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

Electronically Filed
Jun 07 2019 01:09 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

PETITIONERS' REPLY IN SUPPORT OF EMERGENCY MOTION TO STAY DISTRICT COURT PROCEEDINGS PENDING WRIT PETITION PURSUANT TO NRAP 8(c) AND NRAP 27(e)

(*Action Required by June 10, 2019*)

Scott's Opposition to Petitioners' Motion is built on the false premise that neither the discovery commissioner nor the district court found that Lubbers' notes are privileged. This is obviously inaccurate. The discovery commissioner's first finding is that "certain of the Disputed Documents are protected by the attorney-client privilege." *See* DCRR dated 12/6/18 (Ex. 1) at 2. The discovery commissioner, however, found that "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 Trust]." *Id.* The district court largely affirmed the discovery commissioner's ruling and, in fact, only differed by finding that additional portions of Lubbers' notes were protected by the attorney-client privilege. *See* Order dated 5/31/19 (Ex. 2).

Scott's remaining contentions in opposition to Petitioners' stay request are equally flawed and contradicted by the record as: (i) Lubbers' notes are central to his claims by Scott's own admission; (ii) Petitioners will be exposed to irreparable harm from litigating against potentially tainted counsel; (iii) there is no prospect of spoliation of evidence; and (iv) as noted above, the fiduciary exception is at the heart of this appeal. Petitioners will briefly address each point below.

A. Scott's Retroactive Attempt To Minimize The Alleged Importance Of Lubbers' Notes Is Directly Contradicted By The Record.

While Lubbers' notes may have been excised from the public record, the

parties cannot proceed with limited discovery given Scott's unequivocal admissions that Lubbers' notes are critical to his ability to prove his fraud claim. In his Opposition, Scott claims "the Disputed Documents will assist in ultimately proving his case, [but] his claims do not hinge solely on these records." *See* Opp'n at 6. Scott further represents that "he will be able to prove his claims without the Disputed Documents" and Petitioners' "assertion that Scott's fraud claims are 'expressly premised' on the notes is misleading." *Id.* (internal citations omitted).

Suffice it to say, Scott sang a much different tune in the court below. Indeed, Scott ***twice*** represented to the discovery commissioner that "[a]ny denial to Petitioner utilizing Lubbers' admissions will thwart Petitioner's ability to prove fraud, conspiracy, fraudulent concealment, etc." *See* Mot. for Priv. Determ. (Ex. 3) at 21:6-8; Reply in Support of Mot. for Priv. Determ. (Ex. 4) at 21:15-22:1 (same). The Court should thus disregard Scott's claim that Lubbers' notes are not the central focus of the claims asserted in his Supplemental Petition.

Finally, Scott's claim that limited discovery can proceed without controversy ignores reality. As Scott acknowledges, discovery in the underlying litigation has been hotly contested, and while the parties were able to agree on the *language* of the stay order, there will undoubtedly be disputes about the *scope* of such stay. Indeed, the only reason no disputes have arisen on this issue to date is because Petitioners have refused to participate in discovery that would potentially infringe on the subject

matter contained in Lubbers' notes until this matter is resolved. *See* 3/21/19 E-mail Corresp. (Ex. 5).

B. Petitioners Will Suffer Irreparable Harm Without A Complete Stay.

Noticeably absent from Scott's Opposition is any suggestion that a party does not suffer irreparable harm if required to litigate against an adversary in possession of his or her privileged information. *See Zalewski v. Shelroc Homes, LLC*, 856 F. Supp. 2d 426, 436 (N.D.N.Y. 2012). Moreover, because the discovery commissioner and district court already determined that Lubbers' notes are privileged, *see supra* at 1-2, the possibility of disqualification is far from "remote." *See* Opp'n at 7. This is especially true when Petitioners have conclusively demonstrated why the so-called fiduciary exception to the attorney-client privilege has no application in the State of Nevada. *See* Writ Petition at 26-33 (on file).

Scott's contention that Petitioners waited to raise the prospect of irreparable harm resulting from potential disqualification also misses the mark. Petitioners raised this issue as soon as the district court ruled from the bench; the only reason it took nine months to reach that point is due to the lengthy briefing process before the discovery commissioner and district court, the four-month delay between the initial hearing and the entry of the DCRR, and accommodations granted to Scott's counsel for personal reasons. Notwithstanding the time it took for the stay request to become ripe for presentation to the district court (and now this Court), no depositions have

been taken in the underlying matter. Hence, Scott's counsel has not been in a position to exploit the information advantage they have gained through use of Lubbers' notes. The district court's order contemplates scenarios where that could change. Moreover, even depositions that appear ostensibly unrelated to the subject matter of Lubbers' notes may unwittingly intrude into privileged areas given the broad contours of discovery under NRCP 26. A complete stay is proper now.

C. Scott Will Suffer No Irreparable Harm.

Scott's weak claim that he will suffer irreparable harm is premised on the specious notion that Petitioners and non-party American West Group will spoliate evidence if a complete stay is imposed. This is nonsense. First, Petitioners are well aware of their preservation obligations as are the undersigned counsel—assurances to comply with these obligations were made in the district court. Second, a party cannot demonstrate irreparable harm based on a fear of potential spoliation without submitting evidence that prior spoliation has, in fact, occurred. *See, e.g.*, *True the Vote, Inc. v. I.R.S.*, 2014 WL 4347197, at *3-4 (D. D.C. Aug. 7, 2014) (denying injunctive relief where movant showed nothing more than a "distrust" of opponent because "[w]ithout a finding that spoliation previously occurred, there is little basis to conclude that the defendants will 'continue' spoliating potential evidence."). Delay, in other words, is not tantamount to loss of evidence. *See* Ex. 5.

D. The Fiduciary Exception Is Directly At Issue In This Proceeding.

Notwithstanding Scott's creative interpretation of the lower courts' rulings, *see* Opp'n at 9-10, there is no question that the discovery commissioner compelled the production of Lubbers' privileged notes based on a finding that the fiduciary exception applied. Indeed, four of the discovery commissioner's six overarching findings as to attorney-client privilege expressly related to the invocation of the fiduciary exception as a means to overcome the privileged nature of Lubbers' notes. Ex. 1 at 2:16-3:14. The district court affirmed this portion of the DCRR. *See* Ex. 2 at 2. This serious legal issue requires the Court's consideration.

