**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,

v.

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

Respondent,

and

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

Real Party in Interest.



Case No. 78883

District Court Case No. P-13-078912-T

**ANSWER TO PETITION FOR WRIT OF PROHIBITION OR MANDAMUS**

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## VERIFICATION

STATE OF NEVADA )
) ss:
COUNTY OF CLARK )

Under penalties of perjury, the undersigned declares that he or she is counsel for the real party in interest named in the foregoing petition and knows the contents thereof; that the pleading is true of his or her own knowledge, except as to those matters stated on information and belief, and that as to such matters he or she believes them to be true. This verification is made pursuant to NRS 15.010.

Dated this 15th day of July, 2019.

By: _____

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## NRAP 26.1 DISCLOSURE STATEMENT

The undersigned hereby certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

Real Party in Interest Scott Canarelli ("Scott") is an individual being represented and/or has been represented in this litigation by Dana A. Dwiggins, Alexander G. LeVeque, Jeffrey P. Luszeck, Tess E. Johnson and Craig D. Friedel of Solomon Dwiggins & Freer, Ltd.

Dated this 15th day of July, 2019.

By: Tess Johnson

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## ROUTING COUNTERSTATEMENT

Scott does not agree with Petitioners' Lawrence Canarelli ("Larry"), Heidi Canarelli ("Heidi"), and Frank Martin, Special Administrator of the Estate of Edward C. Lubbers ("Lubbers"), Routing Statement because he disputes that "[o]ne of the principal issues...is whether Nevada law permits a judicially created 'fiduciary exception' to the attorney-client privilege...or the statutory exceptions thereto."[1] Rather, Scott contends that the main issue is whether a privilege even applies under the circumstances provided herein. The issue of "fiduciary exception" only comes into play if this Court reverses the District Court's factual finding that there is insufficient evidence to demonstrate the subject documents were communicated to an attorney and that the documents at issue are thus protected by the attorney client privilege. Therefore, Scott does not agree that this matter should be assigned to the Supreme Court of the State of Nevada pursuant to NRAP 17(a)(11)-(12) because it is not a "[m]atter[] raising as a principal issue a question of first impression involving the United States or Nevada Constitutions or common law," or a "[m]atter[] raising as a principal issue a question of statewide public importance."

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1 *See* Petition for Writ of Prohibition or Mandamus ("Writ Petition") at p. v.

As such, Scott contends that this Writ Petition should be assigned to the Court of Appeals in accordance with NRAP 17(b)(13) as a "[p]retrial writ proceedings challenging discovery orders or orders resolving motions in limine."

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## INTRODUCTION

Petitioners have produced documents multiple times during discovery that harm their case and are now desperately seeking to claw them back. Petitioners have argued ad nauseam before both the Discovery Commissioner and the District Court that these records are subject to privilege, but have not been successful in taking back the entirety of one key document, RESP0013285 (the "Typed Notes").[2] Now, the Petitioners are trying to incentivize this Court to issue a writ by emphasizing a legal issue that, while still unaddressed by this Court, is an auxiliary matter. The issue before this Court is, ***first and foremost***, to determine whether the District Court erred in finding that certain documents disclosed by Petitioners are *not* protected by either the attorney-client privilege or the work product doctrine. Thus, there will be absolutely no need for this Court to analyze whether there is a valid exception to a privilege *unless the privilege actually applies* to the documents at issue.

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[2] The "Typed Notes" (1 PA 161 or 1 FUS 74) are a portion of the "Disputed Documents" that are currently before this Court. The Disputed Documents are split in two groups, the "Group 1 Notes," RESP0013824-13288 (1 PA 160-164 or 1 FUS 73-77) and the "Group 2 Notes," RESP078899-78900 (1 PA 166-167 or 1 FUS 79-80), as they were disclosed at different times. The Group 1 Notes are comprised of the Typed Notes and the "Handwritten Notes," RESP013284, 13286-13288 (1 PA 160, 162-164 or 1 FUS 73, 75-77). Citations to "FUS" are to Petitioners' Supplemental Sealed Appendix.

Indeed, Petitioners fail to acknowledge in their Writ Petition that both the Discovery Commissioner and the District Court were unable to definitively find the that documents were, in fact, protected by the attorney-client privilege. In affirming the Discovery Commissioner's findings, the District Court specifically stated that there was no way to tell if the documents were actually communicated to counsel. Self-serving speculations by Petitioners cannot be enough to satisfy the narrow constructions of privilege.

Even if Petitioners are able to persuade this Court to extend evidentiary protections over documents that fall well outside the bounds of attorney-client privilege, these documents are still subject to production under the fiduciary exception and the substantial need doctrine. Lubbers was the Family Trustee of the Trust at the time he authored the Disputed Documents and any retention of counsel at that time was in relation to administrative matters of the Trust. While Petitioners try to use litigation of this matter since June 2017 to color this Court's view of Scott and Lubbers' relationship in late 2013, the fact remains that Scott did not assert claims against Lubbers at that time. Lubbers further ultimately agreed to the relief sought by Scott's "Initial Petition."[3] Given the administrative nature of Lubbers' retention, the fiduciary exception warrants production of these documents.

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[3] "Initial Petition" refers to the Petition to Assume..., filed September 30, 2013.

Finally, there can be no doubt that Lubbers, who passed away over a year ago, was a material witness who Scott was never allowed to timely depose. The Disputed Documents may be the only "testimony" that Scott will be able to recover from Lubbers, as the statements contained therein constitute admissions of a party opponent.[4] In light of his death and the Petitioners' prior refusal to be forthcoming in discovery, there exists substantial need to disclosure of the Typed Notes because there is no way to recover the substantial equivalent of these records.

For the reasons stated in greater detail herein, Scott respectfully requests that this Court deny the Writ Petition.

## COUNTERSTATEMENT OF THE ISSUES

1. Whether the District Court abused its discretion and/or committed clear error by finding that, because there is not sufficient evidence to demonstrate the same were communicated to an attorney, the attorney-client privilege does not apply to a large portion of Lubbers' Typed and Handwritten Notes.

2. If this Court finds the attorney-client privilege applies, whether the "fiduciary exception" or NRS 49.115 applies under Nevada law.

3. Whether the District Court abused its discretion and/or committed clear error by finding that the work product doctrine applies to a large portion of

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[4] NRS 51.035(3).

Lubbers' Typed and Handwritten Notes because there is not sufficient evidence to demonstrate the same were prepared in anticipation of litigation.

4. Whether the District Court abused its discretion and/or committed clear error by finding that, because he is a material witness who passed prior to the timeframe the Court authorized Scott to conduct his deposition, there a substantial need for Lubbers' Typed and Handwritten Notes.

## COUNTERSTATEMENT OF THE FACTS

While NRAP 21 provides that a petition must state "the facts necessary to understand the issues presented by the petition,"[5] Petitioners' Statement of Facts gives an exceedingly pared-down history of the underlying action. It fails to provide the critical background of the basis for Scott's claims and the importance of the Disputed Documents thereto. For that reason, Scott hereby provides a Counterstatement for this Court's review.

### I. Prior to the Sale of the Trust's Interests in American West Entities.

The Trust previously held minority interests in certain entities that comprised, in part, the American West Group ("AWG"), a family enterprise that was, and is, run by Scott's father, Larry. Scott worked for the family business for a period of time, but in or around May 2012, he decided to resign to care for his family, including his three (3) very young children, as his wife was suffering from

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5 NRAP 21(a)(3)(D).

depression and substance abuse. In or around June 2012, the Canarellis began to deny Scott's distribution requests from the Trust. Upon information and belief, these denials were based upon the Canarellis' disapproval of Scott's decision to put his career on hold and be a stay-at-home father.[6]

At the time the distributions were denied, the Canarellis were the Family Trustees of the Trust. In these capacities, they had sole power over the Trust, including the discretion to make or deny distributions.[7] Conversely, Lubbers was then only acting as the Independent Trustee and, as such, had very limited authority and could not intercede the Canarellis' distribution decisions.[8]

In June 2012, Scott was ultimately forced to retain the law office of Solomon Dwiggins & Freer, Ltd. to combat the Canarellis' denial of distributions and increasing hostilities in an attempt to amicably resolve the Parties' differences.

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6 RA000132 ("We are not willing to continue financing your existence as it is today."). Citations to "RA" are to Real Party in Interest's Appendix to Answer to Petition for Writ of Prohibition or Mandamus.

7 RA000024, Sec. 5.01 ("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…").

8 RA000023, Sec. 4.02 (allowing the trust to be held in two trusts); RA000029, Sec. 6.09 (permitting the trust's termination if uneconomical); and *id.* at Sec. 6.10 (the power to postpone any principal distribution otherwise required to be made if, based on the grantor's overall intent, there is a compelling reason to do so.).

During almost a year of negotiations, Scott prepared a budget in which he requested approximately $12,500 in monthly cash distributions,[9] a modest sum considering the Trust's interests were sold less than a year later for over $25 million.[10]

### A. Scott Did Not Threaten Lubbers with Litigation in 2013; Petitioners Conflate Lubbers' Multiple Capacities to Fabricate an Adversarial Relationship Between Scott and Lubbers.

On November 14, 2012, Scott's counsel sent a letter to Lubbers who, at that time, was acting as the Canarellis' counsel and a conduit between them and Scott.[11] Indeed, the letter was addressed to Lubbers as an attorney at "Lubbers Law Group." The letter expressly provided that "the **Trustees** have denied and/or failed to act upon several of Scott's recent requests for distributions."[12] It is apparent that, given the Independent Trustee's limited authority under the Trust and the various non-trustee capacities Lubbers held at such time (and various other times), Scott's alleged "threat" to file a petition "to redress the present Trustees' unreasonable interpretation of the HEMS standard, to remove the Trustees, and to demand

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9 RA000141 – RA000143.

10 *See* Writ Petition, at p. 7.

