lubbers, as 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. And Petitioner complained that the trustees sold the Trust's assets without Petitioner's knowledge or consent and that Petitioner lacked the information to verify whether the sale was designed to punish Petitioner or otherwise harm his financial interests. *Id.* ¶¶ D.5-D.6. The Petition was set to be heard by the Court on October 18, 2013. (Initial Petition at 1; Oct. 2, 2013 Notice of Hearing filed and served by Petitioner's counsel.)

Less than two weeks after Petitioner's service of the Initial Petition and the Notice of Hearing, Lubbers retained the law firm of Lee, Hernandez, Landrum, Garofalo & Blake ("LHLGB") to represent him in connection with responding to the Initial Petition (and two other

[2] Petitioner claims that Lubbers could not have subjectively anticipated litigation given "Petitioner's genuine fondness for him." (Petitioner's Objection at 6.) In addition to the fact this argument is not supported by admissible evidence, it ignores the reality of this case and Petitioner's own actions. Petitioner has aggressively pursued this baseless litigation against Lubbers using a scorched earth litigation style and has continued in this conduct after Lubbers' death, while his widow grieves. Petitioner has conducted a massive fishing expedition in the hopes of finding some sliver of wrongdoing – including having Lubbers and his wife followed by a private investigator before his death. (Exhibit 13 to the Oct. 10, 2018 Pet. For Imposition of an Adverse Presumption, on file herein.) And, throughout this process, Petitioner consistently mischaracterizes the relevant facts with an eye towards furthering his unsupportable claims. It is difficult to believe that this is how Petitioner treats people for whom he has a "genuine fondness."

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petitions filed by Petitioner). (Lee Decl. ¶ 4 and Renwick Decl. ¶ 4, attached to the Opp'n to Privilege Mot.)

In anticipation of an initial telephone call with LHLGB, Lubbers prepared (or had prepared) typed notes. (Exhibit 2 to Petitioner's Objections) (submitted *in camera*). Generally described, the notes initially set forth questions that Lubbers sought to pose to counsel regarding how to respond to the Initial Petition.[3] *Id.* The notes go on to describe Lubbers' "beliefs" regarding the case, including how Respondents should respond to the Initial Petition, and how the Court may view the case. *Id.* Finally, the notes reflect Lubbers' assessment of certain legal issues. *Id.* Lubbers also created additional handwritten notes during his subsequent call with LHLGB.

On October 16, 2013, LHLGB filed Lubbers' Response to the Initial Petition. The parties and their counsel thereafter appeared at the October 18, 2013 hearing. As a result of the hearing, an order was issued on October 24, 2013 in which the Court took jurisdiction over the Trust, confirmed Lubbers as Trustee, ordered an inventory and accounting to be prepared by Lubbers, ordered the turnover of information, and set a hearing date for determining whether the Court should appoint an independent valuator to value the sold assets. On October 31, 2013, Lubbers objected to the language of the October 24, 2013 order. (Trustee's Objection to the Order, on file herein.)

Petitioner filed his Petition to Surcharge on June 27, 2017. As part of their initial disclosures on December 15, 2017, Respondents' counsel inadvertently produced some of Lubbers' notes, which are referred to here as the Group 1 Notes. *See* (Exhibit 2 to Petitioner's Objections) (submitted *in camera*).

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[3] In this brief, Respondents will only describe the notes in general terms so as to prevent further harm from the improper use and unauthorized disclosure of Lubbers' attorney-client privileged and work-product protected material.

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C. **Stephen Nicolatus Is Appointed to Conduct a Valuation, and Lubbers Creates the Work Product Protected Group 2 Notes (Bates Nos. RESP078899-RESP078900)**

On or about December 2, 2013, Lubbers entered into a stipulation with Petitioner regarding the appointment of Stephen Nicolatus to conduct a valuation of the Trust's assets that were sold pursuant to the May 31, 2013 Purchase Agreement (which is the primary subject of Petitioner's Surcharge Petition). (Stip. And Order Appointing Valuation Expert, Exhibit 6 to Opp'n to Privilege Mot.) At that time, Petitioner expressly reserved his right to challenge the Purchase Agreement, complaining that he was not told about the sale of the Trust's assets and stated that he has questions about the appropriateness of the sale in the first instance. (Dec. 6, 2013, Letter from M. Solomon, Exhibit 7 to Opp'n to Privilege Mot.)

On or about December 19, 2013, the parties and their counsel met with Mr. Nicolatus to discuss the materials Mr. Nicolatus would need to conduct the valuation. Lubbers took notes during the meeting, which reflect the information Lubbers believed was important to memorialize. (Exhibit 3 to Petitioner's Objection) (submitted *in camera*).

After the Petition to Surcharge was filed, Respondent's counsel inadvertently produced Lubbers' December 2013 notes on April 6, 2018, as part of a supplement to Respondents' Initial Disclosures.

D. **Petitioner's Files His Supplement to Petition to Surcharge that Relies, in Part, on Lubbers' Notes, and Respondents Seek to Claw Back the Privileged Materials**

On May 18, 2018, Petitioner filed his Supplement to Petition to Surcharge. In the Supplement, Petitioner included Lubbers' Group 1 Notes as Exhibit 4. While the Exhibit itself was submitted *in camera*, Petitioner quotes substantial portions of the type-written notes (Bates No. RESP0013285) in the publicly-filed document. (Supplement to Pet. to Surcharge at 18:24-19:8). Once Respondents reviewed the Supplement to Petition to Surcharge, they learned about the inadvertent production of the Group 1 Notes.

On June 5, 2018, Respondents' counsel sent written notice to Petitioner's counsel demanding that Petitioner return or destroy the Group 1 Notes and agree to redact all public

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references to the same in the Supplement to Petition to Surcharge. (Exhibit 4 to the Privilege Mot.) This claw back letter was based on the fact that the Group 1 Notes are protected by the attorney-client privilege and the work product doctrine. *Id.*

The following week, counsel for the parties discussed the inadvertent disclosure of the Group 2 Notes.[4] (Exhibit 8 to the Privilege Mot.) Respondents sought to claw back these notes because they are protected by the work product doctrine. (Exhibit 10 to the Privilege Mot.) The parties subsequently met and conferred on June 25, 2018, but were unable to resolve the dispute.

E. Petitioner's Motion for Determination of Privilege Designation and the Discovery Commissioner's Report and Recommendation

On July 13, 2018, Petitioner filed his Motion for Determination of Privilege Designation. Respondents subsequently filed their Opposition and Countermotion for Remediation of Improperly Disclosed Attorney-Client Privileged and Work Product Protected Materials. Following a hearing, the Discovery Commissioner issued her Report and Recommendation (the "DCRR").

The Discovery Commissioner found that certain of the Group 1 Notes are protected by the attorney-client privilege. (DCRR at 2:16-17, Exhibit 1 to Petitioner's Objection.) However, the Discovery Commissioner further found that certain of the attorney-client privileged notes are still subject to the "fiduciary exception" because such documents pertain to the administration of the Trust and the exception set forth in NRS 49.115(5).[5] *See, e.g., id.* at 2:18-3:3.

The Discovery Commissioner also found that certain disputed notes reflected protected work product. *Id.* at 4:20-25, 5:7-5:10, 5:15-6:4, 6:22-24, 7:19-22. However, the Discovery

[4] The parties were able to reach an agreement with respect to additional documents that were also inadvertently produced.

[5] On December 17, 2018, Respondents filed their Objections to the DCRR in which Respondents contend that the Discovery Commissioner erred in both recognizing and applying the fiduciary exception to the attorney-client privilege. Because this issue is being separately briefed, Respondents will not further address it in this Opposition.

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Commissioner found that certain notes were still discoverable under the substantial need exception. *Id.*

Petitioner subsequently filed his Objections, which challenge the Discovery Commissioner's findings and conclusions that certain notes are privileged and protected in the first instance. Petitioner further challenges the Discovery Commissioner's findings and conclusions that Respondents did not waive any applicable privilege or protection.

III. LEGAL STANDARD

This Court should adopt the Discovery Commissioner's Report and Recommendations "unless 'the findings are based upon material errors in the proceedings or a mistake in law; or are unsupported by any substantial evidence; or are against the clear weight of the evidence.'" *In re Estate of Hansen*, 124 Nev. 1477, 238 P.3d 822 (2008) (quoting *Russell v. Thompson,* 96 Nev. 830, 834 n.2, 619 P.2d 537, 539–40 n.2 (1980)). The Discovery Commissioner's factual findings should be accepted unless they are clearly erroneous. *Id.* (citing NRCP 53(e)(2)). Upon receipt of an objection, this Court may "affirm, reverse or modify the commissioner's ruling, set the matter for hearing, or remand the matter to the commissioner for further action, if necessary." NRCP 16.1(d)(3); *see also* NRCP 53(e)(2). Nevada district courts will not consider a new argument that was not first decided by the Discovery Commissioner. *Valley Health Sys., LLC v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 127 Nev. 167, 172, 252 P.3d 676, 679 (2011).