Petitioners respectfully submit that their Motion to Stay should be granted.

DATED this 7th day of June, 2019.

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CERTIFICATE OF SERVICE

I certify that I am an employee of Campbell & Williams and that I did, on the 7th day of June, 2019, serve upon the following in this action a copy of the foregoing **Petitioners' Reply in Support of Emergency Motion to Stay District Court Proceedings Pending Writ Petition Pursuant to NRAP 8(c) and NRAP 27(e)** by United States Mail, postage prepaid:

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

Exhibit 1

ELECTRONICALLY SERVED
12/6/2018 1:21 PM

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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.

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Jeffrey P. Luszeck
Tess E. Johnson

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

Case Number: P-13-078912-T

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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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: _____
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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_____:

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

✓ Electronically served counsel on Dec 6, 2018, pursuant to N.E.F.C.R. Rule 9.

By _____
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

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Steven D. Grierson
CLERK OF THE COURT

NEOJ

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

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of:

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

CASE NO. P-13-078912-T
DEPT. NO. 26

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

PLEASE TAKE NOTICE that an "Order on the Parties' Objections to the Discovery Commissioner's Report and Recommendation on the Motion for Privilege Designation" was entered in the above-captioned matter on May 31, 2019, a true and correct copy of which is attached hereto.

DATED: May 31, 2019.

CAMPBELL & WILLIAMS

By: /s/ ***J. Colby Williams***
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Counsel for Respondents

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Campbell & Williams, and that on the 31st day of May, 2019, I served the following parties a true and correct copy of the foregoing **Notice of Entry of Order on the Parties' Objections to the Discovery Commissioner's Report and Recommendation on the Motion for Privilege Designation** via *Tyler eFile & Serve*:

Mark A. Solomon, Esq. (NSB 418)
Dana A. Dwiggins, Esq. (NSB 7049)
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Counsel for Petitioner

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

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

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

On April 11, 2019, this Court held a hearing on Respondents' Objections, in Part, to Discovery Commissioner's Report and Recommendations on Motion for Privilege Determination ("Respondents' Objection"); and Petitioner's Objection to the Discovery Commissioner's Report and Recommendations on (1) the Motion for Determination of Privilege Designation, (2) the Supplemental Briefing on Appreciation Damages ("Petitioner's Objection"). Present at the hearing were: J. Colby Williams and Philip R. Erwin of the law firm Campbell & Williams, on behalf of Respondents; and Dana Dwiggins, Tess E. Johnson and Craig Friedel of the law firm Solomon Dwiggins Freer Ltd., on behalf of Petitioner Scott Canarelli.

Case Number: P-13-078912-T

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

A. RESP013284

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

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

B. RESP013285

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

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

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

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

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

C. RESP013286-RESP013287

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

D. RESP013288

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

NOW, THEREFORE, IT IS HEREBY ORDERED:

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

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

3. The remainder of Respondents' Objections are DENIED.

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

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

DATED this 31st day of May, 2019.

DISTRICT COURT JUDGE

Agreed as to Form:

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Agreed as to Form:

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Attorneys for Petitioner Scott Canarelli

Exhibit 3

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Steven D. Grierson
CLERK OF THE COURT

MOT

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

MOTION FOR DETERMINATION OF PRIVILEGE DESIGNATION OF RESP013284-RESP013288 AND RESP78899-RESP78900.

Petitioner Scott Canarelli ("Petitioner" or "Scott"), beneficiary of The Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998 (the "SCIT"), by and through his counsel, the law firm of Solomon Dwiggins & Freer, Ltd., hereby submits this Motion for Determination of Privilege Designation as to documents produced by Respondents Lawrence and Heidi Canarelli (the "Canarellis"), and Frank Martin, Special Administrator of the Estate of Edward C. Lubbers ("Lubbers")[1](collectively the "Respondents") and identified by Bates labels RESP013284-RESP013288 and RESP78899-RESP78900, copies of which are attached hereto for *in camera*

[1] Edward Lubbers died on April 2, 2018 during the pendency of this litigation. *See* Suggestion of Death Upon the Record Under NRCP 25, filed May 8, 2018. Mr. Martin was appointed as Special Administrator of the Estate of Edward C. Lubbers on or about June 6, 2018. *See In the Matter of the Estate of Edward Lubbers*, Case No. P-18-095584-E. The parties recently stipulated to substitute Mr. Martin in Mr. Lubbers' place. *See* Stipulation and Order to (1) Substitute Party; (2) Vacate Order Adopting Report and Recommendation; (3) Seal Transcripts, filed June 27, 2018.

4845-3736-9709, v. 1

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review as **Exhibit 1** and **Exhibit 2**, respectively. This Motion is filed pursuant to the ESI Protocol entered into between the Parties and agreed to govern the instant litigation. Said protocol allows either party to "claw back" certain documents; provided, however, the non-disclosing party may dispute such claw back and segregate the documents pending a determination by this Court as to the applicability, if any, of the attorney client privilege, work product doctrine, or other applicable privilege.

This Motion 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 13 day of July, 2018.

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Attorneys for Scott Canarelli

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NOTICE OF HEARING

PLEASE TAKE NOTICE that the undersigned will bring the above and foregoing Motion on for hearing before the Discovery Commissioner, located at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada 89101, on November 16, 2018, at 9:00 a.m./p.m., or as soon thereafter as counsel can be heard.

DATED this 13 day of July, 2018.

SOLOMON DWIGGINS & FREER, LTD.

Tess Johnson

Dana A. Dwiggins (#7049)
Jeffrey P. Luszeck (#9619)
Tess E. Johnson (#13511)
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129

Attorneys for Scott Canarelli

DECLARATION OF TESS E. JOHNSON PURSUANT TO EDCR 2.34

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, TESS E. JOHNSON, ESQ., do hereby declare that the following assertions are true to the best of my knowledge and belief:

1. I am an attorney at the law firm of Solomon Dwiggins & Freer, Ltd., which represents Scott Canarelli in the above-named matter.

2. On or about December 15, 2017, the Parties executed an "ESI Protocol," a copy of which is attached hereto as **Exhibit 3**. The ESI Protocol provides that if there is a dispute regarding the privileged nature of disclosed records and the Parties are unable to settle the dispute in good faith, then the objecting party must file a motion to determine the privileged nature of these records.[2]

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[2] *See* **Exhibit 3**, Section 21.