11 2 PA 273-274. Upon information and belief, a substantial portion of Lubbers' legal practice at that time was devoted to AWG and/or the Canarellis.

12 2 PA 273 (Emphasis added). It is important to note that "Trustees" is defined in the Trust Agreement as Larry and Heidi Canarelli and "sometimes referred to as the 'Family Trustee.'" RA000020.

accountings for both Trusts"[13] was directed solely at the Canarellis, ***not Lubbers***.[14] Although Petitioners tout an AWG agenda that Lubbers purportedly prepared as proof that he anticipated litigation against himself,[15] said agenda does not indicate that Scott was threatening Lubbers personally or in his capacity as the Independent Trustee. Rather, based upon each Parties' respective capacities at such time, it is apparent that Lubbers prepared the agenda as Larry's counsel to advise him that Scott had threatened litigation against the Canarellis as Family Trustees.

## II. The Sale of the American West Entities Held by the Trust.

On May 31, 2013, a mere week after the Canarellis resigned as Family Trustees to avoid the apparent conflict of interest, Lubbers accepted the appointment[16] and sold *all* interests in the Trust (the "Sale") to either the "Siblings Trusts"[17] or SJA Acquisitions, LLC ("SJA"), an entity in which the Siblings Trusts

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13 2 PA 273.

14 Petitioners even concede that the "threat" was specifically "to remove Larry and Heidi as Family Trustees of the Trust." *See* Writ Petition at p. 7.

15 *See* Writ Petition, at p. 8.

16 2 PA 257, ll. 17-21.

17 To be consistent with the Writ Petition, "Siblings Trusts" refers to "identical irrevocable trusts" created for the benefit of Scott's three (3) siblings. *See* Writ Petition, at p. 6.

each hold equal membership interests.[18] Although Petitioners have previously labeled the Sale as a "very arms-length transaction,"[19] there is no question at that time that Larry was the Family Trustee for the Siblings Trusts and Cheryl Corley, the President of SJA, was an employee of AWG. Indeed, while Lubbers ultimately executed the "Purchase Agreement"[20] on behalf of the Trust, prior drafts prepared by Lubbers, as Larry's legal counsel, expressly state that Larry contemplated signing on behalf of the Trust, thereby acting on behalf of both the buyer and seller.[21]

## III. Subsequent to the Sale.

Despite Scott having legal representation for almost a year at the time of the Sale, the same was finalized without any notice to him or his counsel. As a result, on September 30, 2013, Scott filed the Initial Petition requesting Lubbers to: (1) provide an inventory; (2) provide an accounting; (3) conduct a valuation of the

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18 1 PA 20-38.

19 RA000065, l. 18.

20 "Purchase Agreement" refers to the written agreement wherein the Petitioners sold the Trust's interests. 1 PA 20-38.

21 1 PA 112-128.

"Purchase Price"[22] as expressly required under the Purchase Agreement;[23] and (4) to provide Scott with all information relating to the Purchase Agreement ("Requested Relief").[24] The Initial Petition was directed at Lubbers ***solely*** because he was the then-serving Family Trustee and Independent Trustee (as the Canarellis had resigned a week prior to the Sale).

On October 16, 2013, Lubbers filed a response to the Initial Petition, stating that he was "generally amenable" to Scott's requests subject to a few clarifications.[25] On December 2, 2013, Scott and Lubbers stipulated to the appointment of Stephen Nicolatus to value the interests previously held by the Trust.[26] Thereafter, in December 2014, Mr. Nicolatus provided his valuation based on the records that AWG provided to him and upon which he relied on the representations that the information was reasonably complete and accurate.[27]

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22 The term "Purchase Price," consistent with its use in the Purchase Agreement, refers to the purchase price for the Trust's prior assets.

23 1 PA 21, Sec. 3.

24 2 PA 269-270.

25 RA000053, ll. 10-21. The "clarifications" were questions on what information Scott was seeking by requesting an inventory and accounting, as of what date Scott was seeking the same and whether the District Court would independently appoint a valuator or if the Parties would meet and confer on the same. *Id.* at ll. 14-21.

26 RA000061 ll. 1-4, 19-25.

27 1 PA 103, ¶3.

In June 2017, following the termination of a tolling agreement that the Parties entered into, in part, for the purposes of reaching an agreement on the Purchase Price, Scott filed the "Surcharge Petition,"[28] asserting claims of breach of fiduciary duty against the Petitioners.[29]

### A. Petitioners' Purported Rationale for Entering the Purchase Agreement.

Petitioners previously represented that purported restrictions on distributions with the AWG line of credit "[would] make providing cash to Scott difficult"[30] and that the Trust's assets were sold "to insulate the Trust from the risks associated with the Trust's investments and to meet Scott's exorbitant cash demands."[31] During the course of litigation, however, Scott learned that these representations were not accurate. For instance, contrary to the claim that the Trust's interests were illiquid,[32] Petitioners' agent, Bob Evans, represented that he was "fully aware" of Scott's

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28 "Surcharge Petition" refers to the Petition to Surcharge Trustee..., filed June 27, 2017.

29 For the purposes of the proceedings before the District Court, Petitioners are referred to as the Respondents, as the matter is a probate proceeding. Scott, on the other hand, is referred to as the Petitioner.

30 1 PA 21, Sec. I.

31 RA000065, ll. 2-3.

32 RA000066, ll. 18-19.

financial situation (and the Trust's) and that Scott had the available resources to purchase ranch property in August 2012 in excess of $1.5 million.[33] Moreover, despite a provision in the Purchase Agreement that the Trust was precluded from receiving any cash distributions from the entities in which it held interests,[34] distributions were routinely made to the Trust and the Siblings Trusts.[35] In fact, during the period immediately preceding the Sale, the Trust received approximately $1.55 million in distributions but were thereafter reversed as a result of Petitioners' backdating the Purchase Agreement.[36] It was for these reasons, among several others, that Scott filed the "Supplemental Petition"[37] asserting additional claims, including but not limited to "fraud, fraudulent inducement, constructive fraud

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33 1 PA 129-131.

34 1 PA 20, Sec. D ("Seller [the Trust], along with the other borrowers (excluding Lawrence D. Canarelli and Heidi Canarelli), is precluded from receiving any cash distributions from any of the LLCs or corporations, including any distribution that would be attributable to Seller's ownership interests in the LLCs and the Corporations.").

35 1 PA 99, ¶21.

36 1 PA 134 (1 FUS 46). Although the Purchase Agreement was executed on May 31, 2013, the "Effective Date" was March 31, 2013.

37 "Supplemental Petition" refers to the Supplement to Petition to Surcharge..., filed May 18, 2018.

and/or negligent misrepresentation" regarding various aspects of the Sale and the Canarellis and Lubbers' conduct both before and after.[38]

**B. The Group 1 Notes.**

During litigation, Petitioners have disclosed certain documents (in some instances multiple times) that they later claim are subject to an applicable privilege.[39] Specifically, on June 5, 2018, almost six (6) months *after* they produced the Group 1 Notes, Petitioners' claimed that these records are protected by both the attorney-client privilege and the work product doctrine.[40] This Bates range was described as "Handwritten notes" and was represented to be part of Lubbers' hard file as Family Trustee.[41] The Group 1 Notes comprise three (3) handwritten pages, one of which has the date October 14, 2013 handwritten on it (the "Handwritten Notes") and one (1) typed page, namely RESP013285, which has the date October 14, 2013 handwritten in the margin (the "Typed Notes"). Petitioners' counsel stated in a declaration that Lubbers prepared the Typed Notes "[i]n anticipation of the call

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38 1 PA 89, ll. 11-16.

39 Indeed, Petititioners requested to clawback records several times before attempting to clawback the Disputed Documents. *See e.g.* 5 PA 950.

40 2 PA 182-184.

41 4 PA 694-697.

with attorneys Lee and Renwick."[42] Scott questions the same, however, because the declaring attorney, J. Colby Williams, was not Petitioners' counsel at that time and failed to set forth the basis of his "personal knowledge."[43]

On May 16, 2018, five (5) months *after* Petitioners produced the Group 1 Notes, Scott filed the Supplemental Petition attaching the Typed Notes as one of several exhibits. Almost three (3) weeks later, Petitioners sought to claw back the same on the basis that such notes were "clearly an attorney-client privileged and attorney work product-protected document" that were inadvertently produced.[44] Despite this contention, Petitioners produced the Typed Notes a second time on the same day they sought to claw back the same.[45] Contrary to Petitioners' illustrations that Scott's reference to the Typed Notes was an "improper use and unauthorized

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42 2 PA 249, ¶12. "Lee and Renwick" refers to attorneys David Lee and Charlene Renwick of the law firm Lee, Hernandez, Landrum & Garofalo.

43 Mr. Williams' firm filed a Substitution of Attorney on December 11, 2013.

44 1 PA 182-184.

45 Scott has previously outlined this and Petitioners' other reckless conduct with respect to discovery in the underlying pleadings. *See* 4 PA 629-630 and 4 PA 896-898 incorporated herein by reference.

disclosure,"[46] the Discovery Commissioner later noted that there was no obvious way to tell that these documents were subject to privilege.[47]

**C. The Group 2 Notes.**

Petitioners disclosed the Group 2 Notes in a supplemental production on April 6, 2018. These two (2) pages have the date December 19, 2013 written in the margin and appear to comprise Lubbers' handwritten notes from a meeting with Mr. Nicolatus (the stipulated business valuator), Mr. Evans, Scott and his counsel and Petitioners' counsel. Petitioners produced these pages within a larger document file, RESP078884 – RESP078932 (a total of 49 pages). Although Petitioners attempt to contrast Scott's conduct with the Group 1 Notes by stating he "did not seek to make unilateral use of the Group 2 Notes,"[48] the circumstances where entirely different. Scott's counsel contacted Petitioners' counsel following disclosure of the Group 2 Notes because it appeared to include several pages of attorneys' notes within the 49-page pdf file. Petitioners' counsel, Mr. Williams,

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46 *See* Writ Petition, at p. 9 n. 3.