IV. ARGUMENT

A. The Discovery Commissioner Correctly Concluded that Lubbers' Group 1 Notes Are Protected by the Attorney-Client Privilege

Petitioner first raises a series of arguments in support of his contention that the Discovery Commissioner erred by finding any portion of the Group 1 Notes protected by the attorney-client privilege. Each of Petitioner's arguments, however, are contrary to Nevada law and the record in this case.

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Nevada has a strong public policy recognizing the importance of attorney-client confidentiality. *Tahoe Reg'l Planning Agency v. McKay*, 769 F.2d 534, 540 (9th Cir. 1985); *Mitchell v. Bromberger*, 2 Nev. 345, 348 (1866) ("[F]or the benefit and protection of the client, the law places the seal of secrecy upon all communications made to the attorney in the course of his professional employment . . . ."). The privilege "rests on the theory that encouraging clients to make full disclosure to their attorneys enables the latter to act more effectively, justly, and expeditiously, a benefit out-weighing the risks posed to truth-finding." *Haynes v. State*, 103 Nev. 309, 317, 739 P.2d 497, 502 (1987).

Nevada codified the privilege in NRS 49.095, which provides as follows:

> 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. *Ralls v. United States*, 52 F.3d 223, 225 (9th Cir. 1995).

"The accepted theory is that the protection afforded by the privilege will in general survive the death of the client." 1 McCormick On Evid. § 94 (7th ed.). This principle is codified in Nevada law, which permits the privilege to be claimed by "the personal representative of a deceased client." NRS 49.105.

Applying these principles to the Group 1 Notes and the evidence submitted by Respondents, Petitioner's argument that the privilege does not apply is untenable.

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1. **Petitioner's Argument that Lubbers' Typed Notes Are Not Privileged Because They Were Not Provided To Counsel Is Contrary to the Law**

Petitioner's first argument is based on a faulty premise and a disregard of the relevant evidence. *See* (Pet. Objections at 13-15). Petitioner claims that Lubbers' typed notes (Bates No. RESP0013285) are not subject to the privilege because they are a preparatory communication. (Pet.'s Objection at 13.) And, Petitioner falsely claims there is no evidence the notes were created by Lubbers or physically provided to counsel. *Id.* at 14. Petitioner's argument must be rejected.

Petitioner assumes, without evidence, that the typed notes were prepared in anticipation of an attorney-client meeting as opposed to a memorialization of such a meeting. Either way, however, the notes are privileged. Petitioner does not dispute that "[t]he memorializations of private conversations . . . with [an] attorney are protected from disclosure by the attorney-client privilege." *United States v. DeFonte*, 441 F.3d 92, 95 (2d Cir. 2006). Thus, to the extent the notes memorialize Lubbers' discussion with counsel, there is no dispute they are privileged.

However, even if the notes were prepared in anticipation of an attorney-client meeting, they are still privileged. *Id.* Notes taken by a client in anticipation of an attorney-client meeting for the purpose of seeking legal advice are privileged. *Id.*; *Graves v. Deutsche Bank Sec., Inc.*, 2011 WL 721558, at *1 (S.D.N.Y. Feb. 10, 2011) ("The notes taken by a client in anticipation of the meeting with the client's attorney may be subject to the attorney-client privilege."); *Bernbach v. Timex Corp.*, 174 F.R.D. 9, 10 (D. Conn. 1997).

Contrary to Petitioner's argument, there is no requirement that such notes be actually provided to counsel. *DeFonte*, 441 F.3d at 96. Instead, the information contained in the notes simply needs to be communicated to the attorney to obtain legal advice. *Bernbach*, 174 F.R.D. at 10. As explained by the Second Circuit in *DeFonte*, the underlying policy of the attorney-client privilege is furthered so long as such information is actually communicated to the attorney. 441 F.3d at 95-96. "A rule that allows no privilege at all for such records would discourage clients

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from taking the reasonable step of preparing an outline to assist in a conversation with their attorney." *Id.* at 96.

The authorities cited by Petitioner do not hold otherwise. First, *Centeno Supermarkets, Inc. v. H.E. Butt Grocery Co.*, 1987 WL 42402, at *5 (W.D. Tex. Sept. 2, 1987) is inapplicable because it did not involve notes prepared by a client for purposes of obtaining legal advice. Instead, the case involved an internal memorandum that was written by a company President to the Vice President of finance. *Id.* As such, there was no attorney-client communication involved.

Second, the Supreme Court of California's decision in *People v. Gutierrez*, 45 Cal. 4th 789, 817, 200 P.3d 847, 867 (2009), is equally inapposite. In that case, the party asserting the privilege indicated that he planned to show pre-existing documents to his attorney. *Id.* However, the court correctly noted that the intent to show a document to a lawyer does not transform such a document to a privileged communication. *Id.* Moreover, the information was never actually subject of an attorney-client communication. *Id.*

Finally, the courts in *Chevron U.S.A., Inc. v. United States*, 83 Fed. Cl. 195, 208 (2008) and *Holliday v. Extex*, 447 F. Supp. 2d 1131, 1137 (D. Haw. 2006), did not discuss at all whether the notes at issue were ever communicated to counsel in any fashion. As such, there is no indication the Court ever considered the issue of whether written notes taken for the purposes of facilitating an attorney-client communication are also privileged.

Moreover, the rule set forth in *DeFonte* is entirely consistent with Nevada law. Nevada law protects "confidential communications. . . [m]ade for the purpose of facilitating the rendition of professional legal services to the client. . . ." NRS 49.095(3). Such communications can be made either orally or in writing. And, a rule that would prevent a client from creating notes that the client wished to discuss with his or her attorney is contrary to Nevada public policy, which encourages clients to make full disclosure to their attorneys. Client notes containing questions and information they wish to convey to their attorney certainly facilitates the rendition of professional legal services.

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Based on the foregoing, Petitioner's argument that there is no evidence the typed notes were given to Lubbers' counsel is irrelevant to the issue of whether the notes are privileged. To the contrary, if a client creates notes to assist him with an upcoming attorney-client meeting, the information need only be communicated with counsel in order to fall squarely within the attorney-client privilege. And, as discussed in Section IV(A)(2) below, the evidence in the record demonstrates the information contained in Lubbers' notes was shared with his counsel.

Petitioner also argues that there is no evidence Lubbers created the typed notes. Here, Petitioner simply disregards the Discovery Commissioner's findings, which are supported by the evidence. As Petitioner correctly states, the notes at issue were produced from Lubbers' hard file within the folder entitled "Corresp, Notes & Memos." (Pet. Objection at 14.) Furthermore, the typed notes were found along with Lubbers' handwritten notes from his meeting with counsel, demonstrating the notes were part of the same attorney-client communication. *See* (Exhibit 2 to Petitioner's Objections) (submitted *in camera*).

Moreover, the Discovery Commissioner found that the handwritten date on the typed notes "is consistent with the date Lubbers consulted with his lawyer, and the notes reflect the types of things one would discuss with his/her attorney." (DCRR at 4:27-5:3, Exhibit 1 to Petitioner's Objection.) And, the Discovery Commissioner, after reviewing the handwriting on the notes, stated that she believed the handwriting was authored by Lubbers. *Id.* at 5:4-6. Petitioner does not dispute any of this circumstantial evidence or present any contradictory evidence. Thus, Petitioner's objection fails because the evidence supports the Discovery Commissioner's findings and conclusions that the Group 1 Notes are, in part, protected by the attorney-client privilege.

2. <u>Substantial Evidence Demonstrates that the Information in the Typed Notes Was Communicated to Lubbers' Attorneys</u>

Petitioner next argues that there is no evidence the typed notes were discussed with Lubbers' counsel. (Pet. Objection at 15-17.) In support of this argument, Petitioner asks this Court to disregard the evidence presented to the Discovery Commissioner by Respondents in

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favor of Petitioner's speculation about what occurred (or did not occur) during Lubbers' meeting with counsel. Petitioner's argument is misplaced because this Court must accept the Discovery Commissioner's factual findings as long as they are supported by the evidence and not clearly erroneous. *See In re Estate of Hansen*, 124 Nev. 1477, at *1.

As discussed above, Lubbers' typed notes are privileged so long as the notes were prepared in order to obtain legal advice and the information was actually communicated to counsel. *DeFonte*, 441 F.3d at 96; *Graves*, 2011 WL 721558, at *1; *Bernbach*, 174 F.R.D. at 10.[6] Here, the Discovery Commissioner's findings and conclusions are support by substantial evidence.

The typed notes bear Lubbers' hand-written date of October 14, 2013, which is the same date Lubbers participated in a half-hour telephone call with his attorneys.[7] (Exhibit 2 to Petitioner's Objections) (submitted *in camera*). The notes begin with three questions seeking legal advice regarding various aspects of responding to the Initial Petition. *Id.* The notes continue by stating Lubbers' "belief" as to how the Court might look at the case. (Exhibit 2 to Petitioner's

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[6] In support of his argument, Petitioner cites several cases that have no bearing on the relevant issue. *See* (Pet. Objection at 15-16.) First, *United States v. Davita, Inc.*, 301 F.R.D. 676, 683 (N.D. Ga. 2014), addressed the principle that transmitting non-privileged documents to an attorney does not make such documents privileged. In this case, there is no evidence whatsoever that Lubbers' notes were a pre-existing, non-privileged document. To the contrary, and as discussed further in this brief, they were prepared for the purpose of obtaining legal advice and communicated to Lubbers' counsel.