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A. RESP013284-RESP013288.

3. RESP013284-RESP013288 was produced in Respondents' initial production of documents on December 15, 2017. It comprises several handwritten and typed notes by Lubbers, some of which are dated October 14, 2013. On May 16, 2018, I filed a supplement to a petition and attached these documents as an exhibit.

4. On June 5, 2018, almost three (3) weeks after I filed the supplement, Elizabeth Brickfield, counsel for Respondents, sent a letter claiming that RESP013284-RESP013288 is "an attorney-client privileged and attorney work product-protected document" that was inadvertently produced.[3] For that reason, she sought to claw back the records pursuant to the ESI Protocol.

5. On June 12, 2018, I responded to Ms. Brickfield's request stating that I challenged her designation of RESP013284-RESP013288 as privileged records.[4] Over the next week, the Parties exchanged additional correspondence regarding their analysis of the protections applicable to RESP013284-RESP013288.[5]

6. On June 25, 2018, Craig Friedel, another attorney with Solomon Dwiggins & Freer, Ltd., and I conducted an EDCR 2.34 conference via teleconference with Ms. Brickfield, Joel Z. Schwarz and Philip R. Erwin. During the call, Ms. Brickfield asked for our basis for resisting Respondents' claw back of RESP013284-RESP013288. Mr. Friedel advised that the typewritten portion of these records do not appear to be from a meeting that purportedly occurred on October 14, 2013 and that he disagreed that the records are a memorialization of the meeting. In addition, he stated that the attorney-client privilege did not apply because, per the notes, both Larry and Bob Evans were present at the meeting. Mr. Friedel further advised that the records were not work product because litigation was not anticipated at the time Lubbers prepared these

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[3] *See* June 5, 2018 letter from Ms. Brickfield attached hereto as **Exhibit 4**.

[4] *See* June 12, 2018 letter from Ms. Johnson attached hereto as **Exhibit 5**.

[5] *See* June 12, 2018 letter from Ms. Brickfield, without enclosure, attached hereto as **Exhibit 6**; *see also* June 18, 2018 letter from Ms. Dwiggins attached hereto as **Exhibit 7**.

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notes. When Mr. Friedel asked what evidence Ms. Brickfield could provide to demonstrate that these records were privileged, she responded that she would get back to us.

B. RESP78899-RESP78900.

7. RESP78899-RESP78900 was produced with Respondents' first supplemental NRCP 16.1 disclosures on April 6, 2018. These pages comprise of handwritten notes by Lubbers and are dated December 19, 2013 but were a part of a larger batch of documents, RESP078884 – RESP078932, that appeared to also include attorneys' notes.

8. On June 14, 2018, Ms. Dwiggins and I conducted a teleconference with Mr. Williams and Philip Erwin, regarding Respondents' potential disclosure of notes prepared by their counsel contained within RESP078884 – RESP078932. During the call, Mr. Williams confirmed that several pages contained his and another attorney's notes, and that he would review these records to assess the extent that these records would need to be clawed back.

9. On June 18, 2018, I received a letter from Mr. Williams advising that the entirety of RESP078884 – RESP078932 would need to be clawed back because the production included notes prepared by attorneys as well as notes taken by Mr. Lubbers "during the pendency of this action."[6]

10. The Parties exchanged several letters regarding the privileged designation of RESP078884 – RESP078932.[7] Ultimately, Ms. Dwiggins agreed to allow the claw back of a substantial portion of the records; however, she maintained that notes prepared by Mr. Lubbers in December, 2013, identified as RESP078899 – RESP078900,[8] did not constitute work product.

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[6] *See* June 18, 2018 letter from Mr. Williams attached hereto as **Exhibit 8**.

[7] *See* June 19, 2018 letter from Ms. Dwiggins attached hereto as **Exhibit 9**; *see also* June 20, 2018 letter from Mr. Williams attached hereto as **Exhibit 10**; June 25, 2018 letter from Ms. Dwiggins attached hereto as **Exhibit 11**.

[8] The Bates range of RESP078899 – RESP078900 is not 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* **Exhibits 9**, **10** and **11**.

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11. On June 28, 2018, Ms. Dwiggins and I conducted a teleconference with Mr. Williams to discuss several matters, including our dispute as to RESP078899 – RESP078900. Despite the Parties' efforts, we were not able to come to an agreement as to whether or not these records were protected as work product.

12. I have made a good faith effort to confer with Respondents' counsel regarding this dispute and have not been able to resolve it.

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

DATED this 13 day of July, 2018.

TESS E. JOHNSON, ESQ.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Petitioner respectfully requests that this Court make a determination pursuant to the ESI Protocol[9] entered into between the Parties as to the applicability of any privileges asserted by Respondents concerning records that have been disclosed in the above-named matter. Specifically, pursuant to the ESI Protocol, Respondents have sought to claw back several records produced during discovery, including but not limited to the records that are the subject of this Motion: RESP013284-RESP013288 and RESP78899-RESP78900 (collectively, "ESI Disputed Documents"). The ESI Disputed Documents are the only remaining documents that Petitioner has disagreed with Respondents' assertion of privilege or that the Parties were not able to reach a resolution on. Now that Petitioner has disputed Respondents' designation of the ESI Disputed Documents, the burden is on the Respondents to prove that such documents are indeed protected by either the attorney client privilege or attorney work product doctrine.

[9] The ESI Protocol allows a Party to "claw back" any "protected records" asserted to be disclosed inadvertently and further sets forth procedures if there is a dispute as to any applicable protections.

Specifically, documents identified as RESP013284-RESP013288 consist of Lubbers'

[redacted]

Moreover, Lubbers was Petitioner's fiduciary and serving as his Trustee at the time the notes were created by Lubbers; therefore, the Lubbers Notes are not protected by the attorney-client privilege. While Petitioner filed an initial Petition in September, 2013 requesting an accounting of the SCIT and an order compelling Lubbers to retain a valuation expert to determine the "purchase price" pursuant to the Purchase Agreement, there was no actual dispute between the Parties. Indeed, Petitioner lacked sufficient information concerning the Purchase Agreement to assert any allegation against Lubbers. Rather, the Petition merely sought information relative to the Purchase Agreement and was otherwise neutral.

