

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

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

Petitioner,

v.

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

Respondents,

And

LAWRENCE and HEIDI CANARELLI, and
FRANK MARTIN, Special Administrator of
the Estate of Edward C. Lubbers, Former
Trustees,

Real Party in Interest.

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Clerk of Supreme Court

Case No.

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

**PETITIONER'S
APPENDIX TO PETITION
FOR WRIT OF
MANDAMUS OR
PROHIBITION
(VOLUME 1 OF 7)**

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ESI PROTOCOL

Scott Lyle Graves Canarelli, by and through his attorneys, the law firm of Solomon Dwiggin & Freer, Ltd., and Lawrence Canarelli and Heidi Canarelli, former trustees of The Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998 (the "Trust"), and Edward Lubbers, former trustee of the Trust, by and through their attorneys, the law firm of Campbell & Williams and the law firm of Dickinson Wright, hereby stipulate to the following protocol as set forth for the production of Discoverable Documents and Electronically Stored Information ("ESI"). As used in this document, the term "Discoverable Documents and Electronically Stored Information" means discoverable documents and data existing in electronic form consistent with Nevada Rule of Civil Procedure 34(a), including by way of example and not by way of limitation (where relevant and not privileged) e-mail, calendars, word processing documents, spreadsheets, electronic slide presentations, databases, and other reasonably accessible electronically stored information relevant to the subject matter of this case pursuant to NRCP 26(b)(1).

Any party, any person or non-party producing or disclosing ESI pursuant to the terms set forth below is referred to as the "Producing Party," and the party or any person or non-party receiving or being given access to ESI is referred to as the "Receiving Party."

1. **Electronic Discovery.** Discovery of electronically stored information shall proceed in the following sequenced fashion:

(a) After receiving requests for document production, the Producing Party shall conduct a reasonable and good faith search for responsive documents and electronically stored information. A Producing Party will disclose to a Requesting Party the existence of those sources of electronically stored information that it believes contain responsive information and that are not reasonably accessible, and, to the extent necessary, the Parties will meet and confer concerning such information that has been identified as not reasonably accessible, but a Producing Party shall not have an obligation initially to search or produce from sources of electronically stored information that it identifies as not reasonably accessible because of undue

burden or cost in accordance with NRCP 26(b)(2) and no such obligation will exist unless and until a showing of good cause is made by the Requesting Party that such searches and production are necessary pursuant to NRCP 26(b)(2);

(b) The Producing Party retains its right to argue that certain sources of electronically stored information are not reasonably accessible because of undue burden or cost and further retain its right to seek cost shifting, as appropriate, in the event a Requesting Party demands and shows good cause supporting production from sources that were deemed by the Producing Party as not reasonably accessible; and

(c) On-site inspections of electronic media under NRCP 34(a) shall not be permitted, unless (i) otherwise agreed to by the parties; or (ii) absent exceptional circumstances where good cause and specific need have been demonstrated and it is so ordered by the Court.

2. **General Format of Production.** Subject to the provisions of paragraph 4, documents that originally existed in electronic form that are produced in these proceedings shall be produced in electronic image form (described below) in the manner provided herein. Documents that originally existed in paper form may be produced in an electronic image form in the manner provided herein, produced in a paper form or made available for initial examination as outlined in paragraph 3. Notwithstanding the foregoing provisions of this paragraph, the Producing Party reserves the right to request that an alternative format or method of production be used for certain documents and, in that event, the parties will meet and confer to discuss alternative production requirements, concerns, formats, methods and costs associated with same.

3. **Initial Examination of Records.** The Producing Party reserves the right to make certain sets of documents available for initial examination by the Requesting Party. The Requesting Party will select those documents it wishes to have produced. The Producing Party reserves the right to review and screen for privilege or protection any document that is selected for production. The Producing Party may withhold from that production any privileged document and identify the privileged document on a privilege log as outlined in paragraph 17 herein. The parties agree that the Producing Party is not waiving, and the Requesting Party will

not argue that the Producing Party has waived, any claims of attorney-client privilege, attorney work product protection, or any other privilege or protection, including protections enumerated in the Stipulated Confidentiality Agreement and Protective Order, by making documents available for examination. In the event the Producing Party becomes aware of an inadvertent disclosure/production of privileged information or a privileged document, the Stipulated Confidentiality Agreement and Protective Order (entered into concurrently herewith) shall govern.

4. Document Image Format. The Producing Party shall make good faith efforts to conform to the specifications in this section based on the party's technological capabilities. Document images produced in electronic form will be produced in single- or multi-page Tagged Image File Format ("TIFFs" or ".tiff format"). All images generated from hard copy documents shall be scanned as black and white images at-least 300 d.p.i. resolution and shall be saved and produced in a Group 4 compression single- or multi-page "TIFF" format and reflect the full and complete information contained on the original document. All images generated from native electronic documents shall be saved electronically (or "printed") in a Group 4 compression single-or multi-page "TIFF" image that reflects the full and complete information contained on the original document. All images generated from short message service (SMS) and multimedia messaging service (MMS) shall be produced in searchable .txt files or saved electronically (or "printed") in a Group 4 compression single-or multi-page "TIFF" image that reflects the full and complete information contained in the SMS or MMS. Documents that present imaging or other formatting problems shall be promptly identified and the parties shall meet and confer to attempt to resolve the problems.

Meta-data for documents generated from native electronic documents shall be provided as set forth in paragraph 11. The parties shall meet and confer to the extent reasonably necessary to facilitate the import and use of the produced materials with commercially available document management or litigation support software (such as Relativity or Concordance).

Notwithstanding the foregoing provisions of this paragraph, the parties recognize that as the case progresses it may be appropriate to allow the parties to produce certain files (*e.g.*, Excel, Lotus 123, or other spreadsheets; e-mails; reports from databases) in either (i) native electronic form or (ii) in a Group 4 compression single-or multi-page “TIFF” image, due to undue burden or cost for a Producing Party. Thus, the parties agree to meet and confer in such circumstances in order to reach a reasonable, alternative form of production.

5. **Document Unitization.** If hard copy documents are scanned into an electronic form, the unitization of the document and any attachments shall be maintained to the extent possible as it existed in the original when creating the image file. For documents that contain affixed notes, the pages will be scanned both with and without the notes and those pages will be treated as part of the same document. The relationship of documents in a document collection (*e.g.*, cover letter and enclosures, e-mail and attachments, binder containing multiple documents, or other documents where a parent-child relationship exists between the documents) shall be maintained through the scanning or conversion process.

6. **Color.** If an original document contains color, the Producing Party shall honor reasonable requests for either the production of an original document for inspection and copying or production of a color image of the document. The Requesting Party agrees to pay for reasonable costs associated with the color scanning and production of color images of documents already produced.

7. **Duplicates.** Where a party has more than one identical copy of an electronic document (*i.e.*, the documents are visually the same and contain the same electronic text), the Producing Party need only produce a single copy of that document. Furthermore, the parties are not required to produce multiple instances of an electronic message sent to multiple recipients, provided that all of the recipients (including “blind carbon copy” recipients) can be identified from documents or electronically stored information produced pursuant to this protocol and, as described in the remainder of this paragraph, and no information is missing from the electronic message. However, the foregoing is without prejudice to a party’s ability to seek production of

multiple instances of an electronic message sent to one or multiple recipients where relevant Attachments to e-mail shall be produced pursuant to this ESI Protocol.

8. **Bates Numbering.** Each page of a produced document shall have a legible, unique page identifier ("Bates Number") electronically "burned" onto the image at a location that does not unreasonably obliterate, conceal, or interfere with any information from the source document. No other legend or stamp will be placed on the document image other than a confidentiality legend (where applicable), redactions, the Bates Number identified above, and any other internal tracking number that the Producing Party may choose to use. The confidential legend shall be "burned" onto the document's image at a location that does not unreasonably obliterate or obscure any information from the source document.

9. **File Naming Conventions.** Each page image file shall be named with the unique Bates Number of the page of document, followed by the extension ".TIF" when available. In the event the Bates Number contains a symbol and/or character that cannot be included in a file name, the symbol and/or character will be omitted from the file name. Each native file shall retain its original file name, followed by the document-type extension (*e.g.*, ".DOC", ".PDF", ".XLS", ".HTM", etc.)

10. **Production Media.** A Producing Party shall produce documents that it produces in an electronic image form pursuant to paragraph 2 on CD-ROM, DVD, external hard drive, File Transfer Protocol ("FTP") or such other readily accessible computer or electronic media as the parties may hereafter agree upon (the "Production Media"). Information that shall be identified on the physical Production Media shall include: (1) a reference to this case number, (2) the Producing Party's name, and (3) the production date. The Bates Number range(s) of the materials on the Production Media shall also be contained on the Production Media, and where not practicable to do so may be provided in an accompanying letter. If the Producing Party encrypts or "locks" the production, the Producing Party shall include with the production an explanation of how to decrypt the files.

The Producing Party agrees to produce the electronic discovery in TIFF format per

paragraph 4, with OCR text files and the appropriate document breaks contained in a Relativity or Concordance .dat load file. Additionally, all pages will be scanned from paper using the standard Group IV, 2-Dimension single page Tagged Image File Format (TIFF), or JPEG when necessary for color photographs, or black and white pages requiring grey scale.

11. Meta-Data. To the extent a Producing Party extracts any of the below metadata fields associated with its production, the Producing Party will produce those metadata fields to the Requesting Party with a load file with each production:

- (a) Subject line
- (b) Sent date
- (c) From
- (d) Recipients(s)/To
- (e) Copyee(s)/CC
- (f) Blind copyee(s)/BCC
- (g) File Name
- (h) Author
- (i) Document Date
- (j) Document Type
- (k) File Extension
- (l) Last Modified Date
- (m) Track Changes
- (n) Starting Bates (Beginning document Bates number);
- (o) Ending Bates (Ending document Bates number);
- (p) Begin Attach (Beginning Bates number for any attachment or range of attachments);
- (q) End Attach (Ending Bates number for any attachment or range of attachments); and
- (r) Source (custodian/location from which document was collected).

Alternatively, a Producing Party can satisfy its obligations under subparagraphs p. and q. above by providing information sufficient to identify any attachments to the documents produced. The meta-data listed above shall be labeled and produced on Production Media and shall be provided in a manner suitable for importing the information in a commercially available document management or litigation support software such as Relativity or Concordance.

For avoidance of doubt, the obligation to produce metadata pursuant to this paragraph is triggered only where such metadata information is available and extraction would not constitute an undue burden or expense. Where such metadata information is not available and/or not capable of extraction without undue burden/expense, this paragraph shall not impose any obligations on any Producing Party.

12. Search Terms and Custodians. The parties shall meet and confer on search terms to be used for electronic documents to identify electronic documents that will be reviewed for possible production pursuant to this Document Production Protocol. The parties shall also meet and confer on custodians for electronic documents to identify electronic documents that will be reviewed for possible production pursuant to this Document Production Protocol.

13. Databases. To the extent a response to discovery requires production of discoverable electronic information contained in a database, the parties shall meet and confer about the extent of the Producing Party's obligations in relation to the same.

14. Production of Other Electronic Documents. This Order only applies to the production of the following categories of electronic documents: databases, e-mails (and any associated attachments), word processing documents, spreadsheets, presentations, and imaged documents (in any format). The parties shall meet and confer to agree on the form of any production of electronic documents other than the foregoing.

15. Exceptions to Protocol. If the forms of production allowed by this protocol present an undue burden or cost for a Producing Party, the parties shall meet and confer to agree on a reasonable, alternative form of production. Any party may file a motion to seek individual relief from this protocol.

16. **Use of Documents.** When documents produced in accordance with this Order are used in any Proceeding herein, including depositions, hearings, or trial, the image copy of documents as described in Paragraph 4 shall be the copy used. Extracted text shall not be used in any Proceeding as a substitute for the image of any document.

17. **Privilege Logs.** The Producing Parties will produce privilege logs in Excel, Word, or a similar electronic format that allows text searching and organization of data. A Producing Party will produce a privilege log within 120 days after the completion of its document production. The production of a privilege log for a custodian will be not less than 30 days prior to a custodian's deposition. The parties may modify the deadlines for production of privilege logs by agreement.

When there is a chain of privileged e-mails, the Producing Party must log each e-mail contained within the chain separately. Distinct claims of privilege within an email chain must be separately identified, and parties shall be required to produce any non-privileged emails or information contained within the chain. To the extent available, the privilege log will contain the following metadata fields: the custodian, document type (*e.g.*, email, Word document, Excel spreadsheet, etc.), date last modified or sent, file name, and, if an email or email chain, the sender(s) and the recipient(s) (to, cc, and bcc). The Producing Party will also include on the log control number, privilege description, and privilege assertion. If a party redacts a responsive document, that party will provide a redaction log identifying each document that contains a redaction and the reason for the redaction. The production of a privilege log for a custodian will be not less than ten (10) days prior to a custodian's deposition. The parties may modify the deadlines for production of privilege logs by agreement.

18. **Costs of Production.** The parties reserve the right to seek cost shifting as appropriate at a later time.

19. **Discovery and Admissibility.** Nothing in this Order shall be construed to affect the discoverability or admissibility of any document or data. All objections to the discoverability or admissibility of any document or data are preserved and may be asserted at any time.

20. **Confidentiality.** The confidentiality of ESI produced in accordance with the instant Document Production Protocol is governed by the Stipulated Confidentiality Agreement and Protective Order, entered into concurrently herewith.

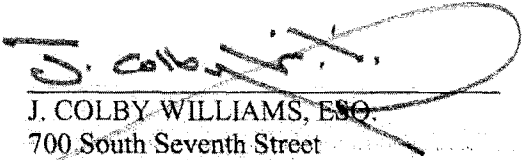
21. **Effect of Disclosure of Privileged Information.** The Receiving Party hereby agrees to promptly return, sequester, or destroy any Privileged Information disclosed or produced by Disclosing or Producing Party upon request by Disclosing or Producing Party regardless of whether the Receiving Party disputes the designation of Privileged Information. The Receiving Party may sequester (rather than return or destroy) such Privileged Information only if it contends that the information itself is not privileged or otherwise protected and it challenges the privilege designation, in which case it may only sequester the information until the claim of privilege or other protection is resolved. If any party disputes the privilege claim ("Objecting Party"), that Objecting Party shall object in writing by notifying the Producing Party of the dispute and the basis therefore. The parties thereafter shall meet and confer in good faith regarding the disputed claim within seven (7) court days after service of the written objection. In the event that the parties do not resolve their dispute, the Objecting Party may bring a motion for a determination of whether a privilege applies within ten (10) court days of the meet and confer session, but may only contest the asserted privileges on ground other than the inadvertent production of such document(s). In making such a motion, the Objecting Party shall not disclose the content of the document(s) at issue, but may refer to the information contained on the privilege log. Nothing herein shall relieve counsel from abiding by applicable ethical rules regarding inadvertent disclosure and discovery of inadvertently disclosed privileged or otherwise protected material. The failure of any party to provide notice or instructions under this Paragraph shall not constitute a waiver of, or estoppel as to, any claim of attorney-client privilege, attorney work product, or other ground for withholding production as to which the Disclosing or Producing Party would be entitled in this action.