47 3 PA 422, ll. 8-14 (Discovery Commissioner: "I'm just trying to understand, [Petitioners'] counsel, what did you all do to ensure -- did you just rely on the ESI protocol, well, they'll let us know? But how would they …know that? Because it's identified as, you know, you've produced it, but how would they know what it is?"); *see also* 3 PA 423, ll. 4-7 (Discovery Commissioner: "Well, how would they know?... Because you've not put a …you've produced them.").

48 *See* Writ Petition, at pp. 12-13.

confirmed that the file contained multiple attorneys' notes, ***including his own***, and advised that they would review the entire file to determine what specific documents should be clawed back. A few days later, Petitioners' counsel advised that the *entirety* of RESP078884 – RESP078932 would need to be clawed back as work product because the production included not only notes prepared by attorneys in this litigation but also notes authored by Lubbers "during the pendency of this action."[49] Due to the Parties' ongoing dispute as to whether the Disputed Documents are privileged, the Petitioners filed the Writ Petition for a final determination.

### D. Petitioners Blocked Scott's Efforts to Depose Lubbers Prior to His Death.

On or about September 28, 2017, after a hearing wherein the District Court suspended Lubbers as Family Trustee of the Trust,[50] Petitioners' counsel advised Scott's counsel, ***for the first time***, that Lubbers had been diagnosed with cancer and would need to resign. Based on this discussion, Scott's counsel was left with the impression that Lubbers, a material witness, was terminal and a deposition was

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49 3 PA 547, ll. 7-24.

50 RA000145, ll. 4-6 and11-13.

necessary in order to preserve his testimony.[51] Although Scott was not privy to the details regarding Lubbers' cancer diagnosis at that time, Lubbers later stated in a declaration executed on February 23, 2018 that he was diagnosed in September 2017 with Stage IIIB non-small cell lung cancer and that statistically "26% of patients diagnosed with [his] condition are alive five years from the date of diagnosis."[52]

Despite the seriousness of Lubbers' condition and Scott's efforts to depose him, Petitioners kept stalling and continuing his deposition. Scott's initial notice to depose Lubbers set his deposition for December 4, 2017, eleven days *before* the Parties were to produce their initial NRCP 16.1 disclosures. Logic would indicate that Scott would not have scheduled a material witness's deposition with little to no discovery, unless he sincerely believed that time was of the essence. Nevertheless, despite Scott's willingness to make all reasonable accommodations for Lubbers, Petitioners delayed the deposition for three (3) months. These multiple continuances ultimately led to Scott filing a motion to compel Lubbers' deposition,

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51 RA000173, ll. 6-7 (Ms. Dwiggins: "...I guess counsel and I have agreed to disagree, but we [Scott's counsel] believed it was terminal, either by direct statements, implication, but..."); *see also* RA000185 ll. 2-3 (Ms. Dwiggins: "I, obviously, was led to believe at a minimum that it was terminal.").

52 RA000166, ¶6.

which was denied, in part, based on Petitioners' representations that Lubbers was not terminal.[53]

Unfortunately, in spite of Petitioners' representations, Lubbers died on April 2, 2018, thereby forever precluding Scott from taking the deposition of a material witness in the underlying action.

## IV. Relevant Procedural Background.

As noted in the Writ Petition, the matter currently before this Court concerns various documents that Petitioners contend should be clawed back due to applicable protections. These matters have already gone before both the Discovery Commissioner and the District Court, who have made several observations and findings with respect to the Disputed Documents.

### A. The Hearing Before the Discovery Commissioner.

Because of the Parties' disputes with respect to the Disputed Documents, Scott filed a motion before the Discovery Commissioner seeking a determination as to any privilege asserted by Petitioners' counsel (pursuant to the ESI Protocol agreed to by the Parties). Throughout the August 29, 2018 hearing, the Discovery Commissioner could not nail down the circumstances under which the Group 1 Notes were prepared, noting on several occasions that some of the notes ***may*** or

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[53] RA000174, ll. 19-22. The Discovery Commissioner ultimately recommended that Lubbers' deposition be taken between April 20 and June 20. *Id.* at ll. 3-5.

***probably*** were prepared before, during or after a call Lubbers purportedly had with his counsel on October 14, 2013.

> I think they were ***probably contemporaneous*** or at least ***perhaps prepared*** immediately following the call and some of them ***may have been prepared in advance*** of the call to -- to set forth the areas that Mr. Lubbers wanted to discuss with his initial lawyer.[54]

The Discovery Commissioner further noted that she did not know whether the Group 1 Notes were even communicated to counsel.

> So Ms. Dwiggins raises an interesting issue, which is ***there's no indication that they were actually sent to the lawyer, or were they prepared contemporaneously with the phone call*** with the lawyer, were they in preparation of the phone call with the lawyer to address the petition? ***We don't know***.[55]

Instead of definitively concluding that a privilege applied and then proceeding to analyze whether there were any exceptions thereto, the Discovery Commissioner found that ***to the extent*** information is contained within an attorney-client privileged document, an exception applies.[56]

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54 3 PA 518, ll. 1-4.

55 3 PA 517, l. 22 – 3 PA 518, l. 1 (Emphasis added).

56 *See e.g.* 3 PA 606, ll. 20-24.

## B. The Hearing Before the District Court on the Objection to Report and Recommendation.

Both Parties subsequently objected to the "Report and Recommendation."[57] Despite previously representing that the Typed Notes were prepared in anticipation of a conference call with counsel (as referenced in Mr. Williams' declaration), Petitioners shifted their argument by asserting that the Typed Notes may instead be a memorialization of the call Lubbers had with Lee and Renwick.[58]

In the Writ Petition, Petitioners contend that the District Court "seemed reluctant" to protect the Typed Notes because there was no way to know if the attorneys were given the document.[59] Petitioners further contend that this is the wrong test because "there is no requirement that such notes actually be physically provided to counsel."[60] Although physical delivery is not an element to establish privilege, Petitioners' argument misdirects this Court from the actual issue with respect to these records: whether these documents were *actually communicated* to counsel.

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57 3 PA 490-614; 3 PA 615-740. "Report and Recommendation" refers to the Discovery Commissioner's Report and Recommendation that is the subject of the Writ Petition. 4 PA 662-674.

58 4 PA 804, ll. 9-10.

59 *See* Writ Petition, at p. 24.

60 *Id.* at p. 24 (citing *United States v. DeFonte*, 441 F.3d 92 (2d Cir. 2006)).

The District Court indeed noted that the Typed Notes were not physically provided to Lubbers' counsel. The findings, however, did not stop there as the District Court stated at several points during the hearing that it was an unsupported assumption that the Typed Notes were even communicated to counsel.

> Judge Sturman: But I don't know why we're assuming that it's part of an attorney-client communication at all. ***There was nothing to indicate that it is.***[61]
>
> Judge Sturman: I'm – so I'm not sure we should assume it is part of an attorney-client communication. ***That's an assumption we're making. And nobody can tell us that.***[62]
>
> Judge Sturman: I – I just view this page, [RESP013285] totally different from really how everybody else does. It's just – to me, ***there's just a lot of assumptions*** being made here that I don't think there's any evidence for. I have – ***there's nothing*** that tells me this – why this would be privileged at all.[63]
>
> Judge Sturman: And I'm – and I – so I guess my concern here is ***there's no way to tell if he ever actually talked to an attorney about any of this.***[64]

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61 5 PA 1006, ll. 9-12 (Emphasis added).

62 *Id.* at ll. 22-24 (Emphasis added).

63 5 PA 1009, ll. 8-12 (Emphasis added).

64 5 PA 1015, ll. 9-11 (Emphasis added).

Indeed, the Order entered by the District Court expressly states that the Discovery Commissioner's findings with respect to the Typed Notes "are ***based upon assumptions and a lack of evidence that any portion of the document was communicated to counsel.***"[65]

In the end, the District Court disagreed with the Discovery Commissioner's analysis but elected to uphold most of the Report and Recommendation because it overall agreed with the conclusions.[66] Of the Typed Notes, the District Court ***only*** found the top portion, which contained various questions and a handwritten notation, was ***potentially*** protected by the attorney-client privilege.[67] Notwithstanding, the only application of the fiduciary exception by the District Court related to small

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65 5 PA 1035, ll. 14-16 (Emphasis added).

66 5 PA 1008, ll. 22-24 (Judge Sturman: "I would just analyze it differently than she did. I don't necessarily think she's wrong in her analysis"); 5 PA 1018, ll. 3-7 (Judge Sturman: "So, in the end, other than, as I said, I think I slightly disagree with her on that first page, I don't otherwise disagree with her...So, I ***–I think for different reasons that she did maybe***, but I think she ended up in the right place ultimately.") (Emphasis added); 5 PA 1019, ll. 3-5 (Judge Sturman: "I would deny the objection because, although I might come to ***the same conclusion for a different reason, I think I come to the same conclusion as she does***.") (Emphasis added).

67 5 PA 1035, ll. 20-23; *see also* 5 PA 1017, ll. 10-25. (Judge Sturman: So, at this point then, I'm -- I am not going to change her analysis starting with the word "Scott" down to "first" because the -- the one handwritten word there could -- I believe ***could be interpreted*** as meaning that Mr. Lubbers did discuss this with counsel... So, in rereading this upper portion of the typewritten portion, I -- I think that, for no other reason, then that ***appears to be*** the kinds of questions that a trustee would ask upon being served with a petition, and ***it appears*** he got an answer to those questions.") (Emphasis added).

portion of the Handwritten Notes.[68] This small portion, however, does not include the material language in the Typed Notes that Petitioners are so desperately trying to protect.