Second, in *Lee v. Condell*, 208 So. 3d 253, 257 (Fla. Dist. Ct. App. 2016), the trial court found that certain personal notes were not privileged because "Lee never gave the notes to his attorney (**or even discussed them with her until after the deposition**)—and obviously only after a plea was reached—they were not written for trial preparation or strategy purposes." (emphasis added). This decision was affirmed by the appellate court. Thus, contrary to the case at bar, the court in *Lee* simply did not address whether client notes prepared for the purpose of assisting the client with an attorney-client meeting are privileged when the information in the notes is communicated to counsel. Instead, *Lee* is consistent with *DeFonte* because the court noted the notes at issue in that case were not discussed with counsel at the relevant time.

[7] As discussed above, the Discovery Commissioner correctly found that the typed notes also had Lubbers' handwriting on them.

Objections) (submitted *in camera*). And, Lubbers then identifies issues where he believes there may be "risk." *Id.*

In addition to the contents of the notes, Lubbers' prior counsel, David S. Lee and Charlene N. Renwick, provided declarations that support the finding of attorney-client privilege. Attorneys Lee and Renwick had a conference call with Lubbers on October 14, 2013 that lasted approximately a half hour. (Lee Decl. ¶ 7, Renwick Decl. ¶ 6, attached to Opp'n to the Privilege Mot.) During this call, Lubbers asked his counsel several questions about his potential response to the petitions and stated his views about several matters related to the petitions and potential strategies for defending against certain allegations. *Id.* ¶ 8; (Renwick Decl. ¶ 7.)

Thus, the evidence in this case shows that Lubbers prepared type-written notes bearing the same date as an attorney-client privileged call he had with attorneys Lee and Renwick. The notes contain Lubbers' questions, beliefs and concerns as to potential risk in the litigation, which are the exact topics that Lubbers discussed with attorneys Lee and Renwick. The Discovery Commissioner's findings are supported by the evidence.

Furthermore, the Discovery Commissioner found that "the notes reflect the types of things one would discuss with his/her attorney." (DCRR at 5:1-3, Exhibit 1 to Petitioner's Objection.) Although Petitioner tries to portray this finding as speculative, the Discovery Commissioner had an opportunity to review the notes in the context of this case. And, based on the Discovery Commissioner's experience and expertise, as well as her understanding of the issues in this matter, she is certainly knowledgeable about the types of things one would typically discuss with their attorney. There is nothing speculative about such a finding.

Given the contents of the notes, the handwritten date, and the Declarations of Lee and Renwick, substantial evidence supports the Discovery Commissioners' findings and conclusions. In his Objection, Petitioner simply seeks to ignore the evidence by referring to the Declarations of Lee and Renwick as "self-serving" and doubting their veracity. (Pet. Objection at 16.)

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Although Petitioner might not be happy about the evidence, he has provided no evidence to question the truthfulness of the Declarations, which were signed by officers of the court.

Instead of disputing the evidence, Petitioner merely speculates that it would not be possible for Lubbers and his counsel to discuss all three of the petitions Scott filed in a thirty-minute phone call. *Id.* And, Petitioner complains that the notes do not reference his request for distributions. *Id.* Contrary to Petitioner's speculation, Lubbers and his counsel had the right to discuss whatever issues they deemed important and to discuss such issues for as little or as long as they liked. Petitioner's speculation about what was or was not discussed has no bearing on whether the Discovery Commissioner's findings are supported by substantial evidence. Petitioner's arguments must be rejected because they are contrary to the facts presented to the Discovery Commissioner that support the findings and conclusions of privilege.

3. The Discovery Commissioner's Findings Are Neither Speculative Nor Contradictory

Petitioner next argues that the Discovery Commissioner made several assumptions and speculated about the circumstances under which Lubbers authored the Group 1 Notes. (Pet. Objection at 17-18.) In support of this argument, Petitioner cites to two comments made by the Discovery Commissioner during the August 29, 2018, hearing. *Id.* However, neither comment demonstrates any error.

During the hearing, the Discovery Commissioner correctly noted that it was unclear if the notes were prepared before, contemporaneous with, or after Lubbers' discussion with his counsel. (Exhibit 7 to Pet. Objections at 32:22-33:4.) The Discovery Commissioner further correctly noted that there was no disagreement that all the notes at issue were Lubbers' notes. *Id.* at 32:18-21.

As discussed above, it does not matter whether the notes were (1) a memorialization of a conversation with counsel, or (2) if they were prepared in anticipation of a call with counsel. *See DeFonte*, 441 F.3d at 95-96. If the notes consist of a memorialization or the call, there is no question they are privileged. *Id.* On the other hand, if the notes were prepared in anticipation of

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a conversation with counsel, they are still privileged so long as the contents were communicated to counsel. *Id.* And, as fully discussed above, substantial evidence supports the Discovery Commissioner's findings. The Discovery Commissioner's uncertainty about when the notes were created does not matter because the decision would have been the same regardless of when the notes were created.

4. **Respondents Did Not Selectively Waive the Attorney-Client Privilege**

Petitioner next contends that Lubbers has selectively waived the attorney-client privilege because his current counsel provided a declaration that describes the circumstances under which the notes were prepared. (Pet. Objection at 18-19.) Contrary to Petitioner's argument, Lubbers' counsel did not disclose any attorney-client privileged information. Moreover, Petitioner's argument has no bearing on the issue presented, which is whether the DCRR is supported by evidence or clearly erroneous.

The subject-matter waiver doctrine that Petitioner relies upon was described by the Nevada Supreme Court in *Wardleigh v. Second Judicial Dist. Court In & For Cty. of Washoe*, 111 Nev. 345, 354, 891 P.2d 1180, 1186 (1995). "[W]here a party seeks an advantage in litigation by revealing part of a privileged communication, the party shall be deemed to have waived the entire attorney-client privilege as it relates to the subject matter of that which was partially disclosed." *Id.* Thus, "where a party injects part of a communication as evidence, fairness demands that the opposing party be allowed to examine the whole picture." *Id.* at 355, 891 P.2d at 1186 (quoting *Remington Arms Co. v. Liberty Mut. Ins. Co.*, 142 F.R.D. 408, 413 (D. Del. 1992)). But "at issue" waiver only occurs "when the holder of the privilege pleads a claim or defense in such a way that eventually he or she will be forced to draw upon the privileged communication at trial in order to prevail." *Id.* at 355, 891 P.2d at 1186. That is certainly not the case here as it is Petitioner—not Respondents—who seeks to make use of Lubbers' privileged communications. Petitioner's desire to use Lubbers' privileged communications to support his Supplemental Petition does not, however, place the communications "at issue" as a party "cannot

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breach his opponent's privilege by the posturing of his own pleading." *Gutter v. E.I. DuPont de Nemours & Co.*, 2001 WL 36086589, at *2 (S.D. Fla. Mar. 27, 2001); *Chase Manhattan Bank N.A. v. Drysdale Secs. Corp.*, 587 F. Supp. 57, 59 (S.D.N.Y. 1984) (same).

Regardless, Respondents did not reveal any attorney-client privileged communication that could result in any waiver. Instead, Respondents revealed the ***circumstances*** under which an attorney-client communication was made, as opposed to the ***contents of that communication***. "[A] client does not waive his attorney-client privilege merely by disclosing a subject which he had discussed with his attorney"; rather, "in order to waive the privilege, the client must disclose the communication with the attorney itself." *United States v. O'Malley*, 786 F.2d 786, 794 (7th Cir. 1986) (quoted with approval in *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct.*, 399 P.3d 334, 345-46 (Nev. 2017)).

At issue is the Declaration of Mr. Williams in which Mr. Williams wrote that "[i]n anticipation of the call with attorneys Lee and Renwick, Lubbers prepared type-written notes." (Williams Decl. ¶ 12, attached to Opp'n to Privilege Mot.) In this statement, Mr. Williams did not reveal any confidential ***communication*** between Lubbers and attorneys Lee and Renwick. Nor did he reveal any communications between himself and Lubbers. Instead, Mr. Williams simply articulated Respondents' position regarding the circumstances under which Lubbers created the notes, which is not privileged.[8] Because Mr. Williams did not reveal any portion of any communications between Lubbers and any of his counsel, no subject matter waiver even arguably occurred.

In sum, the subject matter waiver doctrine has nothing to do with the issue before the Court, which is whether the Court should adopt the DCRR (at least in part). This is not a case where Petitioner is seeking discovery regarding an entire conversation based on Respondents' self-serving, partial disclosure of that conversation in an attempt to prove a claim or defense. Just

[8] There is also no indication that the Discovery Commissioner relied upon Mr. Williams' Declaration in making her findings of fact and conclusions of law. Instead, as fully discussed herein, the DCRR is supported by substantial evidence other than Mr. Williams' Declaration.