22. **Inadvertent Production of Non-Discoverable Documents.** If a Producing Party inadvertently produces a document that contains no discoverable information, the Producing

Party may request in writing that the Receiving Party return the document, and the Receiving Party will return the document. A Producing Party may not request the return of a document pursuant to this section if the document contains any discoverable information.

Dated this 15th day of December, 2017

CAMPBELL & WILLIAMS


J. COLBY WILLIAMS, ESQ.
700 South Seventh Street
Las Vegas, Nevada 89101
Telephone: (702) 382-5222
Facsimile: (702) 382-0540

Dated this ___ day of December, 2017

DICKINSON WRIGHT PLLC

ELIZABETH BRICKFIELD, ESQ.
8363 West Sunset Road, Suite 200
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Telephone: (702) 550-4400
Facsimile: (702) 382-1661

*Attorneys for Edward Lubbers and Lawrence
and Heidi Canarelli, Former Trustees*

Dated this ___ day of December, 2017

SOLOMON DWIGGINS & FREER, LTD

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Attorneys for Petitioner, Scott Canarelli

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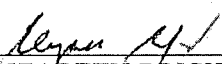
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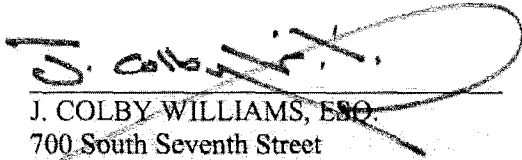
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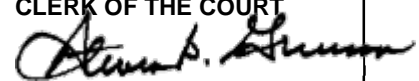
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Attorneys for Scott Canarelli

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of

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

Case No.: P-13-078912-T
Dept. No.: XXVI/Probate

Hearing Date:
Hearing Time:

Before the Discovery Commissioner

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

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

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

APP000014

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

7 This Motion is made and based on the Memorandum of Points and Authorities set forth
8 herein, all of the papers and pleadings already on file with the Court, and any oral argument that
9 the Court may entertain at the time of hearing.

10 DATED this 13 day of July, 2018.

11 SOLOMON DWIGGINS & FREER, LTD.

12 *Tess Johnson*

13 Dana A. Dwiggins (#7049)
14 Jeffrey P. Luszeck (#9619)
15 Tess E. Johnson (#13511)
16 9060 West Cheyenne Avenue
17 Las Vegas, Nevada 89129

18 *Attorneys for Scott Canarelli*

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DATED this 13 day of July, 2018.

Tess Shmon

Attorneys for Scott Canarelli

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SOLOMON DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS



A. RESP013284-RESP013288.

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

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

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

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

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

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

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



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

3 **B. RESP78899-RESP78900.**

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

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

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

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

21
22
23 ⁶ See June 18, 2018 letter from Mr. Williams attached hereto as **Exhibit 8**.

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

27 ⁸ The Bates range of RESP078899 – RESP078900 is not exact because these pages do not
28 have the Bates labels listed on the individual pages. The parties have also identified these pages as
pgs. 16-17 of the produced records. See **Exhibits 9, 10 and 11**.



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

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

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

DATED this 13 day of July, 2018.


TESS E. JOHNSON, ESQ.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Petitioner respectfully requests that this Court make a determination pursuant to the ESI Protocol⁹ entered into between the Parties as to the applicability of any privileges asserted by Respondents concerning records that have been disclosed in the above-named matter. Specifically, pursuant to the ESI Protocol, Respondents have sought to claw back several records produced during discovery, including but not limited to the records that are the subject of this Motion: RESP013284-RESP013288 and RESP78899-RESP78900 (collectively, "ESI Disputed Documents"). The ESI Disputed Documents are the only remaining documents that Petitioner has disagreed with Respondents' assertion of privilege or that the Parties were not able to reach a resolution on. Now that Petitioner has disputed Respondents' designation of the ESI Disputed Documents, the burden is on the Respondents to prove that such documents are indeed protected by either the attorney client privilege or attorney work product doctrine.

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

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

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

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

22 Documents identified as RESP78899-RESP78900 are notes of Lubbers taken during a
23 meeting with Stephen Nicolatus with Western Valuation Advisors, the stipulated business
24 valuator, in December, 2013("Nicolatus Meeting Notes"). The meeting was attending to by
25 Lubbers and his counsel, Petitioner and his counsel and Nicolatus. There were no confidential
26 communications during such meeting and the communications with Nicolatus were never
27 intended to be privileged in any manner. The Lubbers Notes and Nicolatus Meeting Notes are
28



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

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

8 **II. STATEMENT OF FACTS**

9 **A. RELEVANT BACKGROUND.**

10 This case is a trust matter concerning the administration of the SCIT and the conduct of its
11 Former Trustees, the Respondents. The SCIT is an irrevocable trust intended for Scott's use and
12 benefit as well as the benefit of his children. At the time of the creation on or about February 24,
13 1998, the Canarellis were named as Family Trustees of the SCIT and Corey Addock was named
14 as the Independent Trustee. In or around 2005, however, Addock resigned and Lubbers, a long-
15 time attorney and confidant of the Canarellis, accepted the appointment as the Independent
16 Trustee.

17 In or around 2012, Scott and his father became at odds based upon his decision to be a
18 stay-at-home dad. In retaliation, Larry, acting in capacity as the Family Trust of the SCIT,
19 decided to "cut off" distributions to Petitioner, resulting in Scott's retention of counsel in June,
20 2012.

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



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

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

B. PETITION TO ASSUME JURISDICTION.

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

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

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

¹² *Id.* at ¶23.

¹³ *Id.* at ¶26.

1 Agreement ("Initial Petition").¹⁴ The Initial Petition sought for Lubbers to: (1) provide an
2 inventory; (2) provide an accounting; (3) to conduct a valuation of the Purchase Price as expressly
3 required under the Purchase Agreement; and (4) to provide Petitioner with all information relating
4 to the Purchase Agreement. *The Initial Petition did not set forth any allegations or claims*
5 *against Lubbers (or the Canarellis for that matter) as it related to the Purchase Agreement or*
6 *the preparation of an accounting.* Indeed, Lubbers purportedly only became the Family Trustee
7 of the SCIT less than four (4) months prior to the filing of the Initial Petition and the period of
8 time for him to render an accounting had not yet arisen.

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

21 It was not until late 2015, when Petitioner provided Respondents' counsel with a DRAFT
22 copy of the Surcharge Petition that the potential of any claim against Lubbers was anticipated. In
23 response, the Parties entered into a Tolling Agreement in March, 2016, so as to allow the Parties
24 sufficient time to work together to resolve primarily issues concerning the Prior Accountings.
25 During this time, Petitioner believed, based upon statements made by Lubbers prior to the filing
26 of the Surcharge Petition in June, 2017, that Lubbers performed no due diligence on the Purchase
27

28 ¹⁴ See Initial Petition, filed September 30, 2013.

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

8 **C. ESI PROTOCOL.**

9 On or about December 12, 2017, the Parties executed the ESI Protocol.¹⁶ Along with
10 procedures for the production of electronically stored information, the ESI Protocol provides for
11 clawing back privileged documents. In the event a party disputes another's efforts to claw back
12 documents based on privilege, the party must do as follows:

13 If any party disputes the privilege claim ("Objecting Party"), that Objecting Party
14 shall object in writing by notifying the Producing Party of the Dispute and the
15 basis therefore. The parties thereafter shall meet and confer in good faith
16 regarding the disputed claim within seven (7) court days after service of the
17 written objection. In the event that the parties do not resolve their dispute, the
18 Objecting Party may bring a motion for a determination of whether a privilege
applies within ten (10) court days of the meet and confer session, but may only
contest the asserted privileges on ground other than the inadvertent production of
such document(s).¹⁷

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

23 ///

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

27 ¹⁶ See **Exhibit 3.**

28 ¹⁷ *Id.* at Section 21.

III. LEGAL ARGUMENT

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

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

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

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

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

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

²¹ *See Exhibit 4.*

²² *See Exhibit 10.*

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

B. THE ATTORNEY-CLIENT PRIVILEGE DOES NOT APPLY.

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

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

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

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

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

²⁵ See **Exhibit 6**.

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

6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED] The bottom line is that if Petitioner's counsel was
13 provided an opportunity to ask Lubbers questions on these issues during a deposition, the
14 foregoing facts would not be subject to protection based upon the attorney client privilege or work
15 product doctrine. [REDACTED]
16 [REDACTED]

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

19 To the extent the Typed Memo constitutes a memorialization of Lubbers' meeting with his
20 then counsel, the privilege still does not apply to the Lubbers Notes in their entirety because the
21 meeting was in the presence of at least one third party to which the privilege does not extend,
22 namely Larry and/or Evans. The attorney client privilege does not exist as to conversations held
23 in presence of third parties.²⁶ The handwritten notes expressly make notation of the fact that
24 Larry and Evans were in attendance with Lubbers' meeting with his attorney on October 14,
25 2013. At such time, the law firm Lee, Hernandez, Landrum, Garofalo & Blake, APC, only

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

1 appeared in this matter on behalf of Lubbers.²⁷ The engagement letter with the firm also
2 indicates that *only* Lubbers was the client. As Lubbers was the sole Family Trustee and
3 Independent Trustee of the SCIT at such time, there was absolutely no reason for Larry or Evans
4 to participate in such meeting. Not only did the Initial Petition not make allegations against either
5 Respondent for wrongdoing but no claims were asserted in the Initial Petition. Rather, it was a
6 simply straight forward petition that sought Lubbers to render an accounting, obtain a business
7 valuation pursuant to the Purchase Agreement and to further disclose all documents relating to the
8 sale. Neither Larry's nor Evans' participation was necessary in order for Lubbers to comply with

9 [REDACTED]
10 [REDACTED] Therefore, Larry and Evans are "third persons other
11 than those to whom disclosure is in furtherance of the rendition of professional legal services to
12 the client or those reasonably necessary for the transmission of the communication."²⁸ For this
13 reason alone, the participation of Larry and Evans in communications Lubbers had with his
14 counsel constitutes a waiver of the attorney client privilege. Accordingly, this Court should find
15 that the Lubbers Notes are discoverable for all purposes in this litigation.

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

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

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

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

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

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

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

16 **C. THE WORK PRODUCT DOCTRINE DOES NOT APPLY.**

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

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

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

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

litigation when ‘in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation.”³¹ The Ninth Circuit further discussed this test, stating as follows:

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

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

2. The Nicolatus Meeting Notes.

The Nicolatus Meeting Notes relate to a meeting Lubbers participated in with Nicolatus, Petitioner, Mark Solomon, Esq., Evans, Don Campbell, Esq., Hunter Campbell, Esq. and Colby Williams, Esq. in December, 2013.³⁴ As set forth in detail in Section II(B), at the time said meeting occurred Petitioner had only petitioned the Court for an accounting and valuation of the SCIT’s interests sold pursuant to the express terms of the Purchase Agreement. Petitioner lacked sufficient information as to the Purchase Agreement at the time the petitioner was filed and, therefore, absolutely no allegations of wrongful conduct or claims were asserted against either Lubbers or the Canarellis. Petitioner simply wanted information to which he was entitled to as a

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

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

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

³⁴ *See Exhibit 2.*



beneficiary of the trust and to which Lubbers not only had an obligation to provide but which Lubbers agreed to provide to Petitioner.

Given Nicolatus and third parties' attendance, this December, 2013 meeting was not controversial in any manner whatsoever and solely related to the neutral valuation of the Purchased Entities that Nicolatus was appointed to appraise. Consequently, in December, 2013, Lubbers was merely acting as the SCIT's Family Trustee and fulfilling his obligation under the Purchase Agreement to obtain an independent valuation.³⁵ These notes would have been created in a substantially similar form regardless of the prospect of litigation. For this reason, the work product doctrine does not apply.

3. The Lubbers Notes.

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

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

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

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

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



1 As set forth above, the Typed Notes merely contain facts that are not privileged or
2 otherwise protected. In light of the fact that Petitioner could have asked Lubbers questions during
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15 Petitioner, however, was precluded from conducting Lubbers deposition because of his
16 health, in part. As this Court is aware of the cause of Lubbers' death, the seriousness of Lubbers'
17 health condition was well known in October, 2017. For the sole purpose of preserving Lubbers'
18 testimony, Petitioner initially noticed Lubbers' deposition for December 4, 2017; however,
19 Respondents repeatedly continued his deposition based on his health condition. While Petitioner
20 and his counsel were cognizant of the fact that Lubbers was suffering from the side effects of
21 strenuous chemotherapy, Lubbers was a material witness and Petitioner was amenable to
22 providing any accommodation to Lubbers in order to allow him to be the most comfortable during
23

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



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

6 There exists substantial need as a result of these unfortunate circumstances; therefore,
7 warranting the disclosure of the Lubbers Notes, or, at a minimum, the Typed Memo. Lubbers
8 was a material witness in this case. He was the Trustee of the SCIT at the time of the sale and he
9 executed the Purchase Agreement on behalf of the SCIT. There is no other available means for
10 Petitioner to obtain Lubbers' testimony concerning the factual circumstances surrounding the

11 [REDACTED]
12 [REDACTED] Since Lubbers signed the Purchase Agreement (despite only being the
13 "Family Trustee" for seven (7) days prior to its execution), the reasons he ultimately signed the
14 Purchase Agreement are directly relevant to not only the claims asserted in the initial Surcharge
15 Petition but also the Supplemental Surcharge Petition. Such admissions by Lubbers is also
16 necessary for Petitioner to cross examine Larry and Evans on the reasons for entering into the

17 [REDACTED]
18 [REDACTED] Petitioner has absolutely no other means of obtaining such testimony, let
19 alone being "unable without undue hardship to obtain the substantial equivalent of the materials
20 by other means" as required under NRCP 26(b)(3).

21 Moreover, Respondents have not contended, and cannot contend based upon the
22 unavailability of Lubbers, that the Typed Memo was prepared at the request of an attorney.
23 Indeed, the Typed Memo appeared to be prepared before Lubbers initially met with and retained
24 an attorney. Indeed, Lubbers only initially met with an attorney on October 14, 2013 and signed
25 the engagement letter on October 17, 2013. Therefore, by definition, the Typed Memo was not
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1 prepared at the request of an attorney. Under such circumstances, the Typed Memo is not
2 privileged under NRCP(b)(3) and does not constitute work product.³⁹

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

11 **IV. CONCLUSION**

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

15 DATED this 13 day of July, 2018.

16 SOLOMON DWIGGINS & FREER, LTD.

17 
18 Dana A. Dwiggin (#7049)

19 Jeffrey P. Luszeck (#9619)

20 Tess E. Johnson (#13511)

21 9060 West Cheyenne Avenue

22 Las Vegas, Nevada 89129

23 Telephone No: (702) 853-5483

24 Attorneys for Scott Canarelli

25
26 ³⁹ See *Ballard*, 106 Nev. at 85; see also NRCP 26(b)(3) (stating that protected documents
27 include those prepared "by ... [the] other party's attorney, consultant, surety, indemnitor, insurer,
28 or agent"); see also *Goff v. Harrah's Operating Co., Inc.*, 240 F.R.D. 659, 660-61 (D.Nev.2007)
(applying a parallel federal rule).