## LEGAL ARGUMENT

### I. Standard of Review.

Unsurprisingly, Petitioners attempt to convince this Court that it should completely disregard the unfavorable findings and considerations of both the Discovery Commissioner and District Court by requesting a blanket *de novo* review as to all issues before this Court. Although Scott does not contest that a legal issue on the scope of the attorney-client privilege (*e.g.* the "fiduciary exception") should be reviewed *de novo*, he disputes such a broad review when the issues at hand are purely or predominantly factual. In such instances, this Court should give deference to the District Court's findings.

Petitioners contend that *de novo* is appropriate to review decisions as to the attorney-client privilege and mixed questions of law and fact.[69] However, reviewing a district court's decisions in such manner is only appropriate under Nevada law "where the determination, although based on factual conclusions,

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68 5 PA 1008, l. 2 – 1009, l.1 (Judge Sturman: "There is specific reference to fiduciary activity on [RESP013284] that are just purely administrative that would clearly fall within, for lack of a better term, what's called the fiduciary exception.").

69 *See* Writ Petition, at pp. 18-19.

***requires distinctively legal analysis***."[70] Even then, this Court "will give deference to the district court's findings of fact but will independently review whether those facts satisfy" the relevant legal standard.[71]

Scott's contentions regarding the Disputed Documents have little to do with the legal issues, namely the elements of the attorney-client privilege or what constitutes a "communication" with an attorney. Rather, the primary issue at hand is whether the District Court erred in its findings that there is "a lack of evidence that any portion of the Typed Notes was communicated to counsel" (the "Communication Determination").[72] Accordingly, given this is a factual determination, this Court generally "reviews the district court's findings of fact for

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[70] *Hernandez v. State*, 124 Nev. 639, 646, 188 P.3d 1126, 1131 (2008), abrogated on other grounds by *State v. Eighth Judicial Dist. Court*, 134 Nev., Adv. Op. 13, 412 P.3d 18, 22 (2018). Indeed, the only Nevada case cited by Petitioners in support of *de novo* review for mixed question of law and fact involved a review of a summary judgment motion that was granted based on issue preclusion. *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 480, 215 P.3d 709,717 (2009). This Court expressly noted that *de novo* review was appropriate under those specific circumstances of that case because "legal issues predominated."

[71] *Hernandez,* 124 Nev. at 646, 188 P.3d at 1131("As a mixed question of law and fact, we will give deference to the district court's findings of fact but will independently review whether those facts satisfy the legal standard of reasonable diligence").

[72] 5 PA 1035, ll. 15-16.

an abuse of discretion, and this Court will not set aside those findings 'unless they are clearly erroneous or not supported by substantial evidence.'"[73]

Even if the Communication Determination is considered a mixed question of law and fact, the District Court's analysis was "predominantly factual" in nature such that an abuse of discretion standard still applies. At the very least, this Court should give deference to the District Court's factual finding in determining whether the communication element of the attorney's client privilege is satisfied if it determines the *de novo* standard of review is appropriate.

Notwithstanding, Petitioners attempt to convince this Court to find that the Communication Determination is subject to *de novo* review by citing a Ninth Circuit case for the proposition that attorney-client privilege issues are mixed questions of law and fact subject to *de novo* review.[74] However, such case is distinguishable and, of course, non-controlling. In *Fontainbleau,* the federal court considered whether the merits of the appeal favored a stay of the underlying action. The predominate legal issue was ***whether the district court properly relied on***

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[73] *NOLM, LLC v. Cnty. of Clark*, 120 Nev. 736, 739, 100 P.3d 658, 660–61 (2004) (quoting *Sandy Valley Assocs. v. Sky Ranch Estate,* 117 Nev. 948, 954, 35 P.3d 964, 968 (2001)); *J.D. Constr. v. IBEX Int'l Grp.*, 126 Nev. 366, 380-81, 240 P.3d 1033, 1043 (2010) (holding that the Nevada Supreme Court "will not disturb the factual findings of a district court absent clear error.").

[74] *See* Writ Petition, at pp. 18-19 (citing *In re Fontainbleau Las Vegas Holdings, LLC*, No. 2:11-cv-00402-RLH, 2011 WL 1074125, at *3 (D. Nev. Mar. 18, 2011) and *In re Grand Jury Investigation*, 974 F.2d 1068, 1070 (9th Cir. 1992)).

***existing case law*** to conclude that the plaintiffs had waived privilege through their failure to timely respond to discovery after the bankruptcy court twice ordered them to do so.[75] Accordingly, the predominate issue in *Fontainbleau* was legal in nature, thereby warranting *de novo* review.

Moreover, other federal jurisdictions are in direct conflict with *Fontainbleau* and have expressly held that a "clear error"[76] standard applies where, as here, the appellate court is reviewing factual determinations made by the district court to determine the existence of an attorney-client privilege.[77] Indeed, the following

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[75] *Id.* at *3 ("The Court finds that Turnberry is not likely to succeed on the merits of its appeal. The Bankruptcy Court's finding that Turnberry had waived its privilege is clearly supported by the controlling case law... Therefore, the Bankruptcy Court was well within the law and its discretion to find such waiver.").

[76] Notably, Nevada case law tends to conflate the "abuse of discretion" and "clear error" standards such that there appears to be little to no practical distinction between the two. *See supra* note 73 (explaining that Nevada courts will not set aside a finding for "abuse of discretion" unless they are "clearly erroneous").

[77] *See, e.g.*, *Carmody v. Bd. of Trs. of Univ. of Ill.*, 893 F.3d 397, 405 (7th Cir. 2018) ("[w]e review findings of fact on a claim of attorney-client privilege for clear error."); *Lubbers v. Uncommon Prods., LLC*, 663 F.3d 6, 23 (1st Cir. 2011) ("The standard of review concerning a claim of privilege depends on the particular issue...[q]uestions of law are reviewed *de novo*, findings of fact for clear error, and evidentiary determinations for abuse of discretion."); *United States v. Edwards*, 303 F.3d 606, 618, 59 Fed. R. Evid. Serv. 1042 (5th Cir. 2002) ("Because the application of the attorney-client privilege is a fact question to be determined in light of the purpose of the privilege and guided by judicial precedents, we review the district court's finding for clear error only."); *United States v. Faltico*, 586 F.2d 1267, 1270 (8th Cir. 1978) ("We conclude that the findings of the district court on the issue of attorney-client privilege have substantial evidentiary support and are not clearly erroneous.").

standard of review articulated by the Fourth Circuit appears to be the most congruent with the current Nevada Supreme Court case law set forth above:

> We review attorney-client privilege determinations by district courts under a two-fold standard of review... If the district court's ruling below rests on findings of fact, we review for clear error... If, however, the district court's decision rests on legal principles, we apply the *de novo* standard of review.[78]

In the instant case, the District Court's analysis involved weighing the facts before it, namely, the purported date of the notes, the vague and self-serving declarations of Lubbers' prior counsel and the notes themselves to determine whether there was sufficient evidence to demonstrate the notes were ever communicated to an attorney. The Communication Determination made by the District Court lies squarely on the factual end of the spectrum and, therefore, should be reviewed under an "abuse of discretion" standard of review.

## II. The Attorney Client Privilege Should be Construed Narrowly.

Before this Court can consider whether "an important issue of law needs clarification"[79] (i.e. whether the "fiduciary exception" applies under Nevada law), this Court must first determine whether each of the Disputed Documents is even protected under the attorney-client privilege. The Nevada Supreme Court has

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[78] *Compare*, *Hawkins v. Stables*, 148 F.3d 379, 382 (4th Cir. 1998) *with Hernandez*, 124 Nev. at 646, 188 P.3d at 1131.

[79] *See* Writ Petition, at p. 18.

previously described the attorney-client privilege as "a long-standing privilege at common law that protects communications between attorneys and clients."[80] For such a protection to apply, the communications must be: (1) confidential; (2) between an attorney and client; and (3) for the purpose of facilitating the rendition of professional legal services.[81] Nevada caselaw has routinely stated that privileges, regardless of "***whether creatures of statute or the common law, should be interpreted and applied narrowly***."[82]

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80 *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct. In & For Cnty. of Clark*, 399 P.3d 334, 341 (Nev. 2017), *reh'g denied* (Sept. 28, 2017) (citing *Upjohn Co. v. United States,* 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981)).

81 NRS 49.095; *see also Wynn Resorts, Ltd.*, 399 P.3d at 341.

82 *Clark Cnty. Sch. Dist. v. Las Vegas Rev.-J.*, 134 Nev. Adv. Op. 84, 429 P.3d 313, 318 (2018) (quoting *DR Partners v. Bd. of Cnty. Com'rs of Clark Cnty.*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000) (Emphasis added); *see also Whitehead v. Nev. Comm'n on Jud. Discipline*, 110 Nev. 380, 415, 873 P.2d 946, 968 (1994); *Ashokan v. State, Dept. of Ins.*, 109 Nev. 662, 668, 856 P.2d 244, 247 (1993)(citing *United States v. Nixon,* 418 U.S. 683, 710, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039 (1974)) ("Privileges should be construed narrowly."); *see also McNair v. Eighth Jud. Dist. Ct. In & For Cnty. of Clark*, 110 Nev. 1285, 1289, 885 P.2d 576, 579 (1994) ([T]the burden is on McNair to establish that the requested information comes within the privilege."). It should be noted that Petitioners' own authorities state that the privilege must be "strictly construed." *Cencast Servs., L.P. v. United States*, 91 Fed.Cl 496, 502 (2010) (Citations omitted); *see also United States v. Jimenez*, 265 F. Supp.3d 1348 (S.D. Ala. 2017) (quoting *In re Grand Jury Matter No. 91-01386*, 969 F.2d 995, 997 (11th Cir. 1992) ("Yet the privilege is not all-inclusive and is, as a matter of law, construed narrowly so as not to exceed the means necessary to support the policy which it promotes.").

## III. There Is Not Sufficient Evidence to Establish the Attorney-Client Privilege; Petitioners Failed to Meet Their Burden of Proof.