The Lubbers Notes additionally are not protected by the attorney-client privilege because third-parties participated in the meeting that may be the subject of these notes. Notwithstanding, the Lubbers Notes have been in the possession of third parties to which the privilege does not even arguably apply for an extended period of time.

Documents identified as RESP78899-RESP78900 are notes of Lubbers taken during a meeting with Stephen Nicolatus with Western Valuation Advisors, the stipulated business valuator, in December, 2013("Nicolatus Meeting Notes"). The meeting was attending to by Lubbers and his counsel, Petitioner and his counsel and Nicolatus. There were no confidential communications during such meeting and the communications with Nicolatus were never intended to be privileged in any manner. The Lubbers Notes and Nicolatus Meeting Notes are

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similarly not work product because they were not prepared in anticipation of litigation or at the direction of counsel. The fact the Lubbers, himself, is an attorney is of no consequence. Under the law, Lubbers is precluded from acting from Petitioner's fiduciary and his own attorney at the same time.

For reasons set forth in more detail below, Petitioner respectfully requests that this Court determine that the ESI Disputed Documents are not protected under either the attorney-client doctrine or the work product doctrine.

II. STATEMENT OF FACTS

A. RELEVANT BACKGROUND.

This case is a trust matter concerning the administration of the SCIT and the conduct of its Former Trustees, the Respondents. The SCIT is an irrevocable trust intended for Scott's use and benefit as well as the benefit of his children. At the time of the creation on or about February 24, 1998, the Canarellis were named as Family Trustees of the SCIT and Corey Addock was named as the Independent Trustee. In or around 2005, however, Addock resigned and Lubbers, a long-time attorney and confidant of the Canarellis, accepted the appointment as the Independent Trustee.

In or around 2012, Scott and his father became at odds based upon his decision to be a stay-at-home dad. In retaliation, Larry, acting in capacity as the Family Trust of the SCIT, decided to "cut off" distributions to Petitioner, resulting in Scott's retention of counsel in June, 2012.

On May 24, 2013, the Canarellis purportedly resigned as Family Trustees of the SCIT and Lubbers was appointed as Family Trustee. On May 31, 2013, ***one (1) week after his appointment as Family Trustee***, Lubbers sold ***all*** of the SCIT's interests to parallel trusts created by Petitioner's siblings ("the Siblings' Trusts") and SJA Acquisitions, LLC ("SJA"), an entity created by the Siblings Trusts. This sale was done without any notice to Petitioner or his counsel, despite the fact that Petitioner was represented by the undersigned counsel.

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In defense of the sale, Respondents' claim that Scott made unreasonable monetary demands on the SCIT despite knowing that the SCIT's ownership interests were illiquid and that American West was facing difficulty in the homebuilding market.[10] Respondents further contend that the SCIT was unable to meet Scott's "unreasonable demands" because the Canarellis', the Canarellis' family trust, the SCIT ***and the Siblings' Trusts*** "were, as borrowers, negotiating to extend and renew a 'Credit Agreement' with a consortium of lenders that would require personal guarantees and *preclude* the Family Entities from making ***any cash distributions without lenders pre-approval.***"[11] Allegedly, since the Respondents were unable to satisfy Scott's "unrealistic and unreasonable demands for cash"[12] they determined that they could only meet such demands "by reducing it to cash."[13]

Such rationale, however, is merely an excuse intended to justify Respondents' retaliatory acts and fraudulent conduct. Following the valuation prepared by Nicolatus and subsequent information learned by Petitioner, the underlining value of the sale, even as determined by Nicolatus, is not only subject to dispute but the rationale in entering into the sale expressly provided for by Respondents in the Purchase Agreement.

B. PETITION TO ASSUME JURISDICTION.

On September 30, 2013, Petitioner filed a Petition to Assume Jurisdiction Over the Scott Lyle Graves Canarelli Irrevocable Trust; to Confirm Edward C. Lubbers as Family and Independent Trustee; for an Inventory and Accounting; to Compel an Independent Valuation of the Trust Assets Subject to the Purchase Agreement, dated May 31, 2013; and to Authorize and Direct the Trustee and Former Trustees to Provide Settlor/Beneficiary With Any and All Information and Documents Concerning the Sale of the Trust's Assets Under Such Purchase

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[10] *See* Objection to Petition to Surcharge Trustee and for Additional Relief, filed August 9, 2017 ("Objection to Surcharge Petition"), ¶¶19-23.

[11] *Id.* at ¶24 (Emphasis in original).

[12] *Id.* at ¶23.

[13] *Id.* at ¶26.

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Agreement ("Initial Petition").[14] The Initial Petition sought for 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. ***The Initial Petition did not set forth any allegations or claims against Lubbers (or the Canarellis for that matter) as it related to the Purchase Agreement or the preparation of an accounting.*** Indeed, Lubbers purportedly only became the Family Trustee of the SCIT less than four (4) months prior to the filing of the Initial Petition and the period of time for him to render an accounting had not yet arisen.

Nicolatus was thereafter appointed by this Court as the valuation expert and the valuation was completed on December 31, 2014. Subsequent to this period, however, the Parties primarily focused on the "accountings" submitted for the period of 1998 through 2013 ("Prior Accountings"). Specifically, Petitioner retained Daniel T. Gerety, Esq. in 2014 to review and render an opinion, if any, on the deficiencies of the Prior Accounting. The Parties thereafter worked together for over a two (2) year period in relation to the Prior Accounting, including Gerety rendering three (3) separate opinions on the Prior Accountings, Respondents supplementing financial information to Petitioner and Gerety and Gerety personally meeting and working with Respondents' agent, namely Robert Evans, to resolve the issues set forth in the Gerety opinions. In fact, Gerety continued to meet with Evans until late 2016, before it was concluded by Petitioner that sufficient progress was not being made and that Gerety was not receiving the information he was requesting from Evans to reconcile the Prior Accountings.

It was not until late 2015, when Petitioner provided Respondents' counsel with a DRAFT copy of the Surcharge Petition that the potential of any claim against Lubbers was anticipated. In response, the Parties entered into a Tolling Agreement in March, 2016, so as to allow the Parties sufficient time to work together to resolve primarily issues concerning the Prior Accountings. During this time, Petitioner believed, based upon statements made by Lubbers prior to the filing of the Surcharge Petition in June, 2017, that Lubbers performed no due diligence on the Purchase

[14] *See* Initial Petition, filed September 30, 2013.