CERTIFICATE OF SERVICE

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

Via:

- ☐ Hand Delivery
☐ U.S. Mail, Postage Prepaid
☐ Certified Mail, Receipt No.: _____
☐ Return Receipt Request
☒ E-Service through the Odyssey eFileNV/Nevada E-File and Serve System, as follows:

J. Colby Williams, Esq.
Campbell & Williams
700 S. Seventh Street
Las Vegas, NV 89101
Email: jcw@campbellandwilliams.com

Elizabeth Brickfield, Esq.
Var E. Lordahl, Esq.
Dickinson Wright, PLLC
8363 W. Sunset Road, Suite 200
Las Vegas, NV 89113
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vlordahl@dickinsonwright.com

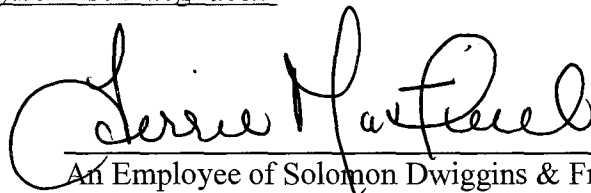

An Employee of Solomon Dwiggin & Freer, Ltd.

EXHIBIT 1

IN CAMERA

**BATES LABEL
RESP013284-RESP013288**

EXHIBIT 1

THIS DOCUMENT CONTAINED
INFORMATION DETERMINED TO BE
PRIVILEGED SUCH THAT ALL COPIES
IN THE POSSESSION OF PETITIONER
WERE DESTROYED IN ACCORDANCE
WITH PARAGRAPH 21 OF THE
PARTIES' ESI PROTOCOL DATED
DECEMBER 15, 2017

See Canarelli v. Eighth Judicial Dist. Court in & for County of Clark, 136 Nev.
Adv. Op. 29, 464 P.3d 114 (2020); 1 APP000001 – APP000013 (ESI Protocol)

EXHIBIT 2

IN CAMERA

**BATES LABEL
RESP78899-RESP78900**

EXHIBIT 2

THIS DOCUMENT CONTAINED
INFORMATION DETERMINED TO BE
PRIVILEGED SUCH THAT ALL COPIES
IN THE POSSESSION OF PETITIONER
WERE DESTROYED IN ACCORDANCE
WITH PARAGRAPH 21 OF THE
PARTIES' ESI PROTOCOL DATED
DECEMBER 15, 2017

See Canarelli v. Eighth Judicial Dist. Court in & for County of Clark, 136 Nev.
Adv. Op. 29, 464 P.3d 114 (2020); 1 APP000001 – APP000013 (ESI Protocol)

EXHIBIT 3

EXHIBIT 3

ESI PROTOCOL

Scott Lyle Graves Canarelli, by and through his attorneys, the law firm of Solomon Dwiggins & Freer, Ltd., and Lawrence Canarelli and Heidi Canarelli, former trustees of The Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998 (the "Trust"), and Edward Lubbers, former trustee of the Trust, by and through their attorneys, the law firm of Campbell & Williams and the law firm of Dickinson Wright, hereby stipulate to the following protocol as set forth for the production of Discoverable Documents and Electronically Stored Information ("ESI"). As used in this document, the term "Discoverable Documents and Electronically Stored Information" means discoverable documents and data existing in electronic form consistent with Nevada Rule of Civil Procedure 34(a), including by way of example and not by way of limitation (where relevant and not privileged) e-mail, calendars, word processing documents, spreadsheets, electronic slide presentations, databases, and other reasonably accessible electronically stored information relevant to the subject matter of this case pursuant to NRCP 26(b)(1).

Any party, any person or non-party producing or disclosing ESI pursuant to the terms set forth below is referred to as the "Producing Party," and the party or any person or non-party receiving or being given access to ESI is referred to as the "Receiving Party."

1. **Electronic Discovery.** Discovery of electronically stored information shall proceed in the following sequenced fashion:

(a) After receiving requests for document production, the Producing Party shall conduct a reasonable and good faith search for responsive documents and electronically stored information. A Producing Party will disclose to a Requesting Party the existence of those sources of electronically stored information that it believes contain responsive information and that are not reasonably accessible, and, to the extent necessary, the Parties will meet and confer concerning such information that has been identified as not reasonably accessible, but a Producing Party shall not have an obligation initially to search or produce from sources of electronically stored information that it identifies as not reasonably accessible because of undue

burden or cost in accordance with NRCP 26(b)(2) and no such obligation will exist unless and until a showing of good cause is made by the Requesting Party that such searches and production are necessary pursuant to NRCP 26(b)(2);

(b) The Producing Party retains its right to argue that certain sources of electronically stored information are not reasonably accessible because of undue burden or cost and further retain its right to seek cost shifting, as appropriate, in the event a Requesting Party demands and shows good cause supporting production from sources that were deemed by the Producing Party as not reasonably accessible; and

(c) On-site inspections of electronic media under NRCP 34(a) shall not be permitted, unless (i) otherwise agreed to by the parties; or (ii) absent exceptional circumstances where good cause and specific need have been demonstrated and it is so ordered by the Court.

2. **General Format of Production.** Subject to the provisions of paragraph 4, documents that originally existed in electronic form that are produced in these proceedings shall be produced in electronic image form (described below) in the manner provided herein. Documents that originally existed in paper form may be produced in an electronic image form in the manner provided herein, produced in a paper form or made available for initial examination as outlined in paragraph 3. Notwithstanding the foregoing provisions of this paragraph, the Producing Party reserves the right to request that an alternative format or method of production be used for certain documents and, in that event, the parties will meet and confer to discuss alternative production requirements, concerns, formats, methods and costs associated with same.

3. **Initial Examination of Records.** The Producing Party reserves the right to make certain sets of documents available for initial examination by the Requesting Party. The Requesting Party will select those documents it wishes to have produced. The Producing Party reserves the right to review and screen for privilege or protection any document that is selected for production. The Producing Party may withhold from that production any privileged document and identify the privileged document on a privilege log as outlined in paragraph 17 herein. The parties agree that the Producing Party is not waiving, and the Requesting Party will

not argue that the Producing Party has waived, any claims of attorney-client privilege, attorney work product protection, or any other privilege or protection, including protections enumerated in the Stipulated Confidentiality Agreement and Protective Order, by making documents available for examination. In the event the Producing Party becomes aware of an inadvertent disclosure/production of privileged information or a privileged document, the Stipulated Confidentiality Agreement and Protective Order (entered into concurrently herewith) shall govern.

4. **Document Image Format.** The Producing Party shall make good faith efforts to conform to the specifications in this section based on the party's technological capabilities. Document images produced in electronic form will be produced in single- or multi-page Tagged Image File Format ("TIFFs" or ".tiff format"). All images generated from hard copy documents shall be scanned as black and white images at-least 300 d.p.i. resolution and shall be saved and produced in a Group 4 compression single- or multi-page "TIFF" format and reflect the full and complete information contained on the original document. All images generated from native electronic documents shall be saved electronically (or "printed") in a Group 4 compression single-or multi-page "TIFF" image that reflects the full and complete information contained on the original document. All images generated from short message service (SMS) and multimedia messaging service (MMS) shall be produced in searchable .txt files or saved electronically (or "printed") in a Group 4 compression single-or multi-page "TIFF" image that reflects the full and complete information contained in the SMS or MMS. Documents that present imaging or other formatting problems shall be promptly identified and the parties shall meet and confer to attempt to resolve the problems.

Meta-data for documents generated from native electronic documents shall be provided as set forth in paragraph 11. The parties shall meet and confer to the extent reasonably necessary to facilitate the import and use of the produced materials with commercially available document management or litigation support software (such as Relativity or Concordance).

Notwithstanding the foregoing provisions of this paragraph, the parties recognize that as the case progresses it may be appropriate to allow the parties to produce certain files (*e.g.*, Excel, Lotus 123, or other spreadsheets; e-mails; reports from databases) in either (i) native electronic form or (ii) in a Group 4 compression single-or multi-page "TIFF" image, due to undue burden or cost for a Producing Party. Thus, the parties agree to meet and confer in such circumstances in order to reach a reasonable, alternative form of production.

5. **Document Unitization.** If hard copy documents are scanned into an electronic form, the unitization of the document and any attachments shall be maintained to the extent possible as it existed in the original when creating the image file. For documents that contain affixed notes, the pages will be scanned both with and without the notes and those pages will be treated as part of the same document. The relationship of documents in a document collection (*e.g.*, cover letter and enclosures, e-mail and attachments, binder containing multiple documents, or other documents where a parent-child relationship exists between the documents) shall be maintained through the scanning or conversion process.

6. **Color.** If an original document contains color, the Producing Party shall honor reasonable requests for either the production of an original document for inspection and copying or production of a color image of the document. The Requesting Party agrees to pay for reasonable costs associated with the color scanning and production of color images of documents already produced.

7. **Duplicates.** Where a party has more than one identical copy of an electronic document (*i.e.*, the documents are visually the same and contain the same electronic text), the Producing Party need only produce a single copy of that document. Furthermore, the parties are not required to produce multiple instances of an electronic message sent to multiple recipients, provided that all of the recipients (including "blind carbon copy" recipients) can be identified from documents or electronically stored information produced pursuant to this protocol and, as described in the remainder of this paragraph, and no information is missing from the electronic message. However, the foregoing is without prejudice to a party's ability to seek production of

multiple instances of an electronic message sent to one or multiple recipients where relevant Attachments to e-mail shall be produced pursuant to this ESI Protocol.

8. **Bates Numbering.** Each page of a produced document shall have a legible, unique page identifier ("Bates Number") electronically "burned" onto the image at a location that does not unreasonably obliterate, conceal, or interfere with any information from the source document. No other legend or stamp will be placed on the document image other than a confidentiality legend (where applicable), redactions, the Bates Number identified above, and any other internal tracking number that the Producing Party may choose to use. The confidentiality legend shall be "burned" onto the document's image at a location that does not unreasonably obliterate or obscure any information from the source document.

9. **File Naming Conventions.** Each page image file shall be named with the unique Bates Number of the page of document, followed by the extension ".TIF" when available. In the event the Bates Number contains a symbol and/or character that cannot be included in a file name, the symbol and/or character will be omitted from the file name. Each native file shall retain its original file name, followed by the document-type extension (e.g., ".DOC", ".PDF", ".XLS", ".HTM", etc.)

10. **Production Media.** A Producing Party shall produce documents that it produces in an electronic image form pursuant to paragraph 2 on CD-ROM, DVD, external hard drive, File Transfer Protocol ("FTP") or such other readily accessible computer or electronic media as the parties may hereafter agree upon (the "Production Media"). Information that shall be identified on the physical Production Media shall include: (1) a reference to this case number, (2) the Producing Party's name, and (3) the production date. The Bates Number range(s) of the materials on the Production Media shall also be contained on the Production Media, and where not practicable to do so may be provided in an accompanying letter. If the Producing Party encrypts or "locks" the production, the Producing Party shall include with the production an explanation of how to decrypt the files.

The Producing Party agrees to produce the electronic discovery in TIFF format per

paragraph 4, with OCR text files and the appropriate document breaks contained in a Relativity or Concordance .dat load file. Additionally, all pages will be scanned from paper using the standard Group IV, 2-Dimension single page Tagged Image File Format (TIFF), or JPEG when necessary for color photographs, or black and white pages requiring grey scale.

11. **Meta-Data**. To the extent a Producing Party extracts any of the below metadata fields associated with its production, the Producing Party will produce those metadata fields to the Requesting Party with a load file with each production:

- (a) Subject line
- (b) Sent date
- (c) From
- (d) Recipients(s)/To
- (e) Copyee(s)/CC
- (f) Blind copyee(s)/BCC
- (g) File Name
- (h) Author
- (i) Document Date
- (j) Document Type
- (k) File Extension
- (l) Last Modified Date
- (m) Track Changes
- (n) Starting Bates (Beginning document Bates number);
- (o) Ending Bates (Ending document Bates number);
- (p) Begin Attach (Beginning Bates number for any attachment or range of attachments);
- (q) End Attach (Ending Bates number for any attachment or range of attachments); and
- (r) Source (custodian/location from which document was collected).

Alternatively, a Producing Party can satisfy its obligations under subparagraphs p. and q. above by providing information sufficient to identify any attachments to the documents produced. The meta-data listed above shall be labeled and produced on Production Media and shall be provided in a manner suitable for importing the information in a commercially available document management or litigation support software such as Relativity or Concordance.

For avoidance of doubt, the obligation to produce metadata pursuant to this paragraph is triggered only where such metadata information is available and extraction would not constitute an undue burden or expense. Where such metadata information is not available and/or not capable of extraction without undue burden/expense, this paragraph shall not impose any obligations on any Producing Party.

12. Search Terms and Custodians. The parties shall meet and confer on search terms to be used for electronic documents to identify electronic documents that will be reviewed for possible production pursuant to this Document Production Protocol. The parties shall also meet and confer on custodians for electronic documents to identify electronic documents that will be reviewed for possible production pursuant to this Document Production Protocol.

13. Databases. To the extent a response to discovery requires production of discoverable electronic information contained in a database, the parties shall meet and confer about the extent of the Producing Party's obligations in relation to the same.

14. Production of Other Electronic Documents. This Order only applies to the production of the following categories of electronic documents: databases, e-mails (and any associated attachments), word processing documents, spreadsheets, presentations, and imaged documents (in any format). The parties shall meet and confer to agree on the form of any production of electronic documents other than the foregoing.

15. Exceptions to Protocol. If the forms of production allowed by this protocol present an undue burden or cost for a Producing Party, the parties shall meet and confer to agree on a reasonable, alternative form of production. Any party may file a motion to seek individual relief from this protocol.

16. **Use of Documents.** When documents produced in accordance with this Order are used in any Proceeding herein, including depositions, hearings, or trial, the image copy of documents as described in Paragraph 4 shall be the copy used. Extracted text shall not be used in any Proceeding as a substitute for the image of any document.

17. **Privilege Logs.** The Producing Parties will produce privilege logs in Excel, Word, or a similar electronic format that allows text searching and organization of data. A Producing Party will produce a privilege log within 120 days after the completion of its document production. The production of a privilege log for a custodian will be not less than 30 days prior to a custodian's deposition. The parties may modify the deadlines for production of privilege logs by agreement.