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the opposite is true. Respondents' position is that the subject communications cannot be used by any party at trial because they are privileged as the Discovery Commissioner properly found.

B. The Discovery Commissioner Correctly Concluded that Lubbers' Notes Are Protected by the Work-Product Doctrine

Petitioner next raises several objections regarding the Discovery Commissioner's findings and conclusions on the work product doctrine. The work-product doctrine is "broader than the attorney-client privilege." *Wynn Resorts*, 399 P.3d at 347 (citing *Hickman v. Taylor*, 329 U.S. 495, 508, 67 S.Ct. 385 (1947)). Like its federal counterpart, the doctrine "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.'" *Id.* (citing *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.) (Torf)*, 357 F.3d 900, 907 (9th Cir. 2004)). "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.* (citing Restatement (Third) of the Law Governing Lawyers § 87 cmt. i (2000)).

In determining whether the "because of" test is met, the Nevada Supreme Court applies a "totality of the circumstances" standard. *Id.* at 348. "In evaluating the totality of the circumstances, the court should 'look[ ] to the context of the communication and content of the document to determine whether a request for legal advice is in fact fairly implied, taking into account the facts surrounding the creation of the document and the nature of the document.'" *Id.* (quoting *In re CV Therapeutics, Inc. Sec. Litig.*, 2006 WL 1699536, at *4 (N.D. Cal. June 16, 2006)). The party asserting the work-product doctrine has the burden of establishing its applicability. *Diamond State Ins. Co. v. Rebel Oil Co.*, 157 F.R.D. 691, 699 (D. Nev. 1994).

In this case, Petitioner's brief focuses entirely on Lubbers' typed notes (Bates No. RESP0013285). Indeed, Petitioner does not specifically address any other protected document. In making his arguments, Petitioner ignores the totality of the circumstances surrounding

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Lubbers' creation of his notes and, instead, relies on pure speculation that Lubbers' notes would have been created in substantially the same form even without litigation. Unfortunately for Petitioner, the Discovery Commissioner's findings are supported by the evidence, and Petitioner has not and cannot demonstrate any clear error. *See In re Estate of Hansen*, 124 Nev. 1477, at *1. Petitioner's specific arguments will be refuted in the same order presented by Petitioner.

1. Lubbers' Group 1 Notes Are Protected Work Product

Petitioner first appears to argue that Lubbers' Group 1 Notes were not prepared in anticipation of litigation because: (1) trust litigation in general is allegedly not adversarial; and (2) Respondents did not identify any wrongdoing alleged against Lubbers in the Initial Petition. (Pet. Objection at 21-22.) Petitioner's arguments ignore the actual findings made by the Discovery Commissioner, which are supported by the evidence in the record and the totality of the circumstances.

The Discovery Commissioner found that "Lubbers anticipated litigation at the time the Initial Petition was filed and at the time the Disputed Documents were prepared." (DCRR at 3:23-25, Exhibit 1 to Petitioner's Objection.) This finding is supported by the evidence presented to the Discovery Commissioner.

As early as November 14, 2012, Petitioner's counsel sent Lubbers (not the Canarellis) a threatening and adversarial letter demanding distributions and disputing Lubbers' interpretation of the Trust agreement. (Nov. 14, 2012, Letter, Exhibit 2 to the Opp'n to Privilege Mot.) In the letter, Petitioner claimed that Lubbers and the other Trustees "fail[ed] to act upon several of Scott's recent requests for distributions **without appropriate justification**." *Id.* (emphasis added). Petitioner further accused Lubbers of acting in "*per se* bad faith." *Id.* And, Petitioner complained that the "neutrality" of the Trustees, which included Lubbers as Independent Trustee, "is compromised and Scott's wellbeing is subordinate to other considerations." *Id.* As such, Petitioner threatened to initiate litigation. *Id.* This threatened lawsuit was significant enough in

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the eyes of Respondents such that Lubbers placed it on their weekly agenda for discussion in November 2012. (Exhibit 4 to the Opp'n to Privilege Mot.)

Scott did, in fact, institute litigation when he filed the Initial Petition in September 2013, which contained a number of adversarial allegations against both the Canarellis and Lubbers. *See* (Exhibit 1 to the Opp'n to Privilege Mot.) In fact, the Initial Petition expressly accuses Lubbers, who was the Family Trustee at the time, of "violat[ing] the fiduciary obligations due and owing to Petitioner[.]" *Id.* ¶ C.6. Petitioner's Objection entirely ignores and/or attempts to downplay his own allegations.

As a result of the lawsuit, Lubbers retained the law firm of LHLGB to represent him. (Lee Decl. ¶ 4 and Renwick Decl ¶ 4, attached to the Opp'n to Privilege Mot.) In anticipation of that call, Lubbers created the Group 1 Notes, which themselves demonstrate that Lubbers anticipated litigation. As discussed throughout this brief, Lubbers' notes contain questions directed at his counsel, they describe Lubbers' beliefs regarding this case, including how Lubbers should respond to the lawsuit, and they indicate areas where Lubbers believes that Lubbers might be as risk. (Exhibit 2 to Petitioner's Objections.)

Based on the totality of the circumstances, Lubbers' Group 1 Notes were created because Lubbers anticipated litigation. This is demonstrated by Petitioner's allegations and threats in his November 14, 2012, Letter, the fact that Petitioner followed through with his threats and filed a lawsuit complaining about Lubbers' alleged acts and omissions, and the fact that Petitioner's Initial Petition itself contained adversarial allegations accusing Lubbers of breaching his fiduciary duties, a claim that Petitioner expanded upon against Lubbers in his Petition to Surcharge. Based on all of this evidence, the Discovery Commissioner's finding that Lubbers anticipated litigation at the time his notes were created is supported by substantial evidence and is not clearly erroneous.[9] Lubbers would not have created the Group 1 Notes but for his

[9] For the same reason, Petitioner's argument that the Discovery Commissioner's comments during the hearing in this matter were based on mere speculation is equally erroneous. *See* (Petitioner's Objection at 20) (citing Exhibit 7 at 82:2-4, 87:22-88:3, and 87:22-88:3.) The

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anticipation of litigation. Petitioner's mere disagreement with the Discovery Commissioner's findings is insufficient for this Court to sustain his objection. *See In re Estate of Hansen*, 124 Nev. 1477, at *1.

Ignoring the actual circumstances of this case (which this Court is required to consider), Petitioner instead argues that trust proceedings ***in general*** are administrative and not adversarial. (Petitioner's Objection at 21.) As a threshold matter, however, Petitioner has not cited a single authority that stands for the proposition that the work-product doctrine does not apply to trust proceedings because they are allegedly administrative in nature.

To the contrary, the comments to the Restatement (Third) of the Law Governing Lawyers § 87, comment c. (2000), which the Nevada Supreme Court found to be consistent with Nevada law, states that "[w]ork-product immunity is also recognized in criminal **and administrative proceedings. . . .**" (emphasis added). "In general, a proceeding is adversarial when evidence or legal argument is presented by parties contending against each other with respect to legally significant factual issues." *Id.* at comment h; *Fru-Con Const. Corp. v. Sacramento Mun. Util. Dist.*, 2006 WL 2050999, at *4 (E.D. Cal. July 20, 2006) ("'Litigation' 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."). And, as set out in NRS 155.180 (made applicable to Trust proceedings by NRS 164.005), the provisions of law and the Nevada Rules of Civil Procedure regulating proceedings in civil cases apply in matters of probate, when appropriate, except as specifically exempted by statute. There is no such exemption for privileges. Thus, the nature of the specific proceeding must be examined as opposed to the nature of trust proceedings in general.

Here, the dispute between the parties was adversarial from its very inception as demonstrated by Petitioner's November 14, 2012, Letter to Lubbers. (*See* Nov. 14, 2012, Letter, Exhibit 2 to the Opp'n to Privilege Mot.) In that letter, Petitioner made several demands and

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Discovery Commissioner based her observations and her ultimate finding on the evidence that was presented to her.

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threats to Lubbers. Petitioner ultimately followed through with his threats and filed the Initial Petition. Lubbers filed a Response to the Initial Petition in which he stated that he "disagrees" with Petitioner's allegations and "generally denies the same." (Response to Initial Petition, on file herein.) And, Lubbers subsequently objected to the Order granting the Initial Petition to the extent it sought "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." (Objection to Order Granting Initial Petition, on file herein.) Thus, this proceeding was adversarial from its inception because the parties (Petitioner and Lubbers at the time) disputed the relevant facts, presented opposing arguments, and took opposing positions in Court.[10]

Nevertheless, in support of his position, Petitioner erroneously argues that Respondents failed to identify any allegations of wrongdoing that were levied against Lubbers in the Initial Petition. Once again, Petitioner chooses to simply disregard his own allegations in the Initial Petition. Among other things, in the Initial Petition, Scott argued that "the Family Trustee," which was Lubbers at that time, "violated the fiduciary obligations due and owing to Petitioner[.]" (Exhibit 1 ¶ C.6, Opp'n to Privilege Mot.) There cannot be any reasonable dispute that this is an allegation of wrongdoing directed at Lubbers, who was the only respondent to the Initial Petition. Similarly, Petitioner alleged that Lubbers, at the time he was the Independent Trustee, "admitted to Petitioner that he had little to no personal knowledge of the Irrevocable Trust's management or its assets, despite service as Independent Trustee since 2005." *Id.* ¶ A.15. Once again, Petitioner is alleging that Lubbers failed to fulfill his obligations when he was Independent Trustee. As a final example, Petitioner raised the possibility that the sale of the Trust's assets was designed to punish Petitioner or harm his financial interests. *Id.* ¶¶ D.5-D.6.