Petitioners correctly concede that they have the burden of establishing each element of the attorney-client privilege.[83] Petitioners, however, attempt to package conjectural evidence and assumptions to prove the central element of the attorney-client privilege – that the subject information was ***actually communicated to an attorney***. As both the Discovery Commissioner and District Court determined there was no clear indication of a communication, this Court should reject the Petitioners' narrative that relies upon selective evidence.

### A. Communication is "Central to the Finding of Privilege."

NRS 49.095 only grants the attorney-client privilege to "confidential ***communications***."[84] Indeed, even the *DeFonte* case, which is so heavily relied upon by Petitioners, acknowledges that the fact that the notes ***were communicated*** by the client to the attorney has been "***[c]entral to the finding of privilege***" in many cases.[85]

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83 *See* Writ Petition, at p. 20 (citing *Ralls v. United States*, 52 F.3d 223, 225 (9th Cir. 1995)).

84 NRS 49.095 (Emphasis added).

85 *DeFonte*, 441 F.3d at 95 (referring to *Bernbach v. Timex Corp.*, 174 F.R.D. 9 (D. Conn. 1997)) and *Clark v. Buffalo Wire Works Co.*, 190 F.R.D. 93 (W.D.N.Y.1999) (Emphasis added). Petitioners have previously conceded the same. 4 PA 804 ll. 24-25 (citing *DeFonte*, 441 F.3d at 95-96) ("[T]he underlying policy of the attorney-client privilege is furthered ***so long as such information is actually communicated*** to the attorney.") (Emphasis added).

Such a requirement comported with the rule's language and the policies behind the privilege.[86]

> A rule that recognizes ***a privilege for <u>any</u> writing made with an eye toward legal representation <u>would be too broad</u>***. A rule that allows no privilege at all for such records would discourage clients from taking the reasonable step of preparing an outline to assist in a conversation with their attorney.[87]

Many jurisdictions have made similar rulings when deciding whether preparatory communications fall within the scope of attorney-client privilege.[88]

A key phrase when bestowing the attorney-client privilege on a client's notes is that they are "***<u>subsequently discussed</u> with one's counsel.***"[89] Although Petitioners correctly state that the Second Circuit reversed the lower court in *DeFonte*, it did not

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86 *DeFonte*, 441 F.3d at 95-96.

87 *Id.* at 96 (Emphasis added).

88 *See Holliday v. Extex*, 447 F.Supp.2d 1131 (Haw. 2006) (notes prepared by company's employee to assist counsel in defense of an action were not protected because the company "has not provided any information regarding how the document was transmitted to counsel."); *People v. Gutierrez*, 200 P.3d 847, 867-68 (Cal. 2009) (an inmate's documents were not privileged because "the intent to show a document to a lawyer does not transform a document into one covered by the attorney-client privilege."); *Duttle v. Bandler & Kass*, 127 F.R.D. 46, 52 (S.D. N.Y. 1989) (although it was evident that legal advice would later be sought concerning the issues discussed in the meeting notes, the court found that "discussions that anticipate a privileged communication are not themselves privileged.").

89 *DeFonte* at 96; *see also* Writ Petition, at p. 24-25.

do so based upon an incorrect finding with respect to communication.[90] Rather, the lower court's finding there was no privilege was based upon the grounds that Collazos "had no expectation of privacy in the contents of her cell."[91] As such, the case was remanded "to decide which of the writings contained in the journal fall within the scope of the privilege" consistent with the opinion.[92] The Second Circuit did not make a definitive finding on whether the outlines in Collazos' journals fell within the scope of privilege (i.e. whether it was communicated to counsel).

A case where the court did not apply protections to outlines or notes protected is *Graves v. Deutsche Bank Sec., Inc.* 2011 WL 721558 (S.D.N.Y. Feb. 10, 2011).[93] There, the plaintiff produced handwritten notes during discovery and subsequently sought to have them clawed back.[94] These notes were described by the plaintiff as documents "prepared after the events described, at the request of the attorney or attorneys he was seeking to retain or had retained," "prepared for the benefit of the counsel he expected to retain," and "prepared for the purpose of communication with

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90 *See* Writ Petition, at p. 24.

91 *DeFonte*, at 94.

92 *Id.* at 96.

93 Petitioners have cited to this case in prior briefing. 4 PA 804, 807.

94 *Graves*, 2011 WL 721558 at *1.

prospective and future counsel."[95] The *Graves* court subsequently held the notes would be privileged "***so long as the notes served as an outline for a communication with counsel***."[96] Despite plaintiff's deposition testimony that was consistent with his prior claims, the court stated that "[n]othing in the record indicates that the content of the plaintiff's handwritten notes served as a basis for any conversation that the plaintiff might have had with counsel" or even "that the content of his notes were orally communicated or discussed with his counsel."[97] For that reason, it found that the notes were not privileged.[98]

### B. Petitioners Provided No Viable Evidence to Show the Disputed Documents Were Actually Communicated to Counsel.

Similar to *Graves* and consistent with the District Court's findings, there is no indication that the Typed Notes were communicated, as an outline or otherwise, with Lubbers' then counsel. In support of the claim that there is "abundant other evidence to establish the application of the privilege," Petitioners list "the notes themselves," "the declarations of Lubbers' attorneys" and "the attorneys'

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95 *Id.*.

96 *Id.* (Emphasis added).

97 *Id.* at *2.

98 *Id.*

contemporaneous billing records."[99] Each of these documents, however, are vague at best and require this Court to draw unsupported conclusions and unreasonable inferences that Lubbers discussed all, or any portion, of the Typed Notes with his prior counsel during the October 14, 2013 telephone call. Petitioners' claim that circumstantial evidence is "sufficient to uphold a finding of privilege,"[100] however, improperly rely upon selective evidence rather than all of the evidence submitted to, and considered by, the Discovery Commissioner and District Court.

Specifically, the billing statement upon which Petitioners rely shows that the October 14 phone call lasted only about 19-24 minutes (0.4 hours) and discussed "responses to petitions."[101] Indeed, at the time of the call, there were three (3) petitions pending before the District Court relating to three (3) separate trusts that concern Scott.[102] The Handwritten Notes confirm that Lubbers discussed all three (3) trusts with Lee and Renwick during such call as he wrote one full page of notes on each petition and trust.

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99 *See* Writ Petition, at p. 21.

100 *Id.* at p. 26.

101 Respondents have further represented that multiple petitions were discussed during the call. *See* 2 PA 187-189 (stating that portions of the October 14, 2013 notes "correspond directly to sections of Scott Canarellis' ***petitions***.") (Emphasis added).

102 2 PA 287, ¶4.

In light of the complexity of the instant matter alone, it is almost unfathomable that Lubbers was able to discuss his responses to all three (3) petitions and the substance of the Typed Notes in less and 25 minutes.[103] This is further supported when one considers the Handwritten Notes alongside the Typed Notes. A cursory review of the content contained therein would show these documents do not coincide with each other. The Handwritten Notes appear to discuss general overviews for the each of the trusts, documents needed by counsel and a question relating to the Trust's administration.[104] The Typed Notes, on the other hand, discuss distributions to Scott and the circumstances of the Purchase Agreement.[105]

The attorneys' declarations also do not substantiate Petitioners' assumptions.[106] When discussing their conversations with Lubbers at around that time, Lee and Renwick both vaguely and identically state as follows:

> I recall Mr. Lubbers asking Mr. Lee and I several questions about his potential response to the petitions. I also recall Mr. Lubbers

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103 2 PA 357-360.

104 1 PA 160, 162 – 163 (1 FUS 73, 75-77).

105 1 PA 161 (1 FUS 74).

106 Petitioners previously stated that Scott has "no evidence to question the truthfulness" or doubt the veracity of Lee and Renwick's declarations. 4 PA 808-809. Scott, however, does not question either Lee or Renwick's credibility in executing the subject declarations; rather, he questions the Petitioners' assumptions that the Typed Notes must have been communicated based on prior counsels' vague statements and billing records based upon their memory of a telephone call almost five (5) years earlier.

> stating his views about several matters related to the petitions and potential strategies for defending against certain of the allegations contained therein.[107]

What is conspicuously missing from counsels' declarations, however, is whether they reviewed their own notes from the call or, for that matter, any portion of their case file beyond the retainer agreement and the billing records before submitting the declarations.

A case that Petitioners cite but is distinguishable from this matter is *United States v. Jimenez*, 265 F.Supp.3d 1348 (S.D. Ala. 2017). In that case, Jimenez's counsel advised the Government that there were potentially privileged communications within the several thousand emails that the Government had previously seized.[108] Among these documents were emails Jimenez had written and sent to himself and were "intended to be notes of topics he wanted to later discuss with his attorneys."[109] Unlike the circumstances here, the disputed emails in *Jimenez* were prepared "at his counsel's direction."[110] Jimenez's counsel further provided a

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107 2 PA 285, ¶8; *see also* 2 PA 288, ¶7.

108 265 F.Supp.3d at 1349.

109 *Id.* at 1349-50.