When there is a chain of privileged e-mails, the Producing Party must log each e-mail contained within the chain separately. Distinct claims of privilege within an email chain must be separately identified, and parties shall be required to produce any non-privileged emails or information contained within the chain. To the extent available, the privilege log will contain the following metadata fields: the custodian, document type (*e.g.*, email, Word document, Excel spreadsheet, etc.), date last modified or sent, file name, and, if an email or email chain, the sender(s) and the recipient(s) (to, cc, and bcc). The Producing Party will also include on the log control number, privilege description, and privilege assertion. If a party redacts a responsive document, that party will provide a redaction log identifying each document that contains a redaction and the reason for the redaction. The production of a privilege log for a custodian will be not less than ten (10) days prior to a custodian's deposition. The parties may modify the deadlines for production of privilege logs by agreement.

18. **Costs of Production.** The parties reserve the right to seek cost shifting as appropriate at a later time.

19. **Discovery and Admissibility.** Nothing in this Order shall be construed to affect the discoverability or admissibility of any document or data. All objections to the discoverability or admissibility of any document or data are preserved and may be asserted at any time.

20. **Confidentiality.** The confidentiality of ESI produced in accordance with the instant Document Production Protocol is governed by the Stipulated Confidentiality Agreement and Protective Order, entered into concurrently herewith.

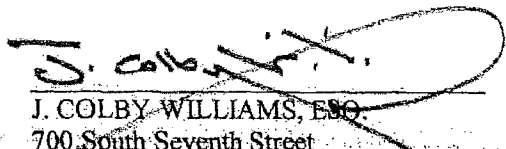
21. **Effect of Disclosure of Privileged Information.** The Receiving Party hereby agrees to promptly return, sequester, or destroy any Privileged Information disclosed or produced by Disclosing or Producing Party upon request by Disclosing or Producing Party regardless of whether the Receiving Party disputes the designation of Privileged Information. The Receiving Party may sequester (rather than return or destroy) such Privileged Information only if it contends that the information itself is not privileged or otherwise protected and it challenges the privilege designation, in which case it may only sequester the information until the claim of privilege or other protection is resolved. If any party disputes the privilege claim ("Objecting Party"), that Objecting Party shall object in writing by notifying the Producing Party of the dispute and the basis therefore. The parties thereafter shall meet and confer in good faith regarding the disputed claim within seven (7) court days after service of the written objection. In the event that the parties do not resolve their dispute, the Objecting Party may bring a motion for a determination of whether a privilege applies within ten (10) court days of the meet and confer session, but may only contest the asserted privileges on ground other than the inadvertent production of such document(s). In making such a motion, the Objecting Party shall not disclose the content of the document(s) at issue, but may refer to the information contained on the privilege log. Nothing herein shall relieve counsel from abiding by applicable ethical rules regarding inadvertent disclosure and discovery of inadvertently disclosed privileged or otherwise protected material. The failure of any party to provide notice or instructions under this Paragraph shall not constitute a waiver of, or estoppel as to, any claim of attorney-client privilege, attorney work product, or other ground for withholding production as to which the Disclosing or Producing Party would be entitled in this action.

22. **Inadvertent Production of Non-Discoverable Documents.** If a Producing Party inadvertently produces a document that contains no discoverable information, the Producing

Party may request in writing that the Receiving Party return the document, and the Receiving Party will return the document. A Producing Party may not request the return of a document pursuant to this section if the document contains any discoverable information.

Dated this 15th day of December, 2017

CAMPBELL & WILLIAMS


J. COLBY WILLIAMS, ESQ.
700 South Seventh Street
Las Vegas, Nevada 89101
Telephone: (702) 382-5222
Facsimile: (702) 382-0540

Dated this ___ day of December, 2017

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ELIZABETH BRICKFIELD, ESQ.
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Telephone: (702) 550-4400
Facsimile: (702) 382-1661

*Attorneys for Edward Lubbers and Lawrence
and Heidi Canarelli, Former Trustees*

Dated this ___ day of December, 2017

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Facsimile: (702) 853-5485

Attorneys for Petitioner, Scott Canarelli

Party may request in writing that the Receiving Party return the document, and the Receiving Party will return the document. A Producing Party may not request the return of a document pursuant to this section if the document contains any discoverable information.

Dated this __ day of December, 2017

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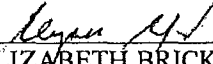
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Dated this 15th day of December, 2017

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Attorneys for Petitioner, Scott Canarelli

*Attorneys for Edward Lubbers and Lawrence
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Dated this ___ day of December, 2017

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*Attorneys for Edward Lubbers and Lawrence
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Dated this 22 day of December, 2017

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EXHIBIT 4

EXHIBIT 4



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June 5, 2018

VIA E-MAIL and U.S. Mail
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tjohnson@sdfnvlaw.com

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

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

Dear Counsel:

In reviewing your recently-filed Supplement to Petition and the Errata thereto, we see that you have attached as an exhibit document Bates No. **RESP013284-RESP013288**. This document is clearly an attorney-client privileged and attorney work product-protected document which was inadvertently produced by Respondents. By **Friday, June 8, 2018**, please:

- (1) Confirm your agreement that the document is privileged and that you will enter into a stipulation to redact all references to the document from your pleading and seal the exhibit in the already-filed pleading; and
- (2) Return the document to us and confirm that all copies in your possession have been destroyed.

Separately, in reviewing documents for Respondents' supplemental disclosure of today's date, we have identified detailed billings from your firm to Scott which were provided to Mr. Lubbers. We have not reviewed these documents, copies of which are being sent to you on a second separate FTP link. Please review the documents and advise us of your position regarding the documents at your earliest convenience.

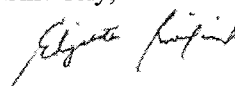
Lastly, in response to your letter dated June 1, 2018, the Documents Bates Nos. RESP0087114-RESP0087115 were inaccurately designated as responsive to certain requests for production to Lubbers. As we advised you on May 10, 2018, those documents are not responsive and, in addition, are communications with counsel during the course of litigation. As such, they have been removed from Lubbers' most recent supplemental responses. Moreover, as we previously discussed, the parties in this matter are not seeking, and accordingly have not been logging, communications with their counsel during the course of the litigation. Thus, there is no need for Respondents to provide the records or amend their privilege log.

DICKINSON WRIGHT PLLC

Dana Dwiggins, Esq.
Tess Johnson, Esq.
June 5, 2018
Page 2

Thank you for your prompt attention to this matter.

Sincerely,



Elizabeth Brickfield

JZS:lms

cc: Joel Z. Schwarz, Esq.
J. Colby Williams, Esq.
Jennifer Braster, Esq.

EXHIBIT 5

EXHIBIT 5



SOLOMON | DWIGGINS | FREER^{LTD}

TRUST AND ESTATE ATTORNEYS

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Justin W. Wilson

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June 12, 2018

Via EMAIL ONLY

Elizabeth Brickfield, Esq.
Joel Z. Schwarz, Esq.
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Email: ebrickfield@dicksonwright.com
jschwarz@dickinsonwright.com

Re: *Scott Lyle Graves Canarelli Irrevocable Trust*, Case No. P-13-078912-T

Dear Ms. Brickfield,

I am in receipt of your June 5, 2018 letter wherein you seek to claw back records identified by Bates Nos. RESP013284-RESP013288. Respectfully, these records are not "clearly" privileged and I see no reason to redact prior filings or return the document to you based on an unsupported claim.

Therefore, I challenge your claim that the above-named records are subject to the attorney/client privilege and/or the work product doctrine. Please advise if you wish to proceed under the provisions of the ESI protocol with this dispute. If you have any questions, please feel free to contact me at the number listed above.

Sincerely,

Tess E. Johnson

cc: client
Colby Williams, Esq., *via email only*

EXHIBIT 6

EXHIBIT 6



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June 12, 2018

VIA E-MAIL and U.S. Mail

ddwiggins@sdfnvlaw.com

tjohnson@sdfnvlaw.com

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

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

Dear Counsel:

On June 5, 2018, we sent you the enclosed letter requesting the return of the inadvertently produced but clearly attorney-client privileged and attorney work product protected document with Bates No. **RESP013284-RESP013288**, whose return we requested by June 8, 2018.

On June 12, 2018 you responded that these records are not "clearly privileged" and challenged the claim.

I am writing to again request that you immediately confirm the privileged nature of this document and act accordingly by returning the document, withdrawing the exhibit and sealing the record.

Although you state that the document is not "clearly privileged", the privileged nature of this document is self-evident. It is the second page of a five page document dated October 14, 2013 comprising Mr. Lubbers' notes from his meeting with his then counsel, David Lee and Charlene Renwick. The notes are dated October 14, 2013 and set out the strategy discussed at the meeting. There are also references and discussions within the notes which correspond directly to sections of Scott Canarelli's petitions. Two days later, October 16, 2013, Mr. Lee and Ms. Renwick filed responses for Mr. Lubbers consistent with the notes.

At a minimum, you had an ethical obligation not simply to sequester the document, but also to advise Respondents' counsel that these documents had been disclosed so as to allow Respondents to assert the privilege. *See* NRPC 4.4(b); *Merits Incentives, LLC, v. Eighth Jud. Dist. Ct.*, 127 Nev. 689, 262 P.3d 720 (2011). Instead, you unilaterally disclosed a portion of the document as an exhibit to the Supplement to Petition, a rogue filing you electronically served on May 18th. You are exacerbating the problem by refusing to act consistent with Respondents' privilege assertion for this inadvertently disclosed document. *See* ESI Protocol ¶ 21 (stating, in part, "[t]he Receiving Party hereby agrees to promptly return, sequester, or destroy any Privileged Information disclosed or produced by Disclosing or Producing

Dana Dwiggins, Esq.
Tess Johnson, Esq.
June 12, 2018
Page 2

Party upon request by Disclosing or Producing Party *regardless of whether the Receiving Party disputes the designation of Privileged Information.*") (emphasis added).

When we realized that the detail of your billings which Scott Canarelli disclosed to Ed Lubbers were in our possession, we wrote you that we had not reviewed the records and asked that you advise us of your position. On June 8th, 2018, Ms. Johnson requested that we destroy the billing records. We have done so. Conversely, you have not returned **RESP013284-RESP013288** nor have you redacted it from your pleading and moved to seal it in these proceedings. We again request that you immediately confirm the privileged nature of this document and act accordingly.

Please advise us by June 13, 2018, how you intend to proceed so we can hold an EDCR 2.34 conference and, if necessary, seek the judicial return of the document. If we are compelled to move the return of this clearly privileged document, we will seek sanctions.

Sincerely,



Elizabeth Brickfield

cc: Joel Z. Schwarz, Esq.
J. Colby Williams, Esq.
Jennifer Braster, Esq.

EXHIBIT 7

EXHIBIT 7



SOLOMON | DWIGGINS | FREER LTD

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June 18, 2018

Via EMAIL ONLY

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jschwarz@dickinsonwright.com

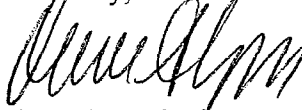
Re: Scott Lyle Graves Canarelli Irrevocable Trust, Case No. P-13-078912-T

Dear Ms. Brickfield and Mr. Schwarz,

This letter is in response to your June 12, 2018 letter, wherein you restate your demand that I "immediately confirm the privileged nature of this document" and return the records to your office. Having reviewed RESP013284-RESP013288 yet again, I disagree with your contention that these records are protected. Notwithstanding your unsupported claims, even if a privilege ever applied to these documents, which we assert it did not, such protection has been waived.

As a result of the dispute as to RESP013284-RESP013288, I will instruct my office to sequester the document until a determination is made as to the privileged nature of these records. At this time, I request that you advise as to your availability to conduct a meet and confer **by Monday June 25, 2018**, pursuant to the ESI Protocol.

Sincerely,



Dana A. Dwiggins

cc: client
Colby Williams, Esq., Philip R. Erwin, Esq., *via email only*

EXHIBIT 8

EXHIBIT 8



CAMPBELL
& WILLIAMS
ATTORNEYS AT LAW

VIA EMAIL
ddwiggins@sdfnvlaw.com

June 18, 2018

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

Re: *The Scott Lyle Graves Canarelli Irrevocable Trust – Case Nos. P-13-078912-T*

Dear Dana:

This letter follows our telephone conversation from last Thursday, wherein you notified me of a potential inadvertent disclosure of attorney-client and/or work product protected information. As a threshold matter, I would like to thank you for notifying me of the potential inadvertent disclosure.

I have now had an opportunity to review the subject documents, which comprise 49 pages and are labeled (at least in the Relativity review platform) with Bates Nos. RESP0078884 – RESP0078932. The documents consist predominantly of attorney's notes taken during the pendency of this action by me and Hunter Campbell while he was an attorney with our firm. I have additionally confirmed that certain of the documents comprise notes taken by Edward Lubbers during the pendency of this action. It is our position that all of the documents are protected by the attorney-client privilege and/or work product doctrine and should not have been produced.

Accordingly, pursuant to Paragraph 21 of the ESI Protocol agreed to in this action, we request that you immediately return or destroy the documents referenced above. Pursuant to the ESI Protocol, the inadvertent disclosure of the subject documents by Respondents does not constitute a waiver, or estoppel, as to any claim of attorney client privilege, attorney work product, or other ground for withholding production as to which Respondents would be entitled in this matter. *See id.* If you contend that the information contained in any of the documents is not privileged or otherwise protected, please sequester those documents until the claim of privilege is resolved and notify Respondents in writing of the basis for your objection. *See id.*

700 SOUTH SEVENTH STREET
LAS VEGAS, NEVADA 89101
PHONE: 702/382-5222
FAX: 702/382-0540

Dana Dwiggins, Esq.
June 18, 2018
Page 2

Thank you for your attention to this matter. Please confirm as soon as possible that you will return, destroy or sequester the subject documents.

Very truly yours,

CAMPBELL & WILLIAMS



J. Colby Williams, Esq.

JCW/

cc: Philip R. Erwin, Esq.
Elizabeth Brickfield, Esq./Joel Schwarz, Esq.
Tess E. Johnson, Esq./Jeffrey P. Luszeck, Esq.
(all via e-mail).

EXHIBIT 9

EXHIBIT 9



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TRUST AND ESTATE ATTORNEYS

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June 19, 2018

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Via EMAIL ONLY

Colby Williams, Esq.
Phil Erwin, Esq.
Campbell & Williams
700 South Seventh Street
Las Vegas, Nevada 89101
Email: jcw@cwlawlv.com

**Re: Scott Lyle Graves Canarelli Irrevocable Trust ("Trust")
Case No. P-13-078912-T**

Dear Colby and Phil:

This letter in response to your letter dated June 18, 2018, in regards to the disclosures you and I spoke about on the telephone last Thursday, June 14, 2018. As a preliminary matter, the documents appear to start with Bate Nos. RESP0078884, however, each of the pages are not individually bated; therefore, I am referencing herein the page number of the 49 pages in total.