[10] It is also self-evident that a beneficiary of a trust would not request the Court to assume jurisdiction over a trust and order relief if there was no dispute between the beneficiary and the trustee.

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Obviously, such an allegation, if proven, could result in civil liability.[11] Thus, the totally of the circumstances, including the Initial Petition itself, demonstrate that Lubbers reasonably anticipated litigation such that the Group 1 Notes are protected by the work product doctrine.

Finally, Petitioner argues that the work product doctrine is limited to the discreet issues contained in the Initial Petition. (Petitioner's Objection at 22.) Petitioner's conclusory argument is contrary to the law. The applicable rule appears in Comment j of the Restatement as follows:

> j. Future litigation. If litigation was reasonably anticipated, the immunity is afforded even if litigation occurs in an unanticipated way. For example, work product prepared during or in anticipation of a lawsuit remains immune in a subsequent suit for indemnification, whether or not the indemnification claim could have been anticipated. Work product prepared in anticipation of litigation remains protected in all future litigation.

Restatement (Third) of the Law Governing Lawyers § 87, comment j (2000). Thus, because Lubbers' notes are protected by the work-product doctrine, they are protected for any future litigation. The work-product doctrine is not limited in any way by the scope of the Initial Petition.

2. <u>Lubbers' Group 2 Notes Are Protected Work Product</u>

Next, Petitioner disputes the Discovery Commissioner's findings and conclusions that the Group 2 Notes are protected by the work product doctrine. However, Petitioner has not identified any factual deficiency or legal error. Instead, Petitioner merely disagrees with the Discovery Commissioner, which is an insufficient basis for this Court to sustain his objection.

Lubbers' Group 2 Notes were created on or about December 19, 2013, when the parties and their counsel met with Mr. Nicolatus, the individual appointed to conduct a valuation of the Trust's assets that were sold in May 2013. (Exhibit 6 to Opp'n to Privilege Mot.) The Discovery Commissioner found that even if the Group 2 Notes "constitute work product, there is substantial need that the documents not be deemed protected because there is no other way for petitioner to

[11] This is demonstrated by Petitioner's Surcharge Petition that raises numerous unsupportable claims on this exact issue.

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obtain said information from Lubbers *via* deposition or other means." (DCRR at 7:19-22, Exhibit 1 to Petitioner's Objection.)

To the extent the Discovery Commissioner concluded that the Group 2 Notes are protected work product, her decision is supported by the evidence. As discussed thoroughly above, Lubbers anticipated litigation no later than November 14, 2012, when Petitioner threatened to initiate litigation. *See* (Nov. 14, 2012, Letter, Exhibit 2 to the Opp'n to Privilege Mot.) Then, in his Initial Petition, Petitioner expressly raised the issue of whether the sale of the Trust's assets was designed to punish Petitioner or harm his financial interests. (Initial Petition ¶¶ D.5-D.6, Exhibit 1 to Opp'n to Privilege Mot.) In connection with Petitioner's questioning of the sale of the Trust's assets, Mr. Nicolatus was appointed to conduct the valuation. (Exhibit 6 to Opp'n to Privilege Mot.) Given Petitioner's adversarial conduct, allegations of Lubbers' wrongdoing, and express statements that the sale of the Trust's asset may have been done to harm Petitioner, no other conclusion could be reached but that Lubbers anticipated litigation. Absent Lubbers' anticipation of litigation, the Group 2 Notes would not have been created.

Rather than contest the evidence, Petitioner merely argues his unsupported view that he allegedly did not view the proceedings as adversarial. (Petitioner's Objection at 22-23.) However, as the Discovery Commissioner correctly pointed out, the relevant inquiry is "what Mr. Lubbers believed." (Exhibit 7 to Petitioner's Objection at 90:19-22.) Thus, Petitioner's post hoc claim that he viewed the valuation as neutral is irrelevant.

3. The Discovery Commissioner Did Not Protect any of Lubbers' Notes as "Opinion" Work Product

Petitioner next argues that the Discovery Commissioner clearly erred by determining that Lubbers' typed notes *may* constitute opinion work product because Lubbers was acting as a client and not as an attorney. (Petitioner's Objection at 23-25.) Petitioner's argument is misplaced because the Discovery Commissioner's findings and conclusions make it clear that she did not apply the heighted protection afforded to "opinion work product" to any of Lubbers'

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notes. As such, the Discovery Commissioner's statement that the typed notes *may* constitute opinion work product had no bearing on her conclusions.[12]

In analyzing the discoverability of work product, courts have distinguished between "ordinary" work product and "opinion" work product. One federal court described the distinction as follows:

> "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 representative 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.

Hooke v. Foss Mar. Co., 2014 WL 1457582 (N.D. Cal. Apr. 10, 2014) (quotations and citations omitted). "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." *Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 401–02, 101 S.Ct. 677, 688–89 (1981)). Indeed, "opinion work product enjoys an almost absolute immunity from discovery." *Laxalt v. McClatchy*, 116 F.R.D. 438, 441 (D. Nev. 1987).

In this case, the Discovery Commissioner found that "Lubbers was not acting as an attorney when he prepared the Disputed Documents." (DCRR at 3:18-19, Exhibit 1 to Petitioner's Objection.) The Discovery Commissioner further found while "non-attorneys can prepare protected work product," "NRCP26(b)(3) only references opinion work product in connection with 'an attorney or other representative of a party[.]'" *Id.* at 3:20-22. Thus, the Discovery Commissioner adopted the exact argument that Petitioner now makes, *i.e.* that the heightened protection afforded for opinion work product does not apply to Lubbers' notes in this case.

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[12] Respondents' Objections to the DCRR, filed on December 17, 2018, objects to the Discovery Commissioner's findings and contends that the notes do constitute "opinion" work product.

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Nevertheless, Petitioner objects to the following finding in the DCRR that was made with respect to Lubbers' typed notes (Bates No. RESP0013285):

> THE COMMISSIONER FURTHER HEREBY FINDS that while certain portions of RESP0013285 may constitute opinion work product, the Factual Statements constitute ordinary work product. To the extent the Factual Statements are intertwined with opinion work product, **there is nonetheless substantial need** to have this information disclosed as Petitioner has no other reasonable way to obtain the information referred in the Factual Statements.

(DCRR at 5:15-20, Exhibit 1 to Petitioner's Objection) (emphasis added). In other words, the Discovery Commissioner applied the "substantial need" exception that is only applicable to ordinary work product.

As the Nevada Supreme Court has noted, "[w]hile the court may release factual work product to opposing counsel upon a showing of substantial need and inability to acquire equivalent information without undue hardship under FRCP 26(b)(3), discovery of the attorney's mental impressions generally requires a higher showing of need or is undiscoverable altogether." *Means v. State*, 120 Nev. 1001, 1009, 103 P.3d 25, 30 (2004). Therefore, although the Discovery Commissioner did use the word "opinion" work product, she applied the lower standard that is only applicable to "ordinary" work product. Petitioner's objection regarding opinion work product is unfounded and should be disregarded.

4. Petitioner Failed to Demonstrate that this Is a Rare Case Requiring the Disclosure of Opinion Work Product

Finally, Petitioner argues that even if any portion of Lubbers' notes constitute opinion work product, Petitioner has a "compelling need" for disclosure due to Lubbers' death. (Petitioner's Objection at 25-26.) Petitioner's argument is contrary to the law because (1) Lubbers' mental impressions are not at issue, and (2) Petitioner can obtain the allegedly factual material from other sources.[13]

[13] Furthermore, if the Court agrees that Lubbers' notes are protected by the attorney-client privilege, it need not consider Petitioner's argument because compelling need is not an exception to the attorney-client privilege. *See* NRS 49.115.

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As discussed above, "opinion work product enjoys an almost absolute immunity from discovery." *Laxalt*, 116 F.R.D. at 441. Opinion work product "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) (citing *Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992)); 8 Fed. Prac. & Proc. Civ. § 2026 (3d ed.). The limited exception to non-disclosure of opinion work product includes situations where the attorney has been designated as an expert witness, "advice of counsel" has been raised as a defense, and in certain bad faith insurance claim settlement cases. *Vaughan Furniture Co. Inc. v. Featureline Mfg., Inc.*, 156 F.R.D. 123, 127 (M.D.N.C. 1994) ("A party waives the opinion work product protection of its attorney by naming its attorney as an expert witness."); *Coleco Indus., Inc. v. Universal City Studios, Inc.*, 110 F.R.D. 688, 691 (S.D.N.Y. 1986); *Holmgren*, 976 F.2d at 577.