110 *Id.* at 1351.

declaration stating that ***he reviewed the disputed emails*** and that his defense strategy and discussions with his clients "***were driven by the contents of***" these emails.[111]

Quite simply, the evidence provided concerning the Disputed Documents does not warrant the logical leaps that Petitioners request of this Court. Other than the billing statements and sparse declarations, Petitioners have all but refused to provide information on par with what was provided in *Jimenez*. The Lee and Renwick declarations do not indicate if they have ever seen the Typed Notes or if they looked through their files or notes to determine if they ever discussed the subject matter therein with Lubbers. Petitioners' counsel avoided providing such information, instead asserting that they "can't have Mr. Lee come in and say, Ed Lubbers told me these five things. Because then that would be a waiver," or prior counsel cannot review the Group 1 Notes to assess if the content was discussed with Lubbers because documents cannot be used to refresh counsels' memory.[112] Such a claim is nothing more than an attempt to use the privilege as both a sword and a shield (i.e. using purportedly privileged communications to meet their burden of

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111 *Id.*

112 3 PA 386, l. 23 – 3 PA 387, l. 3.

proof while at the same time precluding further investigation into the claims based on that same privilege) which is prohibited under Nevada law.[113]

Courts have previously found that disclosing the subject matter of a privileged communication does not act as a waiver of the privilege.[114] In this case, Lee and Renwick could have stated they reviewed the notes and such notes are consistent with communications with Lubbers regarding distributions from the Trust or the rationale and timing of the Sale. They did not. Their vague statements do not provide any illumination as to the circumstances under which Lubbers authored the Typed Notes for a simple reason – they do not know. Such limited representations

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113 *See Molina v. State*, 120 Nev. 185, 87 P.3d 533 (2004) (noting that the Court would "not permit a defendant to use insufficient communication with his attorney as a sword to assert a claim of ineffective assistance of counsel, but then use a claim of attorney-client privilege as a shield to protect the content of his conversations with his attorney."); *see also Wardleigh v. Second Jud. Dist. Ct. In & For Cnty. of Washoe*, 111 Nev. 345, 354, 891 P.2d 1180, 1186 (1995) (describing waiver by implication as an instance "where a party seeks an advantage in litigation by revealing part of a privileged communication."); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156 (9th Cir. 1992) (citing *United States v. Bilzerian,* 926 F.2d 1285, 1292 (2d Cir.1991)) ("The privilege which protects attorney-client communications may not be used both as a sword and a shield.").

114 *See Wynn Resorts, Ltd.*, 399 P.3d at 346 (quoting *United States v. O'Malley,* 786 F.2d 786, 794 (7th Cir. 1986) ("[A] client does not waive his attorney-client privilege 'merely by disclosing a subject which he had discussed with his attorney' "; rather, "[i]n order to waive the privilege, the client must disclose the communication with the attorney itself."); *see also United States v. Wilson*, 2:09-CR-00011-RLH, 2013 WL 6389136, at *2 (D. Nev. Nov. 22, 2013) (citing *United States v. Ortland,* 109 F.3d 539, 543 (9th Cir. 1997) ("Generally, to waive the attorney-client privilege, the client must disclose the contents of a confidential communication.").

cannot be what this Court had in mind when it stated privileges must be narrowly construed.

Despite the lack of evidence demonstrating that the Typed Notes were "communicated," Petitioners expect this Court to simply assume it was so because "the notes reflect the types of things one would discuss with his/her attorney."[115] Such a finding, in and of itself, is speculative. This coupled with Lee and Renwick's ambiguous recollections of a five (5) year old call and the fact that Lubbers, himself, was an attorney fail to meet the heavy burden of proving the Typed Notes are privileged. For these reasons, this Court should affirm any findings that the Typed Notes are not protected by attorney-client privilege.

## IV. This Court Should Recognize a "Fiduciary Exception" to the Attorney-Client Privilege.

As previously mentioned, the Discovery Commissioner recommended that certain portions of the Disputed Documents be produced because, to the extent an attorney-client privilege applies, there is an applicable fiduciary exception. The District Court found the same exception applied to a certain portion of the Handwritten Notes and otherwise affirmed the Commissioner's conclusions albeit under a different analysis.[116] Despite Petitioners' attempts to convince this Court

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115 4 PA 666, ll. 1-2.

116 5 PA 1013, ll. 14-23, 5 PA 1015, ll. 2-11, 5 PA 1023, ll. 7-9, 5 PA 1035, ll. 14-19.

otherwise, it should recognize the "fiduciary exception," thereby upholding a trustee's substantive fiduciary duties to beneficiaries (including but not limited to the duty to inform) and precluding him from putting his own interests before that of a beneficiary.

**A. The Nevada Statutes on Privilege Are Not Exclusive.**

Petitioners spend a major portion of the Writ Petition discussing the statutory interpretation of NRS 49.095 and assert that this Court must follow the maxim *expression unius est exclusion alterius*.[117] However, the history of these and several other evidentiary statutes indicate that the Nevada Legislature did not intend for the evidentiary code to be exhaustive.

The Nevada cases Petitioners cite in support of their argument against the expansion of exceptions are not applicable to the evidentiary statutes. *Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. 484, 327 P.3d 518 (2014) concerned a conflict between constitutional and statutory provisions where the court found that the Minimum Wage Amendment enumerated exceptions which supersede and supplant the taxicab driver exception provided under NRS 608.250(2).[118] *Ramsey v. City of N. Las Vegas*, 133 Nev Adv. Op. 16, 392 P.3d 614 (2017) is also dissimilar to this action because it concerned exceptions to the constitutional provision on recalling

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117 *See* Writ Petition, at p. 27.

118 130 Nev. at 490, 327 P.3d at 522.

political officers.[119] Neither of these cases should pertain to this Court's analysis of Nevada's relevant evidentiary laws.

Several of Nevada's evidentiary statutes were codified in 1971. The Legislative Commission, under a directive, was ordered "to prepare a draft of a new evidence code" because the "[r]ules of evidence [were] scattered throughout" the NRS and "[i]t would be more convenient and serve a beneficial purpose to have all rules of evidence collectively enacted."[120] The Report of the Legislative Commission's Subcommittee for Study of an Evidence Code provides as follows regarding Nevada's laws of evidence (which includes provisions on the attorney-client privilege):

> It must be understood, finally, that any codification of the law of evidence ***is necessarily illustrative rather than definitive***. This is most clearly shown in the treatment of the exceptions to the hearsay rule, where two classes of exceptions are each defined in general terms and illustrated by specific examples without restricting the generality of the definitions...***The principle, however, underlies the entire draft.***
>
> ...
>
> The common situations can be treated, and a desirable uniformity among the courts thus secured, but ***the law must be recognized as free to grow and to adapt to situations unforeseen***, for this, as Mr. Justice Holmes wrote "is the peculiar boast and excellence

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119 392 P.3d at 626.

120 *See* LEGIS. COMM'N OF THE LEGIS. COUNSEL BUREAU, BULLETIN NO. 90 "A PROPOSED EVIDENCE CODE FOR THE STATE OF NEVADA" (1971).

> of the common law." (*Hurtado v. California,* 110 U.S. 516, 530).[121]

Petitioners previously argued that the exceptions to the social worker privilege, NRS 49.254, and the exceptions to the victim's advocate privilege, NRS 49.2549, are expressly drafted to be broader.[122] However, both statutes were enacted well after NRS 49.095; specifically in 1987 and 2003, respectively.

While Nevada has not resolved whether "a beneficiary is entitled to inspect any opinions of counsel the trustee procures in administering the trust,"[123] the legislative history provides that the codification of NRS 49.095 does not foreclose this Court from adopting the fiduciary exception.

### B. The Fiduciary Exception Considers a Trustee's Fiduciary Duties in Conjunction with an Applicable Privilege.

It is undisputed that a fiduciary has a duty of full disclosure to a beneficiary.[124] Encompassed within this duty is the obligation to provide the

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121 *Id.* at p. 8 (Emphasis added). Per the history of NRS 49.095, it was "taken without substantive change from Draft Federal Rule 5-03." *Id.* at p. 23.

122 5 PA 955, ll.7-10; and 5 PA 956, ll. 15-19.

123 *Marshal v. Eighth Jud. Dist. Ct. In & For Cnty. of Clark*, 128 Nev. 915, 381 P.3d 637 (2012) (unpublished) (quoting 3 Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher, *Scott and Ascher on Trusts* § 17.5, p. 1202 (5th ed.2007)).

124 NRS 165.180 ("This chapter does not abridge the power of any court of competent jurisdiction to require testamentary or nontestamentary trustees to file an inventory, to account, to exhibit the trust property, ***or to give beneficiaries***

beneficiaries with opinions given to the trustee to carry out its fiduciary duties during the administration of a trust.[125] The Nevada case cited by Petitioners does not consider this additional obligation simultaneously with relevant privilege statutes. In *State ex rel. Tidvall v. Eighth Jud. Dist. Ct. In & For Cnty. of Clark*, 91 Nev. 520, 539 P.2d 456 (1975), this Court found that the bank superintendent had an absolute right to exercise privilege against the disclosure of bank examination reports.[126] However, the relationship between the parties in *Tidvall* was not that of a trustee and beneficiary, but rather an alleged debtor and a bank superintendent who was a non-party to the action. The bank superintendent did not owe the debtor a separate duty, let alone a fiduciary duty. In contrast, Lubbers owed Scott fiduciary duties, including the duty of loyalty and the duty to disclose and furnish information to Scott. Consequently, Petitioners' reliance on the case law cited in the Writ Petition has no application to the issue presently before this Court.

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***information or the privilege of inspection of trust records and papers*** . . .") (Emphasis added).

125 George Gleason Bogert et al., *The Law of Trusts and Trustees* § 961 (2d ed. rev. 1983) (citing RESTATEMENT (SECOND) OF TRUSTS § 173). *See also* RESTATEMENT (THIRD) OF TRUSTS § 82 (2007) ("[A]dvice obtained in the trustee's fiduciary capacity concerning decisions or actions to be taken in the course of administering the trust is discoverable by a beneficiary to prevent breach of trust or enforce the beneficiary's rights).

126 91 Nev. at 525, 539 P.2d at 459.

Moreover, the common law recognizes an exception to privilege when a trustee obtains advice "***related to the exercise of fiduciary duties***."[127] Indeed, in many jurisdictions in which this question has arisen, courts have given the trustee's reporting duties precedence over the attorney-client privilege.[128] A case on point that was decided subsequent the 1971 evidence codification is *Riggs Nat'l Bank v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976). In *Riggs*, a trustee had a memorandum prepared on behalf of the trust in anticipation of tax litigation.[129] Thereafter, the beneficiaries filed a surcharge claim against the trustee concerning the same subject matter and sought the production of the same legal memorandum.[130] The trustee

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

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

129 355 A.2d. at 710.