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Agreement but rather relied upon Larry's representation that it was "fair" to Scott. These beliefs were communicated to Respondents' counsel. However, following the filing of the Surcharge Petition and Petitioner conducting discovery, it was realized that Lubbers' statements were false and that he was intimately involved in the transaction and otherwise conspired with the Canarellis to financially harm Petitioner. Such discovery, including, in part, the Lubbers Notes, resulted in Petitioner filing a Supplement to the Surcharge Petition to specifically assert claims, in part, of fraud, misrepresentation and fraudulent concealment against Respondents.[15]

C. ESI PROTOCOL.

On or about December 12, 2017, the Parties executed the ESI Protocol.[16] Along with procedures for the production of electronically stored information, the ESI Protocol provides 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, but may only contest the asserted privileges on ground other than the inadvertent production of such document(s).[17]

Respondents have requested to claw back several documents. However, in light of the circumstances surrounding the creation of the ESI Disputed Documents, Petitioner disputes that these records should be afforded any protection based on the attorney-client privilege and/or the work product doctrine.

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[15] Respondents have filed a Motion to Dismiss the Supplement to the Surcharge Petition; however, this Court has not heard the motion and briefing is not complete.

[16] *See* **Exhibit 3**.

[17] *Id.* at Section 21.

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III. LEGAL ARGUMENT

A. Respondents Have The Burden Of Proving The ESI Disputed Documents Are Privileged.

Although Petitioner is obligated to file a motion as the challenging party pursuant to the ESI Protocol, that in no way shifts the burden of proving privilege. "The burden of proof is on the party seeking to establish that the privilege applies."[18] The burden applies to both the attorney client privilege and the work product doctrine. [19] Given that both privileges "obstruct[ ] the search for truth," "[they] must be 'strictly confined within the narrowest possible limits consistent with the logic of [their] principles."[20]

Respondents have asserted that Lubbers Notes are "attorney client privileged and attorney work product protected document,"[21] and that the Nicolatus Meeting Notes are "protected by the attorney work product doctrine."[22] Consequently, as the party asserting the privileges, Respondents have the burden of demonstrating that these protections apply. While Respondents have proffered arguments via correspondence to contend that the ESI Disputed Documents are

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[18] *United States v. Blackman*, 72 F.3d 1418, 1423 (9th Cir. 1995) (citing *Clarke v. American Commerce National Bank*, 974 F.2d 127, 129 (9th Cir.1992)).

[19] *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 25 (9th Cir. 1981)(citing United States v. Bump, 605 F.2d 548, 551 (10th Cir. 1979); *United States v. Landof*, 591 F.2d 36, 38 (9th Cir. 1978); In re Horowitz, 482 F.2d 72, 82 (2d Cir.), cert. denied, 414 U.S. 867, 94 S.Ct. 64, 38 L.Ed.2d 86 (1973)("As with all evidentiary privileges, the burden of proving that the attorney-client privilege applies rests not with the party contesting the privilege, but with the party asserting it."); *see also LightGuard Sys., Inc. v. Spot Devices, Inc.*, 281 F.R.D. 593, 598 (D. Nev. 2012) (citing *Tornay v. U.S.*, 840 F.2d 1424, 1426 (9th Cir.1988) (citing *U.S. v. Hirsch*, 803 F.2d 493, 496 (9th Cir.1986))("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.").

[20] *Whitehead v. Nevada Comm'n on Judicial Discipline*, 110 Nev. 380, 414–15, 873 P.2d 946, 968 (1994).

[21] *See* **Exhibit 4.**

[22] *See* **Exhibit 10.**

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protected, such arguments do not support Respondents' contentions for the reasons set forth herein.

B. THE ATTORNEY-CLIENT PRIVILEGE DOES NOT APPLY.

The attorney client privilege is codified under NRS 49.095. "For this privilege to apply, [1] the communications must be [2] between an attorney and client, [3] for the purpose of facilitating the rendition of professional legal services, and [4] be confidential..."[23] **"Mere facts are not privileged, but communications about facts in order to obtain legal advice are."**[24]

In this case, there is no evidence that the Typed Memo that is contained within the Lubbers Notes was ever provided to Lubbers' attorney or otherwise discussed with his attorney. Notwithstanding, Respondents' claim that the Typed Memo comprises "Mr. Lubbers' notes from his meeting with his then counsel."[25] This representation, however, does not support the protection or consistent with the notes themselves.

Specifically, the face of the Lubbers Notes, themselves, lead one to conclude that the Typed Memo was prepared at a different time then the handwritten notes. Respondents' counsel has absolutely no evidence to support the contention that the Typed Memo and handwritten notes were **both** created during Lubbers' meeting with his counsel. There is additionally no evidence that Lubbers provided the Typed Memo to his attorney at the time, or even discussed the substance of the Typed Memo at the meeting. Indeed, the Typed Memo was contained with Lubbers "hard file," thus evidencing the fact that it was not provided to his then attorney. Presuming, however, that the handwritten notes were taken by Lubbers during his meeting with

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[23] *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court in & for County of Clark*, 399 P.3d 334, 341 (Nev. 2017).

[24] *Id.*; *see also*, *Wardleigh v. Second Judicial Dist. Court In & For County of Washoe*, 111 Nev. 345, 352, 891 P.2d 1180, 1184 (1995) ("The Court in *Upjohn* appropriately noted that **only communications and not facts are subject to the privilege**. Thus, relevant facts known by a corporate employee of any status in the corporation would be discoverable even if such facts were related to the corporate attorney as part of the employee's communication with counsel. The communication itself, however, would remain privileged.").

[25] *See* **Exhibit 6**.

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his attorney in which Larry and Evans participated, the substance of the handwritten notes do not correlate with the substance of the Typed Memo. There is absolutely no indication that Lubbers ever discussed the topics therein with his attorney. Rather, the face of the document, in part, demonstrates that Lubbers articulated certain questions and provided responses based upon his beliefs.