Here, Petitioner does not even argue that this action falls into one of the rare situations where opinion work product is discoverable. The reason is that Lubbers' mental impressions about Petitioner's Initial Petition (which is the subject of his notes) are simply not at issue. In fact, Petitioner acknowledges that he wants to use the work-product protected material to "demonstrate fraud and breach of fiduciary duties on the part of Respondents, **or primarily the Canarellis**."[14] (Petitioner's Objection at 26) (emphasis added). Lubbers' mental impressions about how the Court might view the case have nothing to do with Petitioner's fraud and breach of fiduciary duty claims against Lubbers **or the Canarellis**.

Furthermore, this is not a rare case where discovery should be allowed because Petitioner can obtain the same allegedly "factual" information from other sources. Indeed, in the context of

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[14] It should be noted that Petitioner grossly mischaracterizes Lubbers' type-written notes, which are the only notes specifically discussed in Petitioner's Objections. As discussed above, the notes contain Lubbers' mental impression of how the Court might view this case and are not evidence of any wrongdoing whatsoever.

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"ordinary" work product, which requires a lower showing to obtain discovery, the Nevada Supreme Court has stated that discovery cannot be had when the work-product evidence can be obtained from other sources. *Wardleigh*, 111 Nev. at 359, 891 P.2d at 1188. Thus, if the availability of other sources precludes discovery for "ordinary" work product, it must necessarily also preclude discovery of "opinion" work product.

In this case, Petitioner admits that the Canarellis are able to testify as to the information at issue. (Petitioner's Objection at 26.) Indeed, it cannot be disputed that Larry Canarelli has personal knowledge of the factual circumstances surrounding the Purchase Agreement. Thus, by Petitioner's admission alone, he does not have a compelling need for the information in Lubbers' privileged and work-product protected notes.

Moreover, the alleged "facts" Petitioner seeks to use relate largely to the timing of Petitioner's request for distributions and the execution of the Purchase Agreement.[15] (Exhibit 2 to Petitioner's Objections at RESP0013285) (submitted *in camera*). The timing and amounts of distributions made to Petitioner can be determined based on financial records and Petitioner's own testimony. And, the date and purpose of the Purchase Agreement can be obtained from the face of the Purchase Agreement, which is not inconsistent in any way with Lubbers' work-product protected notes, and from the testimony of Larry Canarelli.

In short, to the extent Petitioner argues there are any "facts" in Lubbers' work-product protected notes, such information is available from numerous other sources, including Petitioner's own testimony. Therefore, Lubbers' untimely passing does not create any compelling need or substantial need to disclose his work-product protected notes.

C. <u>Lubbers Did Not Waive Any Privilege/Protection that Applies to His Notes</u>

Unable to demonstrate any error in the DCRR with respect to the determination of attorney-client privilege and work-product protection, Petitioner argues that the Discovery

[15] The specific information at issue is contained in the first four lines of the typed notes (Bates No. RESP001328) that the Discovery Commissioner did not redact. *See* footnote 1.

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Commissioner erred by not finding waiver. Petitioner's arguments are meritless.

1. No Waiver Occurred Due to AWDI's Alleged Possession of Certain Boxes

Petitioner first argues that Lubbers waived any potential privilege because his notes were allegedly in the possession of non-party AWDI. (Petitioner's Objection at 27-28.) And, Petitioner argues that the Discovery Commissioner erred by finding a common interest between Lubbers and AWDI. *Id.* at 28-34. Petitioner's argument is factually misleading. Contrary to Petitioner's argument, the documents at issue were stored at Respondent Larry Canarelli's office location and viewed by Tina Goode, who has provided assistance with this litigation, as opposed to being provided to a third party unrelated to this action. Moreover, even if the notes were in the "possession of AWDI," the Discovery Commissioner correctly applied the common interest doctrine.

"The attorney-client privilege is waived if the client, the client's lawyer, or another authorized agent of the client voluntarily discloses the communication in a nonprivileged communication." Restatement (Third) of the Law Governing Lawyers § 79 (2000). A truly inadvertent disclosure of privileged documents does not amount to a waiver. *Transamerican Computer Co. v. IBM Corp.*, 573 F.2d 646, 650–51 (9th Cir. 1978); *Bowen v. Parking Auth. of City of Camden*, 2002 WL 1754493, at *4 (D.N.J. July 30, 2002). Similarly, work product protection is generally waived "when the material is disclosed to an adversary." *Cotter v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 134 Nev. Adv. Op. 32, 416 P.3d 228, 232 (2018).

As a threshold matter in this case, Petitioner has provided no evidence whatsoever that the Group 1 Notes or the Group 2 Notes were actually provided to AWDI. Instead, Petitioner merely cites to an e-mail from Tina Goode, the Director of Corporate Administration with AWDI, who has assisted Larry with this litigation, (August 29, 2018, Transcript at 107:16-22), that states, "we received Ed's boxes back from" Lubbers' counsel. (Exhibit 12 to the Privilege Mot.) Ms. Goode's e-mail does not say anything about receiving or reviewing any of Lubbers'

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privileged or protected notes. *Id.* Instead, Ms. Goode was explicitly referring to an e-mail confirming deferring payments. *Id.*

"Waiver results only when a nonprivileged person learns the substance of a privileged communication." Restatement (Third) of the Law Governing Lawyers § 79, comment e. (2000). In this case, Petitioner simply speculates that Lubbers' notes were contained within the boxes and **reviewed by Ms. Goode**. Thus, Petitioner's entire argument is misplaced and unsupported by the record.

More importantly, Petitioner's characterization of the documents as being in the possession of AWDI is entirely misleading. Respondents in this case include the Canarellis and Lubbers, as former family trustees of the Trust. The Canarellis founded American West Home Building Group ("AWG"), which includes AWDI. (Objection to Surcharge Petition ¶ 1.) Larry is an executive with AWG and AWDI and maintains his office at the location where the boxes at issue were stored. Tina Goode has assisted Larry with issues related to this lawsuit. Lubbers and Larry (along with Bob Evans) conducted their weekly Friday meetings regarding the Trust at the offices of Larry/AWDI. (Williams Declaration ¶ 7, attached to the Opp'n to Privilege Motion.)

In light of the above, Petitioner's characterization of Lubbers' documents as being in the possession of AWDI employees is misleading and inaccurate. The records were at AWDI's offices due to the fact that Larry maintains his office at that location, which is also the location where weekly meetings occurred concerning the Trust. And, Tina Goode has assisted with this litigation. (Aug. 29, 2018, Transcript at 107:16-22, Exhibit 7 to Petitioner's Objection.) This is not a case were attorney-client privileged or work product protected documents were disclosed to a third party. Instead, Ms. Goode's e-mail merely shows that the documents were stored at Respondent Larry Canarelli's office and viewed by an individual assisting him with this litigation. Thus, contrary to Petitioner's argument, there was no voluntarily disclosure of attorney-client privileged or work-product protected materials. Petitioner's entire argument is misplaced and contrary to the facts in this case.

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Even if the documents are somehow considered to be in the "possession" of AWDI based on an e-mail from Tina Goode, the Discovery Commissioner correctly found that no waiver occurred in accordance with the common interest doctrine. Petitioner spends an inordinate amount of time briefing the non-issue that there are no claims asserted against AWDI in this case and that AWDI is separate entity from the Respondents in this case. (Petitioner's Objection at 29-34.) Petitioner then claims that these innocuous facts somehow demonstrate the common interest doctrine was erroneously applied. Petitioner's argument, however, is based on a complete disregard of the relevant circumstances of this case and the law regarding the common interest rule.

Nevada law recognizes the common interest doctrine with respect to both the attorney-client privilege and the work product doctrine. *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 the client or the client's lawyer **to a lawyer representing another in a matter of common interest**.") (emphasis added); *see also Cotter*, 416 P.3d at 230 (recognizing the common interest rule in the context of the work-product doctrine). Contrary to Petitioner's argument, "[t]he rule is not narrowly limited to co-parties." *Cotter*, 416 P.3d at 232; *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) ("In order for the joint defense theory to apply, there need not be actual litigation."). Instead, "[t]he common interest rule protects communications made to a non-party who shares the client's interests." *O'Boyle v. Borough of Longport*, 426 N.J. Super. 1, 10, 42 A.3d 910, 916 (App. Div. 2012) (citations and internal quotations omitted). "The parties need not have identical interests, merely a 'common purpose.'" *Id.* "The rationale for the joint defense or common interest privilege focuses not on when documents were generated, **but on the circumstances surrounding the disclosure of privileged documents to a jointly interested third party**." *FSP Stallion 1, LLC v. Luce*, 2010 WL 3895914, at *16 (D. Nev. Sept. 30, 2010) (citations and internal quotations omitted) (emphasis added).