130 *Id.*

asserted privilege on the grounds of attorney-client and work product privileges contending that the legal memorandum was the result of confidential communications between him and his attorneys for legal assistance on the potential litigation against a non-beneficiary.[131]

The court disagreed with the trustee and held that the legal memorandum was not protected by the attorney-client privilege. The court placed great emphasis on the fiduciary nature of the trustee-beneficiary relationship, stating as follows:

> As a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client in the sense that He is personally being served. And, the beneficiaries are not simply incidental beneficiaries who Chance to gain from the professional services rendered. The very intention of the communication is to aid the beneficiaries. ***The trustee here cannot subordinate the fiduciary obligations owed to the beneficiaries to their own private interests under the guise of attorney-client privilege.*** The policy preserving the full disclosure necessary in the trustee-beneficiary relationship is here ***ultimately more important than the protection of the trustees' confidence in the attorney for the trust.***[132]

Similar to the attorney-client privilege, the *Riggs* court also found that the work product doctrine did not preclude the memorandum's disclosure, holding that:

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

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131 *Id.*

132 *Id.* at 712-14 (Emphasis added).

> behalf and what was done in light of that opinion on their behalf.[133]

Accordingly, the *Riggs* court ordered the memorandum's production.[134]

Notwithstanding a trustee's fiduciary obligation of disclosure, Petitioners attempt to convince this Court to disregard the fiduciary exception because it is a facet of common law and Nevada's privileges are statutory.[135] Specifically, Petitioners' claim that the exclusion of the fiduciary exception under the statutory exceptions provided under NRS 49.115 means such an exception does not exist in Nevada as a matter of law. Petitioners' contention, however, is based upon a fundamental misunderstanding of the fiduciary exception. Although the courts have labeled this concept as an "exception," it is a misnomer. It is not an actual "exception" to the attorney-client privilege. Rather, the courts have held that the privilege **does not apply at all** vis-a-via a beneficiary when the Trustee retains an attorney to assist in his or her fiduciary obligations.[136] Indeed, the courts make such rulings on the notion that either: (1) the beneficiary is the real client; or (2) the

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133 *Id.* at 716.

134 *Id.*

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

advice is being sought for the benefit of the beneficiary.[137] Unlike an "exception" to the privilege, when applying the fiduciary exception, courts limit the disclosure to *only* the beneficiaries. In such instances, the privilege still exists vis-a-via third parties. Thus, the fiduciary exception is better described as a definition of who falls within the protected class rather than an actual exception to the same.

### C. The Factors in *Riggs* Weigh in Favor of Applying the Fiduciary Exception.

The *Riggs* court enunciated several factors to determine whether records in question should be allowed: (1) the purpose for which it was prepared; (2) the party or parties for whose benefit it was procured; and (3) what litigation was then pending or threatened.[138] All favor the fiduciary exception's application in this instant case.

As previously mentioned, At the time Lubbers conferred with Lee and Renwick on October 14, 2013, Scott had only filed the Initial Petition, which sought an inventory and accounting that the Canarellis previously denied, a valuation pursuant to the Purchase Agreement and information relating to the Sale. While the Initial Petition included allegations of potential wrongdoing, Scott previously

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137 *Riggs Nat. Bank of Washington, D.C.*, 355 A.2d at 711 ("[T]he ultimate or real clients were the beneficiaries of the trust, and the trustee... in his capacity as a fiduciary, was, or at least should have been, acting only on behalf of the beneficiaries in administering the trust.").

138 *Id.*

asserted and still maintains that the allegations ***were directed solely against the Canarellis during their tenure as Family Trustees***. Specifically, Scott alleged:

> 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***...
>
> 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]'***.
>
> ***...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.
>
> 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.[139]

Scott directed his requests at Lubbers ***solely*** because he was the only serving Family Trustee and Independent Trustee of the Trust at that time. In fact, Lubbers had only been the Family Trustee for about four (4) months at the time the Initial Petition was filed; therefore, he was not yet required to account for his tenure as the Family Trustee.

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[139] RA000005 – RA000007, ¶¶A.10, A.13, A.15 and A.20 (Emphasis added).

The two remaining factors also weigh in Scott's favor. Because there was no cause of action pending or even threatened in 2013, Lubbers' consultation with Lee Hernandez was for the purpose of administering the SCIT and responding to Scott's requests (i.e. an inventory and accounting, a valuation and all information relating to the Purchase Agreement). Each of these requests were purely administrative in nature and fell within the Canarellis' fiduciary obligations as the prior Family Trustees and Lubbers' fiduciary obligations as the then acting Family Trustee. For this reason, the consultation was for Scott's benefit, not for Lubbers' defense of his actions as Family Trustee. There were simply no claims made at such time for Lubbers to defend.

**D. The Statutory Exception Set Forth Under NRS 49.115.**

Irrespective of whether this Court adopts the fiduciary exception, there is still an applicable exception under Nevada statute. Pursuant to NRS 49.115, an exception to the statutory attorney-client privilege applies to matters of a common interest. The relevant statute provides as follows:

> There is no privilege under NRS 49.095 or 49.105:
> ...
> 1. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.[140]

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140 NRS 49.115(5).

The communication Lubbers may have had with counsel on or about October 14, 2013 falls squarely within this exception. The Initial Petition was not adversarial in nature and no claims were asserted against Lubbers. Any advice Lee Hernandez rendered directly related to the relief sought in the Initial Petition. As Scott's trustee, Lubbers was required to provide this information to Scott. Disclosure of this information is merely an administrative aspect of the Trust. This is further evidenced by the fact that Lubbers did not object to the relief sought in the Initial Petition, stating that he was "generally amenable to Petitioner's Prayer."[141] Moreover, Lubbers later entered a Stipulation and Order thereby clarifying certain provisions of the October 24, 2013 Order and agreeing to the retention of a valuator to determine a Purchase Price for the Purchased Entities.[142]

As such, as of October 2013, a common interest existed between Lubbers and Scott relating to Lubbers' administration of the SCIT and his duty to disclose information relating to the Purchase Agreement and the financial transactions of the Trust. Consequently, the exception enunciated under NRS 49.115(5) applies.

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141 RA000053, ll. 12-13.

142 RA000059 – RA000062.

## V. The Disputed Documents Are Not Protected by the Work Product Doctrine

Scott objected to the Discovery Commissioner's finding that Lubbers anticipated litigation at the time he prepared the Disputed Documents. He continues to do so here.[143]

With respect to the work product doctrine, Scott does not dispute that Nevada has adopted the "because of" test which states that "documents are prepared in anticipation of litigation when, given the surrounding circumstances, 'the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation.'"[144] Contrary to the Petitioners' assertions, Lubbers could not have anticipated litigation at the time that he prepared the Disputed Documents for the reasons set forth below.

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143 4 PA 638-645, Sec. III(C)-(D). Although Scott did not file his own application for a writ of mandamus, he still disputes these findings. Under NRS 34.170, a writ "shall be issued upon affidavit, on the application of the party beneficially interested." "the writ must be denied if the petitioner will gain no direct benefit from its issuance and suffer no direct detriment if it is denied." *Heller v. Legis. of State of Nev.*, 120 Nev. 456, 461, 93 P.3d 746, 749 (2004) (quoting *Waste Mgmt. v. Cnty. of Alameda,* 94 Cal.Rptr.2d 740, 747 (Cal. Ct. App. 2000)). Given Scott would not gain a direct benefit (i.e. the ability to use the Typed Notes in support of allegations pled in the Supplemental Petition), he did not file his own petition for a writ.

144 *Wynn Resorts, Ltd.*, 399 P.3d at 347–48 (Citations omitted). When determining whether the "because of" test has been met, the Court further adopted the "totality of circumstances" standard. *Id.*

### A. Petitioners Rely Upon Lubbers' Many Hats to Manufacture "Anticipation of Litigation"

For the work product to apply, "some remote prospect of litigation" is not sufficient.[145] In attempting to establish that the work product applies to the Disputed Documents, Petitioners assert that that Initial Petition "contained multiple adversarial allegations," including the hostility and falling out between Scott and his parents, the allegation that the Canarellis, as the former Family Trustees, breached their fiduciary duty and there was a conflict when entering the Purchase Agreement.[146] Petitioners essentially manipulate Lubbers' many capacities during this time period to portray threatened litigation against him.

As mentioned *supra*, the letter Scott sent to Lubbers at that time was in Lubbers' limited capacity as: (1) the Canarellis' legal counsel in their capacities as the Family Trustees; and (2) a liaison between the Canarellis and Scott. Indeed, the letter is even addressed to Lubbers' law firm. This letter was not a threat to Lubbers personally as he had no actual power as an Independent Trustee or as the Canarellis' counsel. The contention that Lubbers was threatened with litigation at this time would be akin to an attorney anticipating litigation against himself personally for his client's wrongdoing.

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145 *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 635 (D. Nev. 2013) (Citations omitted).

146 *See* Writ Petition, at pp. 36-37.

Even when Scott filed the Initial Petition, Lubbers still could not have anticipated litigation. The relief in the Initial Petition was limited to a request for an accounting and inventory (since the inception of the trust in 1998 through 2013), seeking a valuation pursuant to the terms of the Purchase Agreement and disclosure of information on the sale. As of September 2013, Lubbers had no obligation yet to furnish an accounting from June 2013 forward[147] and Lubbers responded to the Initial Petition stating he was in agreement to provide an accounting from 1998 through 2013, as well as obtain an appraisal and disclosure information on the sale. The conjecture surrounding what Lubbers ***might have anticipated*** at that time is not enough to meet the burden of proof here. Even under the abuse of discretion standard, the District Court erred in affirming this protection and finding that Lubbers' subjectively anticipated litigation against himself.