[redacted]

The bottom line is that if Petitioner's counsel was provided an opportunity to ask Lubbers questions on these issues during a deposition, the foregoing facts would not be subject to protection based upon the attorney client privilege or work product doctrine. [redacted]

1. **Privilege Does Not Exist as to Conversations Held In the Presence of Third Parties.**

To the extent the Typed Memo constitutes a memorialization of Lubbers' meeting with his then counsel, the privilege still does not apply to the Lubbers Notes in their entirety because the meeting was in the presence of at least one third party to which the privilege does not extend, namely Larry and/or Evans. The attorney client privilege does not exist as to conversations held in presence of third parties.[26] The handwritten notes expressly make notation of the fact that Larry and Evans were in attendance with Lubbers' meeting with his attorney on October 14, 2013. At such time, the law firm Lee, Hernandez, Landrum, Garofalo & Blake, APC, **only**

[26] *Nevada Tax Commission v. Hicks*, 73 Nev. 115, 310 P.2d 852 (1957).

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appeared in this matter on behalf of Lubbers.[27] The engagement letter with the firm also indicates that *only* Lubbers was the client. As Lubbers was the sole Family Trustee and Independent Trustee of the SCIT at such time, there was absolutely no reason for Larry or Evans to participate in such meeting. Not only did the Initial Petition not make allegations against either Respondent for wrongdoing but no claims were asserted in the Initial Petition. Rather, it was a simply straight forward petition that sought Lubbers to render an accounting, obtain a business valuation pursuant to the Purchase Agreement and to further disclose all documents relating to the sale. Neither Larry's nor Evans' participation was necessary in order for Lubbers to comply with [redacted] Therefore, Larry and Evans are "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."[28] For this reason alone, the participation of Larry and Evans in communications Lubbers had with his counsel constitutes a waiver of the attorney client privilege. Accordingly, this Court should find that the Lubbers Notes are discoverable for all purposes in this litigation.

1. American West's Possession of Lubbers' Boxes Demonstrate Waiver of the Privilege.

Discovery in this matter has disclosed that American West employees had access to the ESI Disputed Documents, thus effectively demonstrating a waiver of the attorney client privilege. It is undisputed that the ESI Disputed Documents were contained within Lubbers' hard file that, after being provided to Dickinson Wright, was "returned to" American West in November, 2017.

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[27] *See* Trustee Edward C. lubbers' Response to Petition to Assume Jurisdiction Over the Scott Lyle Graves Canarelli Irrevocable Trust; to Confirm Edward C. Lubbers as Family and Independent Trustee; for an Inventory and Accounting; to Compel an Independent Valuation of the Trust Assets Subject to the Purchase Agreement, dated May 31, 2013; and to Authorize and Direct the Trustee and Former Trustees to Provide Settlor/Beneficiary With Any and All Information and Documents Concerning the Sale of the Trust's Assets Under Such Purchase Agreement, filed October 16, 2013.

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

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Indeed, in an email from Tina Goode, the Director of Corporate Administration with American West Development, she not only received the boxes from Ms. Brickfield's office but actually went through the boxes to recover "missing records". Specifically, the email states:

> I know I will sleep better tonight . . . ***we received Ed's boxes back from Elizabeth[Brickfield's] office*** and our missing e-mail confirming deferring payments along with Ed's memo was in the box . . . [29]

There is no question, nor should there be, that AWDI is not a party in this action or encompassed within the Lubbers-Renwick attorney client relationship. Under no circumstances is it "reasonably necessary for the transmission of the communication"[30] that any AWDI employee be in possession of the Lubbers Notes. To the extent the ESI Disputed Documents, including the Typed Memo, can arguably be considered privileged, such privilege was waived when the ESI Disputed Documents were turned over to a third party not encompassed within the attorney client privilege. Accordingly, AWDI's possession of the ESI Disputed Documents destroys any arguable confidentiality related to the same and warrants this Court's finding that the ESI Disputed Documents are discoverable for all purposes in this litigation.

C. THE WORK PRODUCT DOCTRINE DOES NOT APPLY.

NRCP 26(b)(3) provides that "... a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and [1] ***prepared in anticipation of litigation or for trial*** by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)..." thus, Rule 26 protects documents with "two characteristics: (1) they must be prepared in anticipation of litigation or for trial, and (2) they must be prepared by ...another party or ... for that other party's representative." *Id.*

In determining whether work was done in anticipation of litigation, Nevada adopted the "because of" test, which provides that documents are considered to be "prepared in anticipation of

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[29] *See* November 18, 2017 email from Ms. Goode attached hereto as **Exhibit 12** (Emphasis added).

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

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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."[31] The Ninth Circuit further discussed this test, stating as follows:

> The "because of" standard does not consider whether litigation was a primary or secondary motive behind the creation of a document. Rather, it considers the totality of the circumstances and affords protection when it can fairly be said that the "document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of that litigation[.]"[32]

Similarly, "anticipation of litigation" has been held to not being applicable to memoranda when such preparation was not at the request of an attorney.[33]

2. **The Nicolatus Meeting Notes**.

The Nicolatus Meeting Notes relate to a meeting Lubbers participated in with Nicolatus, Petitioner, Mark Solomon, Esq., Evans, Don Campbell, Esq., Hunter Campbell, Esq. and Colby Williams, Esq. in December, 2013.[34] As set forth in detail in Section II(B), at the time said meeting occurred Petitioner had only petitioned the Court for an accounting and 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 petitioner was filed and, therefore, absolutely no allegations of wrongful conduct or claims were asserted against either Lubbers or the Canarellis. Petitioner simply wanted information to which he was entitled to as a

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[31] *Id.* at 347-48 (quoting Restatement (Third) of the Law Governing Lawyers § 87 cmt. i (2000)) (Emphasis in original).

[32] *Id.* at 348 (quoting *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)*, 357 F.3d 900, 908 (9th Cir. 2004).

[33] *Ballard v. Eighth Judicial Dist. Court of State In & For Cty. of Clark*, 106 Nev. 83, 85, 787 P.2d 406, 407 (1990) (holding that the "in anticipation of litigation" does not apply to documents prepared **unless created at the request of an attorney;** therefore, investigation was not considered work product).

[34] *See* **Exhibit 2**.

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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.[35] These notes would have been created in a substantially similar form regardless of the prospect of litigation. For this reason, the work product doctrine does not apply.