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As discussed above, in this case, there is no evidence any privileged or protected information was actually received by AWDI. Instead, the information was simply stored at Larry Canarelli's office location and certain non-privileged documents were reviewed by Ms. Goode, who has assisted Larry with this litigation. Larry and Lubbers are both respondents in this action. And, 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. Sept. 30, 2010) ("The joint defense privilege has been extended to civil co-defendants because '[t]he need to protect the free flow of information from client to attorney logically exists whenever multiple clients share a common interest about a legal matter.'").

Moreover, Petitioner entirely ignores the circumstances of this case. It is undisputed that the assets owned by Petitioner's Trust were gifted to him by Larry and Heidi and largely consisted of entities that comprised part of AWG's home building operations. In fact, Petitioner has subpoenaed several entities within AWG, including AWDI. And, litigation has ensued regarding Petitioner's attempts to compel documents from AWDI. (Petitioner's July 23, 2018, Motion to Compel, on file herein.) In fact, in Petitioner's Motion to Compel records from AWDI, Petitioner contends that AWDI provided records to Stephen Nicolatus so that Mr. Nicolatus could perform a valuation of the assets sold as part of the Purchase Agreement. *Id.* at 6. And, Petitioner is challenging the accuracy of such information. Petitioner also complains *ad nauseum* regarding the construction costs incurred by AWDI which offset the assets' valuation. Thus, at a minimum AWDI has a common interest with Respondents in supporting the accuracy of the financial information and defending against Petitioner's scorched-earth litigation.

Petitioner also confuses the issue of conducting discovery against a non-party with the scope of the common interest doctrine to claim that Respondents are somehow taking inconsistent positions. (Petitioner's Objection at 31-33.) However, as explained above, AWDI's status as a non-party has no bearing on whether it can share a common interest with Respondents. *See Cotter*, 416 P.3d at 232. Thus, there is nothing inconsistent about AWDI's

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defense to Petitioner's excessively broad discovery requests and the assertion of the common interest doctrine.

Finally, Petitioner states that "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." (Petitioner's Objection at 33.) Although Respondents believe such evidence is unnecessary in light of all of the above arguments, if the Court has any lingering concerns, Respondents would gladly present evidence the materials have been securely stored at all times.

2. Respondents' Inadvertent Disclosure Does Not Constitute Waiver

In its last effort to challenge the DCRR, Petitioner argues that Respondents' production of documents was reckless and somehow constitutes waiver. (Petitioner's Objection at 34.) The Court should summarily reject Petitioner's argument because it was never presented to the Discovery Commissioner, it is being raised for the first time in his Objection, it is made in violation of the parties' ESI Protocol, and there is no evidence that Respondents acted recklessly. As the Court is aware, Respondents' discovery and document production in this case has been a massive effort and was required to be done in connection with substantial litigation in this highly contentious case. Respondents' document productions, and in particular the production of Lubbers' files, occurred during the period of time in which Lubbers was suffering from cancer and cancer treatments, which certainly impacted Lubbers' involvement in such productions. Given the extensive work that Respondents have done, the inadvertent disclosure of the limited pages of privileged/protected notes at issue in this case does not evidence waiver.

As a threshold matter, Petitioner's argument regarding recklessness was never raised in his briefing on the underlying Privilege Motion or decided by the Discovery Commissioner. The Nevada Supreme Court has made it clear that district courts will not consider a new argument that was not first decided by the Discovery Commissioner. *Valley Health Sys., LLC*, 127 Nev. at 172, 252 P.3d at 679. "All arguments, issues, and evidence should be presented at the first

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opportunity and not held in reserve to be raised after the commissioner issues his or her recommendation." *Id.* Any other conclusion would "'frustrate the purpose" of having discovery commissioners." *Id.* Because Petitioner is raising this argument for the first time in his Objection, this Court is precluded from considering the issue and it must be summarily rejected by the Court. *See id.*

Second, Petitioner should be barred from making his waiver argument because he expressly agreed not to argue that any waiver occurred through the inadvertent production of privileged or protected materials. On or about December 15, 2017, the parties entered into an ESI Protocol, a binding contract. (Exhibit 3 to the Privilege Mot.) In the ESI Protocol, Petitioner agreed, among other things, as follows:

> The parties agree that the Producing Party is not waiving, and the Requesting Party will not argue that the Producing Party has waived, any claims of attorney-client privilege, attorney work product protection, or any other privilege or protection, including protections enumerated in the Stipulated Confidentiality Agreement and Protective Order, by making documents available for examination.

Id. at 2-3. In addition, Petitioner agreed that in any motion brought to resolve a claim of privilege, the parties "may only contest the asserted privileges on ground other than the inadvertent production of such document(s)." *Id.* at 9. Finally, Petitioner agreed that "[t]he failure of any party to provide notice or instruction under this Paragraph shall not constitute a waiver of, or estoppel as to, any claim of attorney-client privilege, attorney work product, or other ground for withholding production as to which the Disclosing or Producing Party would be entitled in this action." *Id.* Thus, by the plain language of the ESI Protocol, the parties intended to foreclose any argument that the unintended disclosure of privileged information constitutes waiver.[16]

[16] Petitioner's counsel acknowledged the applicability of these provisions below. *See* Hr'g Tr. dated Aug. 29, 2018 at 67:10-11 ("I have not argued that [*i.e.*, that waiver can be caused by inadvertent production despite terms of ESI Protocol].").

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Despite Petitioner's express agreement that no waiver would occur from the disclosure or production of privileged or protected materials and Petitioner's agreement that he would not make such an argument, Petitioner now claims that Lubbers waived the privilege through his inadvertent disclosure. Because the parties entered into a valid and definite contract and any other remedy would be inadequate, the Court should order Petitioner to specifically perform the terms of the contract, which would preclude Petitioner from raising such an argument. *See Mayfield v. Koroghli*, 124 Nev. 343, 351, 184 P.3d 362, 367 (2008) (stating the elements for the remedy of specific performance).

Nevertheless, Petitioner attempts to avoid breaching the ESI Protocol by making a distinction that does not exist in the ESI Protocol itself or in Nevada law. Specifically, Petitioner attempts to distinguish a "reckless" disclosure from an "inadvertent" disclosure. (Petitioner's Objection at 34-40.) Contrary to Petitioner's argument, reckless[17] conduct falls within the scope of inadvertent conduct and is governed by the ESI Protocol.

The word "inadvertent" is defined as inattentive or unintentional. https://www.merriam-webster.com/dictionary/inadvertent (last visited January 14, 2019); Black's Law Dictionary 827 (9th ed. 2009) (defining "inadvertence" as "[a]n accidental oversight; a result of carelessness."). The word "reckless," on the other hand, is "marked by lack of proper caution: careless of consequences." https://www.merriam-webster.com/dictionary/reckless (lasted visited January 14, 2019). In other words, reckless conduct is still inadvertent because it is unintentional. Thus, recklessness is a subset of inadvertence and indisputably falls within the scope of the ESI Protocol.

This argument is further supported by Petitioner's own case law. In support of his argument that inadvertent disclosures can still constitute a waiver, Petitioner relies, in part, on *Fed. Deposit Ins. Corp. v. Marine Midland Realty Credit Corp.*, 138 F.R.D. 479, 480 (E.D. Va. 1991). In that case, the Eastern District of Virginia distinguished between the inadvertent

[17] As discussed further below, Respondents vehemently dispute that they acted with recklessness.

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disclosure of privileged information based on negligence (which the court concluded does not constitute waiver) and the inadvertent disclosure of privileged information based on gross negligence or recklessness (which the court concluded may rise to the level of waiver). *Id.* at 481. In either case, the court recognized that the conduct, whether negligent or reckless, was inadvertent. *Id.*

In this case, it is undisputed that the disclosure of the Group 1 and Group 2 Notes was unintentional. As such, Petitioner's entire argument is immaterial because Respondents' unintentional disclosure is directly within the scope and intent of the ESI Protocol.

Petitioner's citation to *irth Sols., LLC v. Windstream Commc'ns, LLC*, 2018 WL 575911, at *1 (S.D. Ohio Jan. 26, 2018), does not impact or alter this analysis in any way. In *irth Sols., LLC*, the defendant produced 2,200 pages of documents, which included 43 documents (146 pages) that were later recognized as privileged.[18] *Id.* at 1. In seeking to claw back such documents, defendant relied upon an e-mail exchange in which the parties agreed that inadvertent production would not operate as a waiver of the privilege. *Id.* at *4. Thus, the defendant argued that the parties had no duty to prevent inadvertent disclosure. *Id.*

The federal district court rejected this argument because Federal Rule of Evidence 502(b)(2) expressly requires the holder of the privilege to take "reasonable steps to prevent disclosure." *Id.* at *5; Fed. R. Evid. 502(b)(2). The court found that if a party wishes to remove the safeguards of Rule 502(b)(2), then the parties' agreement must reflect such an understanding. *Id.* However, the parties' e-mail agreement did not contain any language that there would be no pre-production review. *Id.*

irth Sols., LLC is distinguishable for numerous reasons, including the fact that Nevada has not adopted Federal Rule of Evidence 502 or any similar rule. Thus, contrary to the

[18] Notably, the magistrate judge found that waiver occurred, in part, because "the privileged documents were not a needle-in-the-haystack but comprised 'more than 10% of the entire production.'" *irth Sols., LLC*, 2018 WL 575911, at *3. In contrast, the privileged documents at issue in this case consist of a handful of pages out of more than two hundred thousand (200,000) pages of documents.