## VI. There Is Substantial Need to Produce the Disputed Documents.

Regardless of whether this Court agrees that the work product doctrine applies to the Disputed Documents, the Discovery Commissioner and District Court

147 RA000032, Sec. 6.15 ("The Trustees shall furnish annually to the current income beneficiary or beneficiaries a complete inventory of the properties then comprising the trust estate, together with an accounting showing all receipts and disbursements of principal and income of the trust estate.").

properly found that there was substantial need for the records to be produced. Indeed, under the law, a deceased witness often constitutes substantial need.[148]

Petitioners dispute there is substantial need for three (3) reasons, namely: (1) substantial need does not overcome any applicable attorney-client privilege;[149] (2) the Disputed Documents are not the substantial equivalent of the discovery Scott purports to need; and (3) Scott can obtain desired discovery through other means.

**A. The Disputed Documents Support Scott's Claims.**

Scott previously referred to a "laundry-list of issues" Lubbers could have testified to had Scott had the opportunity to depose him prior to his death.[150] While the list was admittedly broad, that is due to Scott's efforts to protect the content of the Disputed Documents while NRCP 2.34(e) relief was in effect. In prior briefing, Scott was more specific as to what the Disputed Documents stated and these

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148 2 Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 927 (5th ed. 2007) ("It is impossible to interview a deceased witness. Thus, a showing that a witness is deceased is usually sufficient to require the production of work-product materials. Circumstances where substantial need is found include deceased witnesses, even if protection would be accorded to interview memoranda and a questionnaire completed by still-living witnesses.").

149 As stated *supra*, Scott disputes that the attorney-client privilege applies to the Typed Notes.

150 *See* 4 PA 763, l. 21- 764, l. 3.

portions of his brief were ultimately redacted to maintain confidentiality.[151] It is disingenuous for Petitioners to now take advantage of EDCR 2.34(e) relief by asserting that the issues Scott identifies "extend[s] well-beyond the actual subject matter reflected in any of Lubbers' notes."[152]

**B. Depositions of Other Parties Does Not Rebut Substantial Need.**

Throughout the Parties' litigation of the Disputed Documents, Petitioners have routinely stated that Scott could depose other individuals, thereby obtaining "the 'substantial equivalent of the materials by other means.'"[153] However, Petitioners have failed to provide any support for the notion that the deposition testimony of another is the substantial equivalent for a material witness. In *In re W. States Wholesale Nat. Gas Antitrust Litig.*, No. 2:03-cv-01431-RCJ-PAL, 2016 WL 2593916 (D. Nev. May 5, 2016), *objections overruled*, 203CV01431RCJPAL, 2016 WL 3965185 (D. Nev. July 22, 2016), plaintiffs sought defendant's memorandum and documents containing facts discovered during its internal investigation.[154] The

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151 *See e.g.* 1 PA 150, ll. 6-12 (1 FUS 63); 1 PA 150, ll. 15-16 (1 FUS 63); 1 PA 155, ll. 3-14 (1 FUS 68); 1 PA 156, ll. 11-12 (1 FUS 69); 1 PA 156, ll. 17-18 (1 FUS 69); 1 PA 157, ll. 3-5 (1 FUS 70); 2 PA 322, ll. 6-16 (1 FUS 63); and 2 PA 341, ll. 6-7 (1 FUS 140).

152 *See* Writ Petition, at p. 42.

153 *Id.* at p. 42-43 (citing NRCP 26(b)(3)) (Emphasis added).

154 2016 WL 2593916 *1.

court ultimately determined that there was no substantial need as the defendant "disclosed the witnesses who were interviewed and produced the documents underlying the investigation conducted by its own outside counsel."[155] The plaintiffs would be able to obtain such discovery by deposing the witnesses who were previously interviewed.[156]

Unlike the party in *W. States Wholesale Nat. Gas Antitrust Litig.*, the Typed Notes are not a mere summary of other witnesses' testimony. Rather, Lubbers was a material witness and his passing has left an immeasurable hole in the underlying action. This information cannot simply be obtained through other individuals, such as Larry or Heidi, as Petitioners contend.[157] Scott has pending fraud claims against the Canarellis[158] and Petitioners have been less than forthcoming in discovery and otherwise have fought Scott on almost each and every request for relevant discovery. It is, therefore, not a stretch to presume Petitioners and/or their agents would not be forthcoming when deposed. Indeed, Scott has been forced to appear before both the Discovery Commissioner and the District Court on multiple occasions in relation to at least ten (10) motions to compel. In connection with the same, the Discovery

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155 *Id.* at *8.

156 *Id.*

157 *See* Writ Petition, at p. 42.

158 1 PA 88-136.

Commissioner and the District Court both have made note of their suspicions that Petitioners were not being forthcoming and using their various capacities to hide behind the disclosing relevant discovery, even going so far to say it appeared as if Petitioners were hiding something.

> Judge Sturman: And I can appreciate how, to, to Scott and his Counsel, this feels like just deliberately trying to use -- to hide behind the corporation to impede this litigation.[159]

> Discovery Commissioner: [discussing correspondence pertaining to drafts of the Purchase Agreement] I find that just so difficult to believe that that's it, without any e-mail communications or other communications back and forth, or notes or talking about it. Because that document or that had to be created from something. Somebody had to raise the issue … and talk about it in advance. And so there seems to me that there should definitely be supporting correspondence for that.[160]

> Judge Sturman: And why I'm so upset about it is because they're hiding behind a corporate entity. These are the individuals that's Scott's suing and they're hiding behind a corporate entity saying let's go over to Bankruptcy Court in the form of this corporate entity that's not a party here.[161]

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159 RA000177, ll. 18-20.

160 RA000180, ll. 16-24.

161 RA000183, l. 25 – RA000184, l. 4.

> Judge Sturman: [regarding the Canarellis' claim that they do not have business plans] Okay. That's kind of amazing to admit, but I guess … but, you know, if they've run this business this way, successfully, obviously, for a number of years, with literally no plans, then that's really rather remarkable. And kind of startling, and I don't -- you know, the market might kind of wonder about them.[162]

Perhaps the best evidence of their failure to act in good faith is Petitioners' own conduct in precluding Scott from deposing Lubbers. Despite numerous concessions to reschedule the deposition and a willingness to accommodate his illness, Petitioners refused to allow the deposition to proceed and, upon information and belief, modulated the seriousness of his condition when before the judiciary. Although Scott was aware that Lubbers had been diagnosed with cancer in September 2017, it was not until Petitioners filed their opposition to Scott's motion to compel Lubbers' deposition that the diagnosis was Stage IIIB lung cancer. Despite Lubbers' own admission that only one in four people survive the disease five (5) years after diagnosis, Petitioners continued to claim that his condition was not terminal and that he would likely be well enough for a deposition in several months. That, unfortunately, proved not to be the case.

It is for these reasons that the Discovery Commissioner and District Court properly found that Scott demonstrated substantial need, thereby warranting

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162 RA000188, l. 22 – RA000189, l. 3.

disclosure of the Typed Notes. This Court should affirm such findings and deny the Writ Petition in its entirety.

## CONCLUSION

As stated herein, Petitioners had ample opportunity to set forth sufficient evidence that the Typed Notes are protected by the attorney-client privilege. They did not. Instead, they rested almost entirely on the vague declarations of prior counsel, the billings statements showing a short call took place with respect to three (3) separate trusts and the self-serving declaration of an attorney who did not represent Lubbers at the time any of the Disputed Documents were even prepared. Petitioners were unable to convince both the Discovery Commissioner or the District Court regarding the same and are now trying to convince this Court to brush aside any prior findings, essentially giving them a third bite at the apple. This privilege is narrowly construed because it is a balance between a client receiving reasonably informed professional advice and limiting the obstruction of truth.[163] Petitioners should not be allowed to tilt this balance simply because they regret producing allegedly protected documents, not once but twice.

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[163] 1 Epstein at 11 ("The existence of the privileges is in constant tension with the proposition that the adversary process is designed to ferret out the truth and that any secrecy accorded by the law must be strictly construed lest the secrecy thwart the search for truth.").

Further, although this Court has not addressed whether the "fiduciary exception" applies under Nevada law, the nature of the "exception" warrants its inclusion. The legislative history plainly stated that the available exceptions to the attorney-client privilege were not definitive. A trustee undoubtedly has a duty to disclose information to his or her beneficiaries and this obligation should not be blocked by the attorney-client privilege. As here, Lubbers sought representation from Lee and Renwick to respond to a petition that sought accountings and information regarding the Sale, matters that fall well within a trustee's administrative duties.

Finally, the notion that a material witness's death does *not* constitute substantial need is simply baffling. Lubbers was the Family Trustee of the Trust at the time of the Sale and could have provided information on distributions and the Sale itself. Sadly, Scott was never permitted to depose him. Despite Petitioners' attempts to convince this Court that another party's testimony would constitute the substantial equivalent, Petitioners' constant efforts to hide the ball and obstruct discovery as well as Scott's pending fraud claims demonstrates, at the very least, concern that Petitioners or their agents will not be forthcoming during their deposition.

Therefore, Real Party in Interest Scott Canarelli respectfully requests that this Court deny Petitioners' Lawrence Canarelli, Heidi Canarelli, and Frank Martin,

Special Administrator of the Estate of Edward C. Lubbers Petition for Writ of Prohibition or Mandamus.

Dated this 15th day of July, 2019.

By: _____

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## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman type style.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and contains 13,771 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that the brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules

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of Appellate Procedure.

Dated this 15 day of July, 2019.

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## CERTIFICATE OF SERVICE

Pursuant to NRAP 5(b), I hereby certify that I am an employee of the law firm of Solomon Dwiggins & Freer, Ltd., and that on July 15, 2019, I filed a true and correct copy of the foregoing **ANSWER TO PETITION FOR WRIT OF PROHIBITION OR MANDAMUS**, with the Clerk of the Court through the Court's e-flex electronic filing system and notice will be sent electronically by the Court to the following:

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I further certify that a copy of the above-mentioned document will be served via U.S. Mail, postage prepaid, addressed to the above and as follows:

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

*Respondent*

DATED: July 15th 2019.

Terrie Maxfield
An Employee of Solomon Dwiggins & Freer