I am in agreement that your notes and Hunter Campbell's notes, which I understand to be Pages 1-15, 18-41 and 45-49 are privileged and, therefore, I agree to destroy the same. As to Pages 16-17 and 42-44, please confirm which of those documents are Mr. Lubbers' or any other individual's notes based on the handwriting. It is my understanding based on our conversation that these latter pages are not notes of any of the attorneys with your firm. If I am mistaken as to any of the foregoing categories, please clarify.

To the extent the notes consisting of Pages 16-17 and 42-44 are either Mr. Lubbers (or possibly Mr. Evans), I do not understand the basis for your objection. The notes appear to be taken at a group meeting; therefore, do not constitute "confidential communications" between an attorney and his client.

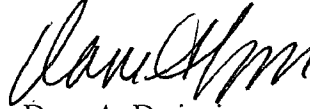
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Colby Williams, Esq.
June 19, 2018

As I mentioned, I am willing to delete the link entirely from our database and allow you to resend those documents that are not privileged in a separate link. However, in light of your position that Pages 16-17 and 42-44 are privileged, I am be sequestering all of the documents until such time as we are otherwise able to reach an agreement or the Court addresses the same. In the interim, I have instructed those attorneys at my firm with access to the database not to review the documents, print or otherwise make copies of the same.

If you have any questions, please contact me at the number listed above.

Sincerely,



Dana A. Dwiggins

cc: client
Elizabeth Brickfield, Esq.

EXHIBIT 10

EXHIBIT 10



CAMPBELL
& WILLIAMS
ATTORNEYS AT LAW

VIA EMAIL

June 20, 2018

ddwiggins@sdfnvlaw.com

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

Re: *The Scott Lyle Graves Canarelli Irrevocable Trust – Case Nos. P-13-078912-T*

Dear Dana:

Thank you for your letter dated June 19, 2018 wherein you agreed to destroy documents 1-15, 18-41, and 45-49 (contained within Bates Nos. RESP0078884 – 78932) in response to the clawback letter we sent on June 18. As it relates to the documents you have challenged and agreed to sequester, *i.e.*, 16-17 and 42-44, I can confirm that documents 42 and 44 reflect handwritten notes taken by Hunter Campbell while he was an attorney at our firm during the pendency of the above matter. Document 43 also reflects Mr. Campbell's handwritten notes, but they actually appear to be notes taken in connection with a different client wholly unrelated to the above matter. With this clarification, I trust you will likewise agree to destroy these documents. Please confirm.

Documents 16-17 reflect Edward Lubbers' handwritten notes taken on or about December 19, 2013, which was during the pendency of the above-referenced matter. It is our position that these documents are protected by the attorney work product doctrine. As you know, the doctrine protects documents prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative. *See Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.*, 133 Nev. Adv. Op. 52, 399 P.3d 334, 347 (2017). While Mr. Lubbers may have arguably prepared the notes during a group meeting in his capacity as a party in the litigation (as opposed to his capacity as an attorney), work product protection still attaches. *Cf., Mega Mfg., Inc. v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 2014 WL 2527226, at *2 (Nev. May 30, 2014) ("Whether an attorney is involved or directs an investigation is not dispositive for deciding whether the fruit of that investigation is work product."); *Wulz v. Bank of China Ltd.*, 304 F.R.D. 384, 393-94 (S.D.N.Y. 2015). Mr. Lubbers thereafter shared his notes with counsel and would have had no reason to prepare the notes in a similar form but for the existence of the pending action. Under

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FAX: 702/382-0540

Dana A. Dwiggins, Esq.

June 20, 2018

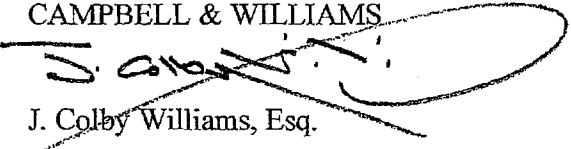
Page 2

the totality of the circumstances, we believe the notes are subject to protection, were inadvertently produced, and should be returned or destroyed under the parties' ESI Protocol. The foregoing is not a full expression of our position on this matter.

In light of the foregoing, please advise whether you will agree to return or destroy Mr. Lubbers' notes or, alternatively, you wish to discuss this matter further.

Very truly yours,

CAMPBELL & WILLIAMS


J. Colby Williams, Esq.

JCW/

cc: Philip R. Erwin, Esq.
Elizabeth Brickfield, Esq./Joel Schwarz, Esq.
Tess E. Johnson, Esq./Jeffrey P. Luszeck, Esq.
(all via e-mail).

EXHIBIT 11

EXHIBIT 11



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June 25, 2018

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Via EMAIL ONLY

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Campbell & Williams
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**Re: Scott Lyle Graves Canarelli Irrevocable Trust ("Trust")
Case No. P-13-078912-T**

Dear Colby:

This letter is in response to your June 20, 2018 letter wherein you discuss your position as to the sequestered notes that have been identified as page numbers 16-17 and 42-44. As you have represented that pages 42-44 are Hunter Campbell's written notes, I will agree to destroy these pages. With regard to pages 16-17, which you assert are Mr. Lubbers' handwritten notes, I am not persuaded that these records are protected by the work product doctrine. As you are aware, the party claiming the protection bears the burden of demonstrating the applicability of the work product doctrine.¹

Nevada does protect documents prepared by or for another party or by or for that other party's representative, however, they must *be prepared in anticipation of litigation* or for trial.²

¹ *LightGuard Sys., Inc. v. Spot Devices, Inc.*, 281 F.R.D. 593, 598 (D. Nev. 2012)(citing *Tornay v. U.S.*, 840 F.2d 1424, 1426 (9th Cir.1988)).

² *Wynn Resorts, Limited v. Eighth Judicial District Court of State el rel. Cty. Of Clark*, 399 P.3d 334, 337 (2017); *see also Id.* at 348 (quoting *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.) (Torf)*, 357 F.3d 900, 907 (9th Cir. 2004) ("The anticipation of litigation must be

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Colby Williams, Esq.
June 25, 2018

In determining whether work was done in anticipation of litigation, Nevada adopted the “because of” test, which provides that documents are considered to be “prepared in anticipation of litigation when ‘in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation.’”³ The Ninth Circuit further discussed this test, stating

[t]he “because of” standard does not consider whether litigation was a primary or secondary motive behind the creation of a document. Rather, it considers the totality of the circumstances and affords protection when it can fairly be said that the “document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of that litigation[.]”⁴

Mr. Lubbers’ notes relate to a meeting he had with Stephen Nicolatus (the neutral valuator), Scott, Mark Solomon, Bob Evans, Don and Hunter Campbell and yourself in December, 2013. Given Mr. Nicolatus’ attendance, this meeting clearly related to the valuation of the entities sold under the Purchase Agreement. In December, 2013, litigation as to the purchase price of the sold entities was not anticipated, and Mr. Lubbers was merely acting as the SCIT’s Family Trustee and fulfilling his obligation under the Purchase Agreement to get an independent valuation. These notes would have been created in a substantially similar form regardless of the prospect of litigation. For this reason, the work product doctrine does not apply.

Regardless of whether this Court finds that Mr. Lubbers’ notes constitute work product, I am still entitled to these records under NRCP 26(b)(3) which provides that “upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” Substantial need is determined on a case-by-case basis.⁵ As you are well aware, I made multiple attempts to depose Mr. Lubbers over five (5) months, offering to accommodate his illness to ensure that his testimony would be preserved. You fought me on this and made representations to this Court that he was not terminal and he passed away before I could

the *sine qua non* for the creation of the document — ‘but for the prospect of that litigation,’ the document would not exist.”).

³ *Id.* at 347-48 (quoting Restatement (Third) of the Law Governing Lawyers § 87 cmt. i (2000))(Emphasis in original).

⁴ *Wynn Resorts*, 399 P.3d at 348 (quoting *Torf*, 357 F.3d at 908).

⁵ *Cung Le v. Zuffa, LLC*, 321 F.R.D. 636, 641 (D. Nev. 2017).

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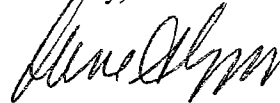
Colby Williams, Esq.
June 25, 2018

depose him. There is no other way for me to obtain Mr. Lubbers' thoughts and impressions regarding the valuation of the entities other than these and his other notes.

On a different note, I instructed our vendor to remove the entire file from our database, including all associated with metadata. It was confirmed this afternoon that it has been removed. Likewise, all hard copies have been destroyed, save and except Mr. Lubbers' notes referenced herein. Such notes will be sequestered pending resolution of our dispute.

At this time, I request that you advise as to your availability to conduct a meet and confer **by Friday, June 29, 2018**, pursuant to the ESI Protocol. If you have any questions, please contact me at the number listed above.

Sincerely,



Dana A. Dwiggins

cc: client
Elizabeth Brickfield, Esq.

EXHIBIT 12


EXHIBIT 12

From: Tina Goode [TGoode@AmericanWestHomes.com]
Sent: 11/18/2017 1:34:25 AM
To: Larry Canarelli [LCanarelli@AmericanWestHomes.com]; Bob Evans [BobEvans@AmericanWestHomes.com]; Teresa OMalley [TOmalley@AmericanWestHomes.com]
CC: Tina Goode [TGoode@AmericanWestHomes.com]
Subject: Email Jackie Nares and Ed - Memo instructing defer payments
Attachments: Defer Payment email and Memo.pdf

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

Have a wonderful weekend!!

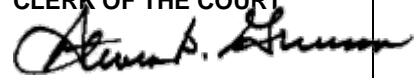
Tina Goode
Director, Corporate Administration

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APP000078

RESP0092371



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Telephone: (702) 550-4400
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*Attorneys for Lawrence and
Heidi Canarelli, and Frank Martin,
Special Administrator of the Estate of
Edward C. Lubbers, Former Trustees*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

In the Matter of the

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

Case No. P-13-078912-T
Dept. No. XXVI/Probate

**RESPONDENTS' OPPOSITION TO
MOTION FOR DETERMINATION OF
PRIVILEGE DESIGNATION OF
RESP013284-013288 AND RESP078899-
078900 AND COUNTERMOTION FOR
REMEDATION OF IMPROPERLY
DISCLOSED ATTORNEY-CLIENT
PRIVILEGED AND WORK PRODUCT
PROTECTED MATERIALS**

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

Respondents Lawrence Canarelli (“Larry”) and Heidi Canarelli (“Heidi”) (collectively “the Canarellis”), and Frank Martin, Special Administrator of the Estate of Edward C. Lubbers (“Lubbers”), as former Family Trustees of the Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998 (the “SCIT”), by and through undersigned counsel, hereby submit their Opposition to Petitioner Scott Canarelli’s Motion for Determination of Privilege Designation of RESP013284-013288 and RESP078899-078900 and Countermotion for Remediation of Improperly Disclosed Attorney-Client Privileged and Work Product Protected Materials. This Opposition and Countermotion are based on the papers and pleadings on file herein, the exhibits attached hereto, the following Points and Authorities, and any oral argument the Court considers at the time of the hearing.

DATED this 10th day of August, 2018.

CAMPBELL & WILLIAMS

By /s/ J. Colby Williams
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J. COLBY WILLIAMS, ESQ. (5549)
PHILIP R. ERWIN, ESQ. (11563)
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Las Vegas, Nevada 89113

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

POINTS AND AUTHORITIES

I. INTRODUCTION

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

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

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

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

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

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

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

II. FACTUAL BACKGROUND

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

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

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

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

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

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

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

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

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

15
16 6. The lawsuit threatened by Scott’s counsel in November 2012 ultimately came in the
17 form of the Initial Petition filed on September 30, 2013. Despite Petitioner’s retroactive attempts
18 to downplay the Initial Petition as “neutral” because there was purportedly “no actual dispute
19

20
21 ³ As the Court knows from prior motion practice, AWG is a home building business. Larry is the
22 founder of AWG, and Mr. Evans is its Senior Vice President of Finance. The SCIT formerly held
23 minority interests in various corporations and limited liability companies that comprised a portion
24 of AWG’s homebuilding operations. See Opp’n to Motion to Compel Lawrence and Heidi
25 Canarelli’s Responses to Scott Canarelli’s Request for Production of Documents dated May 29,
26 2018 (on file). Though not a party herein, Respondents agreed to search and produce responsive
27 ESI from Mr. Evans on the theory that he acted as an agent of the former Family Trustees in
28 connection with the SCIT. See *id.* at Ex. 7. A true and correct copy of the e-mail exchange between
counsel on this subject is being reproduced as Exhibit 3 hereto.

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

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

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

- “Since the Irrevocable Trust’s creation fifteen years ago, *Petitioner has never received an inventory of the Irrevocable Trust’s assets or an annual accounting as specifically provided thereunder, despite requests for the same.*” Ex. 1 ¶ A.10 (emphasis added); *see also id.* ¶ C.5 (same);
- “Indeed, Petitioner has never been provided with a copy of the Credit Agreement, despite the collateralization of the Irrevocable Trust’s interest in the LLCs and Corporations in conjunction therewith.” *Id.* ¶ A.12;
- “In or about May 2012, *the Family Trustees became hostile toward Petitioner and stopped making distributions to Petitioner and/or his family*, despite Petitioner’s dependence on such distributions for his and his family’s health, maintenance, support and general welfare. The cessation of distributions followed receipt by Petitioner of a letter from Larry and Heidi that read that Larry and Heidi were ‘*not willing to continue financing [Petitioner’s] existence because ‘it is against everything that [Larry and Heidi] think is good for [Petitioner].*’” Petitioner is informed and believes that *the hostility* stemmed from his decision to become a stay at home father after his wife returned to the workplace.” *Id.* ¶ A.13 (emphasis added);
- “At the onset of SDF’s representation of petitioner, Petitioner requested an accounting and an inventory of trust assets from the trustees. However, the Independent Trustee informed Petitioner that *Larry would not authorize the provision of an accounting and/or an inventory of the Irrevocable Trust or its assets.* Further, *the Independent Trustee admitted to Petitioner that he had little or no personal knowledge of the Irrevocable Trust’s management or its assets, despite serving as Independent Trustee since 2005.*” *Id.* ¶ A.15 (emphasis added);
- “At the time the Purchase Agreement was entered, Larry was on both sides of the transaction. Thus, *Larry had a conflict as both Co-Family Trustee of the Irrevocable Trust, on one hand, and Trustee of the Siblings Trust [sic] and manager of SJA.*” *Id.* ¶ A.20 (emphasis added);

- “Accordingly, the Family Trustee violated the fiduciary obligations due and owing to Petitioner by failing to provide Petitioner with an inventory of the Irrevocable Trust’s assets or render a fiduciary accounting as required by law. Thus, this Court should enter an Order compelling Lubbers to provide Petitioner with an inventory of the Irrevocable Trust’s assets and a complete accounting of the Irrevocable Trust’s activities from February 24, 1998, the date of the Irrevocable Trust’s creation, through the present date.” *Id.* ¶ C.6 (emphasis added);
- “Here, the Family Trustees had a duty to provide Petitioner with the Information and documents necessary to keep him apprised of the nature, value and transactions of the Irrevocable Trust. Instead, the trustees sold the Irrevocable Trust’s interests in the LLC’s and the Corporations to SJA and the Siblings Trusts without Petitioner’s knowledge or consent following a falling out between Petitioner and his parents.” *Id.* ¶ D.5 (emphasis added);
- “Petitioner lacks any way of verifying whether this sale was prudent . . . or designed to punish him or otherwise harm his financial interests. Indeed, the sale effectively strips the Irrevocable Trust of all of its assets by disposing all of its interests in the LLCs and Corporations in favor of trusts and entities established by Larry for his other three children.” *Id.* ¶ D.6 (emphasis added); and
- “Moreover, at the time the Family Trustees conducted the sale, the purchasers, SJA and the Siblings Trusts, were managed by Larry thereby creating a conflict as both the buyer and seller.” *Id.* ¶ D.7 (emphasis added).