3. The Lubbers Notes.

Regardless of whether this Court finds that the Lubbers Notes constitute work product, Petitioner should nevertheless have access, at a minimum, to the Typed Memo NRCP 26(b)(3) which provides that "upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means."[36] Substantial need is determined on a case-by-case basis.[37] However, substantial need may exist "when a witness is not available for deposition by the requesting party."[38]

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[35] The Purchase Agreement provides that "[t]he LLC Sale Interests Purchase Price and/or the Corporation Sale Interests Purchase Price shall be increased, but not decreased, based upon a review of the enterprise value of each LLC and each Corporation by a third party analyst, to be conducted not less than 120 days after the date of this Agreement." *See* Exhibits to: Surcharge Petition filed June 29, 2017, p. 2 Sec. 3.

[36] *Wardleigh v. Second Judicial Dist. Court In & For Cty. of Washoe*, 111 Nev. 345, 358, 891 P.2d 1180, 1188 (1995).

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

[38] *Gay v. P. K. Lindsay Co., Inc.*, 666 F.2d 710, 713 (1st Cir. 1981) ("[I]t seems well-settled that there is in general no justification for discovery of the statement of a person contained in work product materials when the person is available to be deposed."); *In re Grand Jury Investigation (Sun Co.),* 599 F.2d 1224, 1232 (3d Cir.1979) (recognizing a "substantial need" exists generally involve unavailable witnesses due to circumstances such as death); *Gargano v.*

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As set forth above, the Typed Notes merely contain facts that are not privileged or otherwise protected. In light of the fact that Petitioner could have asked Lubbers questions during [redacted]

[redacted]

[redacted]

Petitioner, however, was precluded from conducting Lubbers deposition because of his health, in part. As this Court is aware of the cause of Lubbers' death, the seriousness of Lubbers' health condition was well known in October, 2017. For the sole purpose of preserving Lubbers' testimony, Petitioner initially noticed Lubbers' deposition for December 4, 2017; however, Respondents repeatedly continued his deposition based on his health condition. While Petitioner and his counsel were cognizant of the fact that Lubbers was suffering from the side effects of strenuous chemotherapy, Lubbers was a material witness and Petitioner was amenable to providing any accommodation to Lubbers in order to allow him to be the most comfortable during

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Metro-N., 222 F.R.D. 38, 40 (D. Conn. 2004) (citing *Almaguer v. Chicago, Rock Island, and Pacific Railroad Co.*,55 F.R.D. 147, 150 (D.Neb.1972)); *see also United States v. Nobles*, 422 U.S. 225, 248, 95 S. Ct. 2160, 2174 (1975) ("Where a witness is available to be deposed, courts often hold that work product containing information about the witness' prior statements is not discoverable because that information is available through other means."); *Hickman v. Taylor*, 329 U.S. 495, 512, 67 S. Ct. 385 (1947) (stating that disclosure of documents otherwise protected by the work product doctrine "might be justified where the witnesses are no longer available . . .").

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the deposition (including limited the deposition to short periods of time). Respondents refused each proposal made and, as a result, Petitioner was forced to file a motion to compel Lubbers' deposition. The Discovery Commissioner postponed the deposition set for March 5 -7, however, based upon Lubbers' representation that his condition was not terminal. Unfortunately, Lubbers passed away within the month and Petitioner was deprived of obtaining Lubbers' testimony.

There exists substantial need as a result of these unfortunate circumstances; therefore, warranting the disclosure of the Lubbers Notes, or, at a minimum, the Typed Memo. Lubbers was a material witness in this case. He was the Trustee of the SCIT at the time of the sale and he executed the Purchase Agreement on behalf of the SCIT. There is no other available means for Petitioner to obtain Lubbers' testimony concerning the factual circumstances surrounding the [redacted] Since Lubbers signed the Purchase Agreement (despite only being the "Family Trustee" for seven (7) days prior to its execution), the reasons **he** ultimately signed the Purchase Agreement are directly relevant to not only the claims asserted in the initial Surcharge Petition but also the Supplemental Surcharge Petition. Such admissions by Lubbers is also necessary for Petitioner to cross examine Larry and Evans on the reasons for entering into the [redacted] Petitioner has absolutely no other means of obtaining such testimony, let alone being "unable without undue hardship to obtain the substantial equivalent of the materials by other means" as required under NRCP 26(b)(3).

Moreover, Respondents have not contended, and cannot contend based upon the unavailability of Lubbers, that the Typed Memo was prepared at the request of an attorney. Indeed, the Typed Memo appeared to be prepared before Lubbers initially met with and retained an attorney. Indeed, Lubbers only initially met with an attorney on October 14, 2013 and signed the engagement letter on October 17, 2013. Therefore, by definition, the Typed Memo was not

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prepared at the request of an attorney. Under such circumstances, the Typed Memo is not privileged under NRCP(b)(3) and does not constitute work product.[39]

[redacted] Petitioner is unable to obtain substantial equivalent evidence of the admissions through other means. Any denial to Petitioner utilizing Lubbers' admissions will thwart Petitioner's ability to prove fraud, conspiracy, fraudulent concealment, etc. Based on the foregoing, this Court should find that the ESI Disputed Documents are discoverable for all purposes and not protected by the attorney client privilege or the work product doctrine.

IV. CONCLUSION

For the above reasons, Petitioner Scott Canarelli respectfully requests that this Court find that the ESI Disputed Documents be deemed discoverable and not subject to either the attorney client privilege or the work product doctrine.

DATED this 13 day of July, 2018.

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39 *See Ballard,* 106 Nev. at 85; *see also* NRCP 26(b)(3) (stating that protected documents include those prepared "by ... [the] other party's attorney, consultant, surety, indemnitor, insurer, or agent"); *see also Goff v. Harrah's Operating Co., Inc.,* 240 F.R.D. 659, 660–61 (D.Nev.2007) (applying a parallel federal rule).