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governing law in that case, there is no requirement in Nevada for the parties to include any specific language in the ESI Protocol other than what is contained in that document. Moreover, contrary to the position taken by the defendant in *irth Sols., LLC*, Respondents have never argued that they had no duty of care. Instead, as demonstrated below, Respondents took reasonable precautions to protect their privileged information.

Indeed, even setting aside the ESI Protocol, the Nevada Supreme Court has never addressed the circumstances under which an inadvertent disclosure might amount to waiver. And, courts across the country are split on the appropriate standard. 8 Fed. Prac. & Proc. Civ. § 2016.3 (3d ed.) (describing the different approaches courts have taken). The Restatement (Third) of the Law Governing Lawyers § 79 (2000) provides that "[w]aiver does not result if the client or other disclosing person took precautions reasonable in the circumstances to guard against such disclosure." *See also* Fed. R. Evid. 502(b). And, federal courts have held that the inadvertent disclosure of a few privileged documents does not waive the privilege when a large number of documents are involved and reasonable precautions were taken. *Transamerica Computer Co. v. International Business Mach. Corp.*, 573 F.2d 646, 652 (9th Cir. 1978); *Kansas-Nebraska Nat. Gas Co. v. Marathon Oil Co.*, 109 F.R.D. 12, 21 (D. Neb. 1983) (no waiver when one document among 75,000 produced "slipped through the cracks" of otherwise careful screening procedure).

As previously described to the Court in this case, Respondents have undergone an extraordinary effort to locate, review and produce hundreds of thousands of pages of documents.[19] *See* Fed. R. Evid. 502 advisory committee notes (Revised 11/28/2007) (stating that in evaluating the reasonableness of a party's efforts, the Court should consider "the number of documents to be reviewed and the time constraints for production."). Specifically, over the course of approximately one year, Respondents have made at least sixteen separate document

[19] For example, on July 13, 2018, Respondents Submitted a Status Report describing their compliance with e-discovery in this matter. Rather than fully describing such discovery efforts here, Respondents incorporate their Status Report herein by this reference.

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disclosures. In total, these materials consist of nearly two hundred thousand pages of documents, and at least fourteen thousand five hundred and thirty-nine (14,539) individual documents.

At the time this massive discovery effort was underway, Respondents also had to litigate numerous substantial issues in this case, including multiple discovery motions, Petitioner's incessant requests for sanctions, and whether Petitioner's Supplemental Surcharge Petition fails to state a claim for relief, just to name a few. From September 30, 2017 through April 6, 2018, there were four hearings and ten filings by Respondents of responsive documents to motions or objections filed by Petitioner, all while Respondents were reviewing and producing a massive number of documents. Multiple professionals, with differing knowledge of the matters and issues, were involved in the review and production of documents. Petitioner's present Objection is a representative sample of the ongoing litigation in this case as it is forty pages long and presents numerous issues, which required substantial time to oppose.

Nevertheless, during all of this litigation, Respondents took reasonable steps to protect their privileged and protected information while still producing such documents within a reasonable time frame. First, Respondents entered into the ESI Protocol itself. As discussed above, in the ESI Protocol, the parties specifically agreed that no waiver of privileged or protected information would occur based on the disclosure of the same. (Exhibit 3 to the Privilege Mot.) Thus, Respondents were proactive about protecting their privilege in the event of unintentional disclosure.

Second, Respondents' counsel utilized Relativity, an electronic database to review and analyze documents, code documents, remove duplicate documents, identify near duplicate documents, and protect attorney-client and work-product documents. During this process, Dickinson Wright utilized numerous attorneys to review all documents prior to the time they were produced, including several attorneys who had not previously been involved in the case.[20]

[20] It should be noted that Petitioner also misconstrues Respondents' efforts to claw back all privileged materials. *See* (Petitioner's Objection at 37-39.) Contrary to Petitioner's assertions, Respondents did not fail to claw back any disputed documents. *See id.* Instead, during the parties' November 2, 2018, telephone call, the only document that was specifically discussed

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Respondents' diligence is in stark contrast to the circumstances presented in *Eigenheim Bank v. Halpern*, 598 F. Supp. 988 (S.D.N.Y. 1984), which Petitioner relies upon in his Objection. (Petitioner's Objection at 36.) In *Eigenheim Bank*, the court found that a party waived its privilege by disclosing the document at issue in connection with two separate cases. *Id.* at 989-90. In that case, the document was not part of a voluminous production. *Id.* at 991. Moreover, the "document was *specifically* requested as one of only thirty documents." *Id.* And, despite the fact that it was previously produced in other litigation and the privilege was asserted, it was again produced. *Id.* Finally, the producing party did nothing more than simply claim the production was inadvertent. *Id.*

In contrast to *Eigenheim Bank*, Respondents exercised diligence and precautions in connection with a massive document production. Nevertheless, a handful of documents were inadvertently produced. Given the huge number of documents that were reviewed, the precautions Respondents took to protect privileged and protected information, the time constraints involved, and the continuing ongoing litigation, there is no good faith argument that Respondents have somehow waived either the attorney-client privilege or the work-product doctrine.[21]

Petitioner is simply trying to obtain an advantage in litigation by mischaracterizing a privileged document because Petitioner has no actual evidence to support his claims. Petitioner's

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was the typed notes (Bates No. RESP0013285), which is why that document was specifically clawed back. (Nov. 2, 2018, E-mail from Colby Williams to Dana Dwiggins, **Exhibit 1**.) Nevertheless, the parties expressly agreed that the issue of privilege was being presently litigated before the Court. *Id.* Because the issues was already being litigated, there was no need to specifically claw back other documents as the decision was in the hands of the Court.

[21] It should be noted that contrary to Petitioner's argument, Respondents continued to review their production as needed by the demands of the case. *See* (Petitioner's Objection at 37-38.) However, the federal court rule Petitioner is advocating for "does not require a producing party to engage in post-production review to determine whether any protected communication or information has been produced by mistake." *See* Fed. R. Evid. 502 advisory committee notes (Revised 11/28/2007).

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unsupported speculation that Respondents failed to take reasonable steps is contrary to the facts of this case and his new argument must be rejected.

V. CONCLUSION

The Discovery Commissioner carefully considered the parties' arguments, reviewed the evidence, and conducted a lengthy hearing before issuing her report and recommendation. There is no question that the Discovery Commissioner's factual findings are supported by the evidence. Furthermore, the Discovery Commissioner's legal conclusions that Lubbers' Notes are protected, at least in part, by the attorney-client privilege and the work-product doctrine is not clearly erroneous. As such, Petitioner's Objections should be overruled in their entirety.

DATED this 14th day of January, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of January, 2019, I caused a copy of the foregoing **RESPONDENTS' OPPOSITION TO PETITIONER'S OBJECTION TO THE DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS ON (1) THE MOTION FOR DETERMINATION OF PRIVILEGE DESIGNATION, (2) THE SUPPLEMENTAL BRIEFING ON APPRECIATION DAMAGES** to be served through the Eighth Judicial District Court's electronic filing system, addressed to the following party:

Dana Dwiggins, Esq.
Alexander LeVeque, Esq.
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/s/ Cindy S. Grinstead
An Employee of Dickinson Wright

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EXHIBIT TABLE

Exhibit	Description	Page(s)
1	Nov. 2, 2018, E-mail from Colby Williams to Dana Dwiggins	2

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EXHIBIT 1

EXHIBIT 1

Cindy S. Grinstead

From: Dana Dwiggins <ddwiggins@sdfnvlaw.com>
Sent: Friday, November 2, 2018 5:07 PM
To: Colby Williams
Cc: Jeffrey P. Luszeck; Tess E. Johnson; Erin L. Hansen; Terrie Maxfield; Elizabeth Brickfield; Joel Z. Schwarz; Phil Erwin
Subject: Re: Clawback Request

I agree with your summary of our conversation.

Dana A. Dwiggins
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On Nov 2, 2018, at 5:03 PM, Colby Williams <jcw@cwlawlv.com> wrote:

> Dana,
>
> I am following up on our telephone conversation this afternoon wherein we discussed several topics, one of which was your notification to me that the Ed Lubbers' type-written notes originally produced as RESP0013285 have also been produced at Bates No. RESP0088955. As you know, we contend the notes

are privileged and were inadvertently produced. Petitioner disagrees, and the parties are presently litigating the privilege dispute before the Court. In any event, for completeness, we hereby provide notice of our request to clawback Bates No. RESP0088955 pursuant to Paragraph 21 of the parties' ESI Protocol. I understand Petitioner disputes our position, but agrees to sequester the document pursuant to the parties' agreement. We will also undertake a further review of Respondents' production to determine whether any other documents (including those that are the subject of the pending privilege dispute) were included as part of this or other productions.

Please advise if I have incorrectly summarized our discussion. Thank you for the notification.

Regards,
Colby

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