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

8. Less than two weeks after Petitioner’s service by mail of the Initial Petition, Lubbers retained the law firm Lee, Hernandez, Landrum, Garofalo & Blake (“LHLGB”) to represent him in connection with responding to the Initial Petition (and the two other petitions filed by Scott).⁵ The contemporaneous billing records from LHLGB reflect that attorneys David Lee and Charlene

⁵ Declaration of David S. Lee, Esq. (“Lee Decl.”) ¶ 4; Declaration of Charlene N. Renwick, Esq. (“Renwick Decl.”) ¶ 4.

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

9. In anticipation of the call with attorneys Lee and Renwick, Lubbers prepared type-written notes. Generally described, the notes initially set forth a series of questions that Lubbers sought to pose to counsel regarding how to respond to the Initial Petition.⁷ The notes go on to describe Lubbers’ “beliefs” regarding the case, including how Respondents should respond to the Initial Petition, and how the Court may view the case. *See* Mot., Ex. 1. Finally, the notes reflect Lubbers’ assessment of certain legal issues. *Id.* The notes, in other words, reflect Lubbers’ request for legal advice and his mental impressions about pending litigation and, thus, are a quintessential example of attorney-client privileged and work-product protected material.

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

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

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

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

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

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

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

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

⁹ See Lee Decl. ¶ 9; Renwick Decl. ¶ 8.

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

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

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

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

16. Despite Petitioner’s revisionist claim in the present Motion that “[i]t was not until late 2015, when Petitioner provided Respondents’ counsel with a DRAFT copy of the Surcharge Petition that the potential of any claim against Lubbers was anticipated,” *see* Mot. at 10:21-22, Petitioner’s counsel has recently admitted elsewhere that “[a]t the time Lubbers retained Gerety to prepare the 2014 accounting, *there were several unanswered questions raised by Petitioner through Gerety that potentially could result in litigation.*”¹⁵ Again, Lubbers provided notice of his intent to retain Gerety to perform the 2014 accounting back in December 2014.¹⁶

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

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

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

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

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

¹⁶ See Ex. 8.

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

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

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

20. On May 18, 2018, Petitioner filed his Supplement to Petition to Surcharge Trustee and Former Trustees for Breach of Fiduciary Duties, Conspiracy and Aiding and Abetting; Petition for Breach of Fiduciary Duty for Failure to Properly Account; and Petition for an Award of Attorney Fees, Accountant Fees & Costs (the "Supplemental Petition") (on file).

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

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

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

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

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

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

23
24
25
26 The Receiving Party hereby agrees to promptly return, sequester, or destroy any
27 Privileged Information disclosed or produced by Disclosing or Producing Party
28 upon request by Disclosing or Producing Party *regardless of whether the*

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

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

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

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

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

III. ARGUMENT

A. Governing Principles.

1. Attorney-Client Privilege

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

2. Attorney Work Product Protection

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

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

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

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

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

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

Petition. “At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client’s case.” *Wynn Resorts*, 399 P.3d at 347 (quoting *United States v. Nobles*, 422 U.S. 225, 238 (1975)). As one federal court has noted, “[t]he primary purpose of the rule is to prevent exploitation of another party’s efforts in preparing for the litigation.” *Diamond State*, 157 F.R.D. at 699.¹⁸

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

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

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

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

1 as a “neutral” pleading because there was purportedly “no actual dispute between the Parties” and
2 “absolutely no allegations of wrongful conduct or claims were asserted against either Lubbers or
3 the Canarellis.” *See* Mot. at 7:12-17; 17:15-18. After erecting this false premise, Petitioner then
4 argues that Lubbers could not have reasonably anticipated litigation when he prepared his notes
5 in October and December 2013 because no claims were anticipated against Lubbers until late 2015
6 when Petitioner provided Respondents’ counsel with a copy of his draft Petition to Surcharge. *Id.*
7 at 10:21-22. Setting aside the salient question of how Scott is qualified to make the omniscient
8 determination of when Respondents anticipated litigation, the plain language of the Initial Petition
9 and the totality of the circumstances demonstrate that Lubbers unquestionably prepared his notes
10 because of actual litigation.
11

12 A petition filed in Probate Court to initiate a trust proceeding is tantamount to a complaint
13 filed in district court. *Compare* NRS 132.270 and NRS 164.010 with NRCP 3; *see also*, A. Freer
14 and J. Luszeck, *Probate “Pro-Tip” Primer* (Nev. Lawyer Jan. 2018) (“Instead of filing a
15 complaint, an estate or trust proceeding is initiated by filing a petition.”). Except as otherwise
16 provided, the Nevada Rules of Civil Procedure apply to trust proceedings, *see* NRS 155.180,
17 including the right to conduct discovery. *See* NRS 155.170(1) (interested person in trust
18 proceeding “[m]ay obtain discovery, perpetuate testimony *or conduct examinations in any*
19 *manner authorized by law or the Nevada Rules of Civil Procedure[.]*”) (emphasis added); *see*
20 *also* NRS 47.020 (Nevada Rules of Evidence embodied in NRS Title 4 “govern[] proceedings in
21 courts of this State[.]”).
22

23 “Litigation,” for purposes of determining whether work product protection applies,
24 “includes a proceeding in a court or administrative tribunal in which the parties have the right to
25 cross-examine witnesses or to subject an opposing party’s presentation of proof to equivalent
26 disputation.” *Fru-Con Const. Corp. v. Sacramento Mun. Util. Dist.*, 2006 WL 2050999, at *4 (E.D.
27
28

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

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

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

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

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

13
14 **2. Notes Made by a Party “Because of” Ongoing Litigation Constitute**
15 **Work Product Even if They Were Not Made at the Direction of an**
16 **Attorney.**

17 Petitioner twice cites *Ballard v. Eighth Jud. Dist. Ct.*, 106 Nev. 83, 85, 787 P.2d 406, 407
18 (1990) to support the proposition that Lubbers’ notes are not protected work product because “they
19

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

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

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

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

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

4 In *Wultz v. Bank of China, Ltd.*, the New York federal district court discussed the “because
5 of” test adopted in *Wynn Resorts, supra*, and cited *United States v. Adlman*, 134 F.3d 1194, 1202
6 (2d Cir. 1998), on which the Nevada Supreme Court also relied. The district court explained that
7 “[n]otwithstanding the common description of the doctrine as the ‘attorney’ work product doctrine,
8 as a doctrine ‘intended to preserve a zone of privacy in which a lawyer can prepare and develop
9 legal theories and strategy,’ . . . and as applying to ‘materials prepared by or at the behest of
10 counsel,’ . . . it is not in fact necessary that the material be prepared by or at the direction of an
11 attorney.” 304 F.R.D. at 393-94. Indeed, “it is well-established that the [work product] doctrine
12 protects writings made by a party even without any involvement by counsel.” *Szulik v. State St.*
13 *Bank & Tr. Co.*, 2014 WL 3942934, at *3 (D. Mass. Aug. 11, 2014). Lubbers’ notes fall squarely
14 within the principles enunciated above.
15

16
17 **3. Respondents Did Not Waive any Privilege/Protection that Applies to
Lubbers’ Notes.**

18 Petitioner next claims that any privilege or protection that attached to the Lubbers notes
19 was waived because Lubbers’ handwritten notes dated October 14, 2013 (RESP0013284) reflect
20 that his meeting with counsel occurred in the presence of Larry and Bob Evans who are purported
21 third parties that destroy the privilege. *See* Mot. at 14:17-15:15. Petitioner also contends that any
22
23
24

25 ²⁰ Petitioner’s citation to *Goff* is puzzling given that it unequivocally refutes the very proposition
26 Petitioner asks this Court to adopt—*i.e.*, that a document, “by definition,” cannot be work product
27 protected unless it was “prepared at the request of an attorney.” *See* Mot. at 20:21-21:27-28 and
28 n.39. Of course, just the opposite is true. As Judge Reed aptly observed at the beginning of his
analysis: “It may be surprising to long-time practitioners that ‘a lawyer need not be involved at all
for the work product protection to take effect.’” *Goff*, 240 F.R.D. at 660 (quotation omitted).

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

4 As a threshold matter, the Lubbers notes do not state that Larry and Bob Evans were present
5 on the phone call with attorneys Lee and Renwick. The isolated references to “Larry” and “Bob”
6 are corroborative of nothing. Notably, the billing records of Mr. Lee and Ms. Renwick contain
7 no reference to Larry or Bob being present during the October 14, 2013 phone call. Even if these
8 individuals were present during the call, the information reflected in Lubbers’ notes is still
9 privileged and/or protected because Lubbers and Larry undisputedly share a common interest in
10 defending against the allegations contained in Scott’s various petitions. And Bob Evans has
11 undisputedly been an agent of the former Family Trustees of the SCIT (*i.e.*, Lubbers and Larry)
12 when it comes to accounting matters.
13

14 Nevada’s attorney-client privilege statute codifies the common interest rule. *See* NRS
15 49.095(3) (protecting confidential communications “[m]ade for the purpose of facilitating the
16 rendition of professional legal services to the client, by him or his lawyer to a lawyer representing
17 another in a matter of common interest.”); *cf. Collins v. State*, 113 Nev. 1177, 1183–84, 946 P.2d
18 1055, 1060 (1997) (NRS 49.095 protects “communications made in the course of an on-going and
19 joint effort to set up a common defense strategy.”) (citation omitted).²¹ The Nevada Supreme
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23 ²¹ As explained further, “[p]articipants in a joint or common defense or individuals with a
24 community of interest may communicate among themselves and with the separate attorneys on
25 matters of common legal interest, for the purpose of preparing a joint strategy, and the attorney-
26 client privilege will protect those communications to the same extent as it would communications
27 between each client and his own attorney.” *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575,
28 578 (N.D. Cal. 2007). The common interest theory applies even if the parties have “some adverse
interests.” *See Eisenberg v. Gagnon*, 766 F.2d 770, 787-88 (3d Cir. 1985). Moreover, “[i]n order
for the joint defense theory to apply, there need not be actual litigation.” *Nidec*, 249 F.R.D. at 578.

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

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

17 Nor did Bob Evans’ alleged participation in the conference call with Lubbers and his
18 attorneys destroy any privileged communications. It is undisputed that Mr. Evans acted as an
19 agent for Larry and Lubbers in their capacities as Family Trustees related to accounting matters
20 for the SCIT, and personally assisted in production of the documents to Scott ordered by the Court
21 in response to the Initial Petition.²² Indeed, Petitioner has claimed that Respondents were obligated
22 to search and produce responsive ESI from Evans’ own files even though he is not a party in this
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24
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27 ²² *See* Objection to Pet. to Surcharge Trustee and for Additional Relief dated 8/9/17 (on file) at
28 Ex. A (Declaration of Robert Evans).

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

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

16
17
18 The same reasoning applies regarding the subsequent production of certain Lubbers’ files
19 to AWG for safekeeping after Lubbers’ death. Again, Petitioner has cited no evidence that
20 Lubbers’ privileged and work-product protected notes were actually provided to AWG. He instead
21 cites an e-mail referencing an entirely different, non-privileged directive from Lubbers addressing
22 the deferral of principal payments under the Purchase Agreement. *See* Mot. at 15:16-16:14.
23 Regardless, Larry and Mr. Evans are AWG executives, the Purchased Entities formerly owned by
24 the SCIT comprised part of AWG’s homebuilding operations, and Petitioner has subpoenaed
25 several entities within the AWG for records and is presently pursuing a motion to compel
26 documents from one of those entities, American West Development, Inc., regarding its finances
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just as he has filed similar motions to compel against all of the Respondents herein. AWG, hence, shares a common legal interest with Respondents such that the alleged disclosure of privileged documents to the corporation would not waive the privilege. *See Wynn Resorts*, 399 P.3d at 341 (“communications may be disclosed to other persons within a corporation or legal team in order to facilitate the rendition of legal advice without losing confidentiality.”). Nor would such disclosure waive any work product protection as it is well settled that the disclosure of work product to some, but not others is permitted, *see Cotter*, 416 P.3d at 232, so long as the material is not purposefully disclosed to an adversary. *See id.* (quoting *Wynn Resorts*, 399 P.3d at 349). There has been no waiver here.

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

(i) *Lubbers’ notes reflect mental impressions, not “facts”*

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

Again, it is improper for Petitioner to be arguing the actual content of the notes themselves to try and defeat the privilege. *See Mot.*, Ex. 3 (ESI protocol) § 21. Nevertheless, even Petitioner recognizes that “Lubbers articulated certain questions and provided responses *based upon his beliefs*.” *See Mot.* at 14:3-5 (emphasis added). Beliefs are not facts. They are instead synonymous with “opinions.” *See* www.merriam-webster.com/dictionary/belief. But even if a portion of the notes are deemed to contain “facts,” which is not the case, they are still contained in a

communication with counsel that should remain privileged. *See Wardleigh*, 111 Nev. at 352, 891 P.2d at 1184 (“relevant facts known by a corporate employee of any status in the corporation would be discoverable even if such facts were relayed to the corporate attorney as part of the employee’s communication with counsel. ***The communication itself, however, would remain privileged.***”) (emphasis added); *Upjohn Co. v. United States*, 449 U.S. 383, 396, 101 S. Ct. 677, 685–86 (1981) (“While it would probably be more convenient for the Government to secure the results of petitioner’s internal investigation by simply subpoenaing the questionnaires and notes taken by petitioner’s attorneys, such considerations of convenience do not overcome the policies served by the attorney–client privilege.”).

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

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

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

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

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

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

“Opinion work product enjoys an almost absolute immunity from discovery,” *Laxalt v. McClatchy*, 116 F.R.D. 438, 441 (D. Nev. 1987), and “is only discoverable when counsel’s mental impressions are at issue and there is a compelling need for disclosure.” *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 634 (D. Nev. 2013). The limited exceptions to non-disclosure where an attorney’s mental impressions are “at issue” include situations where the attorney has been designated as an expert witness or where “advice of counsel” has been raised as a defense. *See, e.g., Vaughn Furniture Co., Inc. v. Featureline Mfg., Inc.*, 156 F.R.D. 123 (M.D.N.C. 1994) (attorney’s mental impressions become discoverable when named as an expert witness); *Coleco Indus., Inc. v. Universal City Studios*, 110 F.R.D. 688, 690 (S.D.N.Y. 1986) (when the defendant raised an “advice of counsel” defense, opinion work product became discoverable). Neither situation applies here.