CERTIFICATE OF SERVICE

PURSUANT to NRCP 5(b), I HEREBY CERTIFY that on July 13th, 2018, I served a true and correct copy of the **MOTION FOR DETERMINATION OF PRIVILEGE DESIGNATION OF RESP013284-RESP013288 AND RESP78899-RESP78900** 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:

J. Colby Williams, Esq.
Campbell & Williams
700 S. Seventh Street
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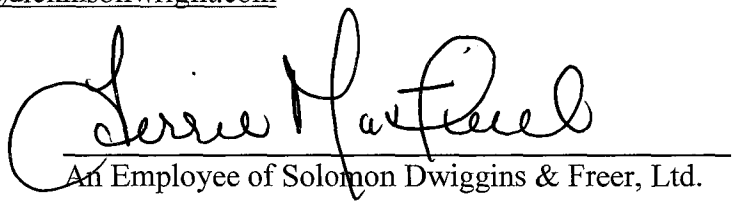

An Employee of Solomon Dwiggins & Freer, Ltd.

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Exhibit 4

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DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of THE SCOTT LYLE GRAVES CANARELLI IRREVOCABLE TRUST, dated February 24, 1998.	Case No.: P-13-078912-T Dept. No.: XXVI/Probate Hearing Date: August 29, 2018 Hearing Time: 1:30 p.m. ***Before the Discovery Commissioner***

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

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

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

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

[redacted]

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

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

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

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

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

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

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

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

II. RESPONSE TO RESPONDENTS' "FACTUAL BACKGROUND"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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contents of the Typed Memo, which included issues totally outside the scope of the Initial Petition. This Court is able to easily assess the reasonableness of the same by reviewing the handwritten notes. Although the Initial Petition was neutral, at least as to Lubbers, because it merely sought the production of an accounting and documentation relating to the Purchase

[redacted]

the Typed Memo were never discussed with LHLGB in their totality.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. LEGAL ARGUMENT

A. Reply To Opposition To Motion For Determination.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[37] *See* Ex. 6.

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

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

[redacted]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[54] *Id.*

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

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

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

The Canarellis further contended:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

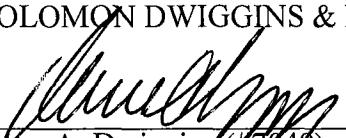
Finally, Petitioner's Counsel did not violate the Confidentiality Agreement because said agreement was intended to protect the Parties financial information as opposed to a Parties' typed and/or handwritten notes.[60] As such, Petitioner is not at fault for citing portions of a document that Respondents'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

IV. CONCLUSION

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

DATED this 24th day of August, 2018.

SOLOMON DWIGGINS & FREER, LTD.



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

CERTIFICATE OF SERVICE

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

Via:

[____] Hand Delivery

[____] U.S. Mail, Postage Prepaid

[____] Certified Mail, Receipt No.: _____

[____] Return Receipt Request

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

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Exhibit 5

Subject: Re: Canarelli-Letter to Colby Williams from DAD re AWG PMK Deposition
Date: Thursday, March 21, 2019 at 1:41:03 PM Pacific Daylight Time
From: Colby Williams
To: Terrie Maxfield, Dana Dwiggins, Jeffrey P. Luszeck, Tess E. Johnson, Craig Friedel, Erin L. Hansen, Allie Carnival
CC: Phil Erwin, jschwarz@dickinson-wright.com, Jennifer Braster
Attachments: image001.jpg, image002.jpg, image003.jpg, image004.jpg

Dana,

I write in response to your letter dated March 13, 2019 wherein you inquired whether I am still "amendable" [sic] to the taking of a "PMK" deposition on topics associated with American West Group ("AWG"). By PMK deposition, I understand that to mean a deposition pursuant to NRCP 30(b)(6).

As a threshold matter, when this topic came up during a call with you, Tess, Jen and me on January 16, 2019, I did not say I was amenable to proceeding with a PMK deposition (or any other depositions) at that time as I believed the outstanding privilege issues needed to be resolved first. That is still my position. I did say that, at the appropriate time, I would likely be amenable to conducting a single Rule 30(b)(6) deposition on financial topics related to multiple entities, but that I would first need to see the proposed topics and then consult with the client. Having now seen your draft subpoena directed to "All Entities Encompassed within the American West Group," I foresee several problematic issues. First, AWG is comprised of both purchased entities and non-purchased entities, the latter of which (with a couple possible exceptions) are not relevant to the SCIT litigation. Second, many of the purchased entities are dissolved and no longer exist, thereby rendering it impossible to designate someone to testify on their behalf under Rule 30(b)(6) and other Nevada law. Third, many of the proposed topics appear extremely overbroad. Because I believe any deposition is premature at this point, it's not productive to list the objections in this e-mail, but suffice it to say counsel will need to have a meet and confer prior to any such deposition in an effort to reach agreement on the scope of the topics. Absent such an agreement, it will likely be necessary to seek a protective order to clarify the matter prior to any deposition. Finally, given that Jen represents the subpoenaed, non-party purchased entities, she obviously has to be a part of any discussion about a 30(b)(6) deposition (combined or otherwise) related to those entities. I have, thus, copied her here.

The foregoing is not meant to be an exhaustive recitation of all the issues related to the draft deposition notice, but this should be sufficient to tee up some of the items that will need to be discussed.

Regards,
Colby

J. Colby Williams, Esq.
Campbell & Williams
Tel. 702.382.5222

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From: Terrie Maxfield <TMaxfield@sdfnvlaw.com>
Date: Wednesday, March 13, 2019 at 11:19 AM
To: Colby Williams <jcw@cwlawlv.com>
Cc: Phil Erwin <pre@cwlawlv.com>, "jschwarz@dickinson-wright.com" <jschwarz@dickinson-wright.com>, Dana Dwiggins <ddwiggins@sdfnvlaw.com>, "Jeffrey P. Luszeck" <jluszeck@sdfnvlaw.com>, "Tess E. Johnson" <tjohnson@sdfnvlaw.com>, Craig Friedel <cfriedel@sdfnvlaw.com>, "Erin L. Hansen" <ehansen@sdfnvlaw.com>, Allie Carnival <acarnival@sdfnvlaw.com>
Subject: Canarelli-Letter to Colby Williams from DAD re AWG PMK Deposition
Resent-From: Proofpoint Essentials <do-not-reply@proofpointessentials.com>
Resent-To: Colby Williams <jcw@cwlawlv.com>
Resent-Date: Wednesday, March 13, 2019 at 11:12 AM

Colby,

Please see attached letter of today's date and attachment thereto.

Thanks,

Terrie Maxfield
Legal Assistant to Craig D. Friedel and Tess E. Johnson
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