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

processes such that they should not be subject to production on even a limited basis. *See, e.g., SEC v. Roberts*, 254 F.R.D. 371, 382-82 (N.D. Cal. 2008) (refusing production of attorney’s notes where “the facts contained within the notes are likely inextricably tied with the attorney’s mental thoughts and impressions.”). Petitioner has failed to overcome the near absolute immunity applicable to “opinion” work product.²³

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

I. INTRODUCTION

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

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

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

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

II. ARGUMENT²⁴

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

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

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

²⁴ Respondents incorporate the factual background set forth above.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

Based on the foregoing, Respondents respectfully request that:

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

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

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

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

DATED this 10th day of August, 2018.

CAMPBELL & WILLIAMS

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Special Administrator of the Estate of
Edward C. Lubbers, Former Trustees*

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of August, 2018, I caused a true and correct copy of the foregoing **Opposition to Petitioner Scott Canarelli's Motion for Determination of Privilege Designation of RESP013284-013288 and RESP078899-078900 and Countermotion for Remediation of Improperly Disclosed Attorney-Client Privileged and Work Product Protected Materials** to be served through the Eighth Judicial District Court's electronic filing system, to the following parties:

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Counsel for Scott Canarelli

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

DECLARATION OF J. COLBY WILLIAMS

DECLARATION OF J. COLBY WILLIAMS, ESQ.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- “Since the Irrevocable Trust’s creation fifteen years ago, *Petitioner has never received an inventory of the Irrevocable Trust’s assets or an annual accounting as specifically provided thereunder, despite requests for the same.*” Ex. 1 ¶ A.10 (emphasis added); *see also id.* ¶ C.5 (same);
- “Indeed, Petitioner has never been provided with a copy of the Credit Agreement, despite the collateralization of the Irrevocable Trust’s interest in the LLCs and Corporations in conjunction therewith.” *Id.* ¶ A.12;
- “In or about May 2012, *the Family Trustees became hostile toward Petitioner and stopped making distributions to Petitioner and/or his family*, despite Petitioner’s dependence on such distributions for his and his family’s health, maintenance, support and general welfare. The cessation of distributions followed receipt by Petitioner of a letter from Larry and Heidi that read that Larry and Heidi were ‘*not willing to continue financing [Petitioner’s] existence because ‘it is against everything that [Larry and Heidi] think is good for [Petitioner].*’” Petitioner is informed and believes that *the hostility* stemmed from his decision to become a stay at home father after his wife returned to the workplace.” *Id.* ¶ A.13 (emphasis added);
- “At the onset of SDF’s representation of petitioner, Petitioner requested an accounting and an inventory of trust assets from the trustees. However, the Independent Trustee informed Petitioner that *Larry would not authorize the provision of an accounting and/or an inventory of the Irrevocable Trust or its assets.* Further, *the Independent Trustee admitted to Petitioner that he had little or no personal knowledge of the Irrevocable Trust’s management or its assets, despite serving as Independent Trustee since 2005.*” *Id.* ¶ A.15 (emphasis added);
- “At the time the Purchase Agreement was entered, Larry was on both sides of the transaction. Thus, *Larry had a conflict as both Co-Family Trustee of the Irrevocable Trust, on one hand, and Trustee of the Siblings Trust [sic] and manager of SJA.*” *Id.* ¶ A.20 (emphasis added);
- “Accordingly, *the Family Trustee violated the fiduciary obligations due and owing to Petitioner by failing to provide Petitioner with an inventory of the Irrevocable Trust’s assets or render a fiduciary accounting as required by law.* Thus, this Court should enter an Order compelling Lubbers to provide Petitioner with an inventory of the Irrevocable Trust’s assets and a complete accounting of the Irrevocable Trust’s activities from February 24, 1998, the date of the Irrevocable Trust’s creation, through the present date.” *Id.* ¶ C.6 (emphasis added);

- “*Here, the Family Trustees had a duty to provide Petitioner with the Information and documents necessary to keep him apprised of the nature, value and transactions of the Irrevocable Trust. Instead,* the trustees sold the Irrevocable Trust’s interests in the LLC’s and the Corporations to SJA and the Siblings Trusts without Petitioner’s knowledge or consent *following a falling out between Petitioner and his parents.*” *Id.* ¶ D.5 (emphasis added);
- “Petitioner lacks any way of verifying whether this sale was prudent . . . or *designed to punish him or otherwise harm his financial interests. Indeed, the sale effectively strips the Irrevocable Trust of all of its assets by disposing all of its interests in the LLCs and Corporations in favor of trusts and entities established by Larry for his other three children.*” *Id.* ¶ D.6 (emphasis added); and
- “Moreover, at the time the Family Trustees conducted the sale, the purchasers, SJA and the Siblings Trusts, were managed by Larry *thereby creating a conflict as both the buyer and seller.*” *Id.* ¶ D.7 (emphasis added).

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

11. Less than two weeks after Petitioner’s service by mail of the Initial Petition, Lubbers retained the law firm Lee, Hernandez, Landrum, Garofalo & Blake (“LHLGB”) to represent him in connection with responding to the Initial Petition (and the two other petitions filed by Scott).⁵ The contemporaneous billing records from LHLGB reflect that attorneys David Lee and Charlene Renwick conducted a conference call with Lubbers on October 14, 2013 that lasted approximately a half hour.⁶ The general subject matter of the call was regarding “responses to petition.” *Id.*

⁵ Declaration of David S. Lee, Esq. (“Lee Decl.”) ¶ 4; Declaration of Charlene N. Renwick, Esq. (“Renwick Decl.”) ¶ 4.

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

12. In anticipation of the call with attorneys Lee and Renwick, Lubbers prepared type-written notes. Generally described, the notes initially set forth a series of questions that Lubbers sought to pose to counsel regarding how to respond to the Initial Petition.⁷ The notes go on to describe Lubbers' "beliefs" regarding the case, including how Respondents should respond to the Initial Petition, and how the Court may view the case. *See* Mot., Ex. 1. Finally, the notes reflect Lubbers' assessment of certain legal issues. *Id.* The notes, in other words, reflect Lubbers' request for legal advice and his mental impressions about pending litigation and, thus, are a quintessential example of attorney-client privileged and work-product protected material.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19. Despite Petitioner’s revisionist claim in the present Motion that “[i]t was not until late 2015, when Petitioner provided Respondents’ counsel with a DRAFT copy of the Surcharge Petition that the potential of any claim against Lubbers was anticipated,” *see* Mot. at 10:21-22, Petitioner’s counsel has recently admitted elsewhere that “[a]t the time Lubbers retained Gerety to prepare the 2014 accounting, *there were several unanswered questions raised by Petitioner through Gerety that potentially could result in litigation.*”¹⁵ Again, Lubbers provided notice of his intent to retain Gerety to perform the 2014 accounting back in December 2014.¹⁶

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

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

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

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

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

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

¹⁶ *See* Ex. 8.

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

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

23. On May 18, 2018, Petitioner filed his Supplement to Petition to Surcharge Trustee and Former Trustees for Breach of Fiduciary Duties, Conspiracy and Aiding and Abetting; Petition for Breach of Fiduciary Duty for Failure to Properly Account; and Petition for an Award of Attorney Fees, Accountant Fees & Costs (the "Supplemental Petition") (on file).

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

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

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

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

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

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

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

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

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

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

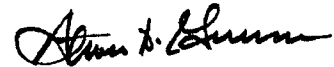
29. In direct contravention to the way they handled the set of Lubbers’ notes addressed above, Petitioner’s counsel notified Respondents’ counsel on or about June 14, 2018 that they were in possession of a set of different, potentially privileged/protected documents that may have been inadvertently produced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

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

DATED this 10th day of August, 2018.


J. COLBY WILLIAMS

EXHIBIT 1


CLERK OF THE COURT

PET
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Attorneys for Petitioner, Scott Canarelli

DISTRICT COURT

COUNTY OF CLARK, NEVADA

In the Matter of the

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

Case No.: P-13-078912-T
Dept. No.: XXVI/PROBATE

Hearing Date: 10/18/2013
Hearing Time: 9:30 a.m.

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

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

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

A.

GENERAL ALLEGATIONS

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

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

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

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

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

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

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

8 A.6 Upon information and belief, the Irrevocable Trust was funded with minority interests in
9 certain limited liability companies (the “LLCs”) and corporations (the “Corporations”) that comprise
10 or support the Nevada home building operation commonly known as “American West.”³ Petitioner is,
11 however, unaware of whether the Independent Trustee created any sub-trust as provided under Article
12 4.02 of the Irrevocable Trust or otherwise created the ESBT Share by transferring such minority
13 interests to the same.
14

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

18 A.8 The Irrevocable Trust provides for distributions of income and principal for Petitioner,
19 his spouse and/or children for their health, education, support and maintenance. *Id.* at 5.01. In making
20 such distributions, the Irrevocable Trust mandates that the Family Trustee be “mindful of the fact that
21

22
23
24 ² Specifically, Article 4.01 of the Irrevocable Trust specifically defines the Settlor’s intent as
25 follows: “The Grantor plans to transfer to the Irrevocable Trustees shares of the stock of an S corporation and
26 intends that this trust shall constitute an Electing Small Business Trust, as defined in § 1361(e) of the Internal
Revenue Code of 1986 (“the Code”), for so long as the Irrevocable Trustee shall own any stock of an S
corporation. All provisions of this instrument shall be construed consistent with this intent.” See Ex. 1 at 4.01.

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

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

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

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

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

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

24 A.13 In or about May, 2012, the Family Trustees became hostile towards Petitioner and
25 stopped making distributions to Petitioner and/or his family, despite Petitioner's dependence on such
26
27
28

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

7
8 A.14 Following Petitioner's receipt of the letter, Petitioner engaged the law firm of Solomon
9 Dwiggins & Freer, Ltd. ("SDF"), to assist him in resuming the distributions provided to him under the
10 Irrevocable Trust. After weeks of negotiations with the Independent Trustee, the Irrevocable Trust
11 began directly paying some of Petitioner's living expenses and resumed monthly distributions to
12 Petitioner for Petitioner and his family's maintenance and support.

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

19
20 A.16 Pursuant to Articles 8.02 and 8.04 of the Irrevocable Trust, Larry and Heidi resigned as
21 Co-Family Trustees of the Irrevocable Trust and jointly appointed Lubbers as their successor. *See*
22 *Resignation and Appointment of Family Trustee*, attached hereto as **Exhibit 3**. Such resignation is
23 undated; however, its purported effective date is May 24, 2013, at 5:00 p.m. ("Effective Date"). *Id.*
24 Thus, as of the Effective Date, Lubbers purportedly began serving and continues to serve as both the
25 Family Trustee and the Independent Trustee of the Irrevocable Trust.

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

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

15
16 A.19 Although the Purchase Agreement was purportedly executed on May 31, 2013 – after
17 Larry and Heidi's resignation as Family Trustees of the Irrevocable Trust –, the Purchase Agreement's
18 effective date is March 31, 2013, months prior to such resignation.

19
20 A.20 At the time the Purchase Agreement was entered, Larry was on both sides of the
21 transaction. Thus, Larry had a conflict as both Co-Family Trustee of the Irrevocable Trust, on one
22 hand, and Trustee of the Siblings Trust and manager of SJA.

23 A.21 The Purchase Agreement provides, in pertinent part, that the Irrevocable Trust's interests
24 in the LLCs shall be sold to and purchased by SJA (the "LLC Sale Interests") and the Irrevocable
25 Trust's interests in the Corporations shall be purchased by the Sibling Trusts (the "Corporation Sale
26 Interests"). The LLC Sale Interests purchase price is \$15,801,913.00 and the Corporation Sale
27 Interests purchase price is \$9,454,861.00. Such amounts are based on the Irrevocable Trust's
28

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

7
8 A.22 The Purchase Agreement provides that the LLC Sale Interests Purchase Price is to be
9 paid by SJA to the Irrevocable Trust with \$1,000,000.00 cash down and the balance in the form of an
10 unsecured promissory note ("LLC Note") with an interest rate of or about 3.70% per annum⁴ to be
11 repaid monthly in the amount of \$45,639.23 over ten (10) years. See Ex. 4 at Ex. B ¶¶1-2(A) and (B).
12 The LLC Note provides for the first monthly installment payment to be made on April 1, 2013. *Id.* at
13 ¶2(B). The LLC Note also provides for annual payments of principal in the amount of \$1,000,000.00
14 in semi-annual installments, the first of which shall be paid on October 1, 2013, with subsequent
15 payments to be paid every six months thereafter and any unpaid balance of principal to be due and
16 payable on the date of maturity. *Id.* at ¶2(C).

17
18 A.23 Similarly, the Purchase Agreement provides for the Corporation Sale Interests Purchase
19 Price to be paid by the Sibling Trusts to the Irrevocable Trust with \$1,000,000.00 cash down with the
20 balance in the form of an unsecured promissory note ("Corporation Note") having an interest rate of or
21 about 3.70% per annum⁵ to be repaid monthly in the amount of \$26,069.15 over ten (10) years. See
22 Ex. 4 at Ex. C ¶¶1-2(A) and (B). The Corporation Note provides for the first monthly installment
23 payment to be made on April 1, 2013. *Id.* at ¶2(B). The Corporation Note also provides for annual
24 payments of principal in the amount of \$1,000,000.00 in semi-annual installments, the first of which
25

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

⁵ See, *supra*, n.4.

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

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

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

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

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

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

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

B.

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

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

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

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

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

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

C.

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

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

C.2 NRS 153.031(1), made applicable to trust proceedings pursuant to NRS 164.005, provides that a trustee or beneficiary of a trust may petition the court regarding any aspect of the affairs of the trust, including settling the accounts and reviewing the acts of the trustee, including the exercise of discretionary powers. *See* NRS 153.031(1)(f).

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

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

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

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

5 C.5 As previously set forth, over the past fifteen years, Petitioner has never received an
6 inventory of the Irrevocable Trust’s assets or an account of its administration, despite a request for the
7 same. Indeed, it was not until on or about June 18, 2013 – weeks after the Family Trustee sold all of
8 the Irrevocable Trust’s interests in the LLCs and the Corporations – that Petitioner received any
9 information whatsoever regarding the assets held (or formally held) by the Irrevocable Trust and their
10 purported values.
11

12 C.6 Accordingly, the Family Trustee has violated the fiduciary obligations due and owing to
13 Petitioner by failing to provide Petitioner with an inventory of the Irrevocable Trust’s assets or render
14 a fiduciary accounting as required under law. Thus, this Court should enter an Order compelling
15 Lubbers to provide Petitioner with an inventory of the Irrevocable Trust’s assets and a complete
16 accounting of the Irrevocable Trust’s activities from February 24, 1998, the date of the Irrevocable
17 Trust’s creation, through the present date.
18

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

23 ///

24 ///

25 ///

26 ///

D.

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

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

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

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

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

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

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

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

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

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

22
23
24
25
26 ⁶ Notably, Petitioner is unaware of any similar sale of any interests in the LLCs and/or
27 Corporations owned by the Sibling Trusts. Rather, Petitioner is informed and believes that the Sibling Trusts
28 shall retain their respective interest in the LLCs and Corporations. Moreover, Petition is further informed and
believes that the Irrevocable Trustee(s) of the Sibling Trusts have recently made several large distributions
and/or acquisitions, despite being subject to the same restrictions imposed by the Credit Agreement.

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

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

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

17 E.

18 PRAYER

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

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

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

SOLOMON DWIGGINS & FREER, LTD.
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TEL: (702) 853-5483 | FAX: (702) 853-5485

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

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

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

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

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

DATED September 26, 2013.

SOLOMON DWIGGINS & FREER, LTD.

By: 

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

Attorneys for Petitioner, Scott Canarelli

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LAS VEGAS, NEVADA 89129
TEL: (702) 853-5483 | FAX: (702) 853-5485

VERIFICATION

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

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

DATED this 25 day of September, 2013.


SCOTT LYLE GRAVES CANARELLI

EXHIBIT 2

SOLOMON DWIGGINS & FREER, LTD.
Attorneys at Law

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

Cheyenne West Professional Centre
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129

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

Of Counsel
Steven E. Hollingworth

Direct Dial:
(702) 589-3500

November 14, 2012

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

Via Email and U.S. Mail

Re: Scott Canarelli

Dear Ed:

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

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

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

SOLOMON DWIGGINS & FREER, LTD.
Attorneys At Law

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

- (1) [REDACTED] made payable to Scott Canarelli each month, beginning November 23, 2012, for daily living needs;
- (2) [REDACTED] made payable to Scott Canarelli each February 1 for Valentine's Day gifts.
- (3) [REDACTED] made payable to Scott Canarelli each November 1 for Wedding Anniversary gifts.
- (4) [REDACTED] made payable to Scott Canarelli each December 1 for Christmas Gifts.
- (5) [REDACTED] made payable to Scott Canarelli each January 1 for family birthday gifts; and
- (6) [REDACTED] made payable to my firm to replenish Scott's retainer.

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

Sincerely,

SOLOMON DWIGGINS & FREER, LTD.



Mark A. Solomon

MAS/agl

cc: Client (via email)

EXHIBIT 3

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

Colby,

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

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

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

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

Dana,

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

1. Modification of Confidentiality Agreement

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

2. Modification of the Scheduling Order

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

3. ESI Searches

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

Please confirm that the foregoing is agreeable.

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

Let me know if you wish to discuss anything further.

Thanks,
Colby

J. Colby Williams, Esq.
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Las Vegas, Nevada 89101
T: 702.382.5222
F: 702.382.0540
E: jcw@cwlawlv.com

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From: Dana Dwiggins <ddwiggins@sdfnlaw.com>

Date: Thursday, May 17, 2018 at 2:37 PM

To: Colby Williams <jcw@cwlawlv.com>

Cc: Phil Erwin <pre@cwlawlv.com>, "Tess E. Johnson" <tjohnson@sdfnlaw.com>, "Erin L. Hansen" <ehansen@sdfnlaw.com>

Subject: Canarelli

Colby,

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

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

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

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

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

Dana A. Dwiggins

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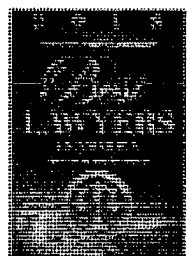
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Email: ddwiggins@sdfnlaw.com | Website: www.sdfnlaw.com

 www.facebook.com/sdfnlaw

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



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EXHIBIT 4

From: Ed Lubbers [ELubbers@LubbersLaw.com]
Sent: 11/15/2012 5:59:52 PM
To: Bob Evans [BEvans@AmericanWesthomes.com]; Dianne Ferraro [DFerraro@AmericanWesthomes.com]; Teresa OMalley [TOmalley@AmericanWesthomes.com]
Subject: Agenda
Attachments: 11.16.2012.doc

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

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Canarelli/American West Companies
AGENDA
November 17, 2012

A. DOCUMENTS

B. TOPICS

1.

2.

3.

4.

Redacted

5.

6.

7.

8.

9.

10. Scott – lawsuit threatened

DECLARATION OF DAVID S. LEE

DECLARATION OF DAVID S. LEE

I, DAVID S. LEE, declare as follows:

1. I am a partner in the law firm Lee, Hernandez, Landrum, & Carlson. I have been a licensed and practicing attorney in the State of Nevada continuously since 1996.
2. I make this Declaration in support of Respondents' Opposition to Motion for Determination of Privilege Designation of RESP013284-RESP013288 and RESP78899-RESP78900 .
3. I have personal knowledge of the facts stated in this Declaration unless otherwise so stated, and am competent to testify thereto if called upon to do so.
4. In or about early-mid October 2013, Edward Lubbers contacted our law firm, which was then known as Lee, Hernandez, Landrum, Garofalo & Blake, to represent him in connection with responding to several petitions that had been filed in probate court by the law firm Solomon Dwiggins & Freer. The petitions related to several trusts in which Scott Canarelli was a beneficiary and Mr. Lubbers was a trustee. One of the trusts at issue was The Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998 (the "SCIT"), which was the subject of Case No. P-13-078912-T.
5. I have reviewed certain of our firm's records related to our representation of Mr. Lubbers in this matter, and note that we provided Mr. Lubbers with a written retainer agreement on or about October 17, 2013. I am aware, however, that attorneys at our firm had substantive discussions with Mr. Lubbers about the representation prior to October 17 as set forth below.
6. I have reviewed my firm's billing records from October 2013 for the Canarelli trust matters, which were created at or about the time of the events recorded therein in the normal course of business. A true and correct copy of my firm's billing records for October 2013 for the

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

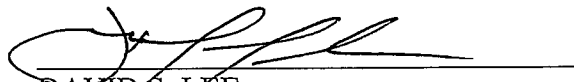
7. The subject billing records reflect that Charlene Renwick, another attorney at the firm, and I conducted a conference call with Mr. Lubbers on October 14, 2013 that lasted approximately a half hour. The general subject matter of the call reflected in the records is “re: responses to petition.”

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

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

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

DATED this 8 day of August, 2018.


DAVID S. LEE

DECLARATION OF
CHARLENE N.
RENWICK

DECLARATION OF CHARLENE N. RENWICK

I, CHARLENE N. RENWICK, declare as follows:

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

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

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

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

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

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

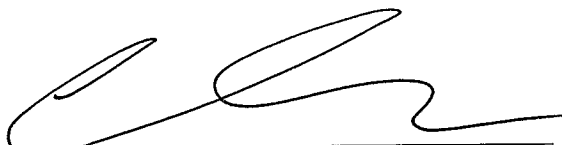
....” The rest of the entry has been redacted to protect attorney-work product and attorney-client privileged communications.

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

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

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

DATED this ²⁸0 day of August, 2018.



CHARLENE N. RENWICK

EXHIBIT 5

LEE, HERNANDEZ, LANDRUM, GAROFALO & BLAKE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

7575 VEGAS DRIVE, SUITE 150
LAS VEGAS, NEVADA 89128

TAX I.D. NO. 06-1663241

TELEPHONE: (702) 880-8750
FACSIMILE: (702) 314-1210Ed Lubbers
8345 W. Sunset Rd. #250
Las Vegas, NV 89113Statement Date: November 30, 2013
Statement No. 84457
Account No. 2087.035
Page: 1

Attn: Ed Lubbers

Lubbers - Trustee of Canarelli Trust

APPROVAL *[Signature]*
COMPANY *SCOTT*
VENDOR *LEEHE*
PAY DATE *2/05/14*
INVOICE # *84457*
AMOUNT *27336.88*
DATE *SVCS 2013/10:11*
ACCT/PROJ *81000*
V SUR ICC *0000*

Fees

ENTERED FEB 03 2014

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

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Ed Lubbers

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11/30/2013

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2087-035

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84457

Lubbers - Trustee of Canarelli Trust

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

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Ed Lubbers

Lubbers - Trustee of Canarelli Trust

Account No:
Statement No:

Page: 2
11/30/2013
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84457

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

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Ed Lubbers

11/30/2013

Account No: 2087-035
Statement No: 84457

Lubbers - Trustee of Canarelli Trust

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

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

Expenses

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

Advances

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

APP000165

Ed Lubbers

11/30/2013

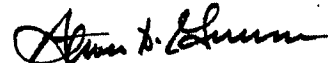
Account No: 2087-035
Statement No: 84457

Lubbers - Trustee of Canarelli Trust

10/31/2013	Response to Petition to Assume Jurisdiction Over the Scott Canarelli Protection Trust; to Confirm Trustees; to Compel the Production of a Fully Executed Copy of the Trust; and to Compel an Inventory and an Accounting	233.19
10/31/2013	Electronic Filing Fee (Per Court Order): 10/16/13 Trustee Edward C. Lubbers' Response to Petition to Assume Jurisdiction Over the Scott Lyle Graves Canarelli Irrevocable Trust; to Confirm Edward C. Lubbers as Family and Independent Trustee; for an Inventory and Accounting; to Compel an Independent Valuation of the Trust Assets Subject to the Purchase Agreement, Dated May 31, 2013; and to Authorize and Direct the Trustee and Former Trustees to Provide Settlor/Beneficiary With Any and All Information and Documents Concerning the Sale of the Trust's Assets Under Such Purchase Agreement	233.19
10/31/2013	Electronic Filing Fee (Per Court Order): 10/16/13 Trustee Edward C. Lubbers' Response to Petition to Assume Jurisdiction Over the Scott Lyle Graves Canarelli Irrevocable Trust - Secondary Trust; to Confirm Trustee; and to Compel an Inventory and an Accounting	233.19
10/31/2013	Electronic Filing Fee (Per Court Order): 10/31/13 Trustee's Objection to Order Granting Petition to Assume Jurisdiction Over the Scott Lyle Graves Canarelli Irrevocable Trust - Secondary Trust; to Confirm Trustee; and to Compel an Inventory and an Accounting	3.50
10/31/2013	Electronic Filing Fee (Per Court Order): 10/31/13 Trustee's Objection to Order Granting Petition to Assume Jurisdiction Over the Scott Lyle Graves Canarelli Irrevocable Trust; to Confirm Edward C. Lubbers as Family and Independent Trustee; for an Inventory and Accounting; to Compel an Independent Valuation of the Trust Assets Subject to the Purchase Agreement, Dated May 31, 2013; and to Authorize and Direct the Trustee and Former Trustees to Provide Settlor/Beneficiary With Any and All Information and Documents Concerning the Sale of the Trust's Assets Under Such Purchase Agreement	3.50
10/31/2013	Electronic Filing Fee (Per Court Order): 10/31/13 Objection to Order Granting Petition to Assume Jurisdiction Over the Scott Canarelli Protection Trust; to Confirm Trustees; to Compel the Production of a Fully Executed Copy of the Trust; and to Compel an Inventory and an Accounting	3.50
	Electronic Filing Fee (Per Court Order):	710.07
	Total Advances	755.12
	Total Current Work	7,336.36
	Balance Due	\$7,336.36

APP000166

EXHIBIT 6



CLERK OF THE COURT

1 **STIP**
2 MARK A. SOLOMON, ESQ.
3 Nevada Bar No. 00418
4 Email: msolomon@sdfnlaw.com
5 BRIAN P. EAGAN, ESQ.
6 Nevada Bar No. 09395
7 Email: beagan@sdfnlaw.com
8 SOLOMON DWIGGINS & FREER, LTD.
9 Cheyenne West Professional Centre
10 9060 West Cheyenne Avenue
11 Las Vegas, Nevada 89129
12 Telephone: (702) 853-5483
13 Facsimile: (702) 853-5485
14
15 Attorneys for Petitioner, Scott Canarelli

10 **DISTRICT COURT**

11 **COUNTY OF CLARK, NEVADA**

12 In the Matter of the

Case No.: P-13- 078912-T
Dept. No.: XXVI/PROBATE

13 THE SCOTT LYLE GRAVES CANARELLI
14 IRREVOCABLE TRUST dated February 24,
15 1998,

Hearing Date: N/A
Hearing Time: N/A

16 **STIPULATION AND ORDER APPOINTING**
17 **VALUATION EXPERT AND CLARIFYING ORDER**

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

25 WHEREAS the Order provides, in pertinent part, that:

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

SOLOMON DWIGGINS & FREER, LTD.
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TEL: (702) 853-5483 | FAX: (702) 853-5485

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

4 ...

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

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

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

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

26 WHEREAS on November 1, 2013, this Court held a hearing regarding the determination of a
27 valuation expert and heard Edward C. Lubbers' limited objection to the language of the Order;
28

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

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

13 ACCORDINGLY, Petitioner, SCOTT CANARELLI, Settlor and Beneficiary of the Irrevocable
14 Trust by and through his counsel of record, the law firm of SOLOMON DWIGGINS & FREER, LTD.
15 and EDWARD LUBBERS, Successor Family and Independent Trustee of the Irrevocable Trust, by
16 and through his counsel of record, the law firm of CAMPBELL & WILLIAMS, HEREBY
17 STIPULATE AND AGREE AS FOLLOWS:
18

19 IT IS HEREBY STIPULATED AND AGREED that EDWARD LUBBERS, Successor Family
20 and Independent Trustee of the Irrevocable Trust, is hereby authorized and directed to retain
21 STEPHEN NICOLATUS of WESTERN VALUATION ADVISORS as a valuation expert on behalf
22 of Scott Canarelli to value the assets held by the LLCs and the Corporations that were subject to the
23 Purchase Agreement, dated May 31, 2013, the cost of such valuation to be solely borne by the
24 Irrevocable Trust; and
25

26 IT IS HEREBY STIPULATED AND AGREED that the wording of the Order regarding the
27 Trustee's agreement to provide the Beneficiary with information and documentation concerning the
28

SOLOMON DWIGGINS & FREER, LTD.
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TEL: (702) 853-5483 | FAX: (702) 853-5485

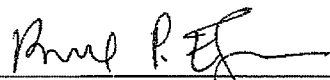
1 Purchase Agreement, dated May 31, 2013, contemplates the scope of information and documents that
2 Edward Lubbers, Lawrence Canarelli and Heidi Canarelli shall provide to Scott Canarelli concerning
3 such purchase agreement, but does not establish the standard for the determination of the actions of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

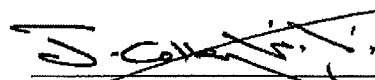
7 DATED November 25th, 2013.

DATED November 25th, 2013.

8 SOLOMON DWIGGINS & FREER, LTD.

CAMPBELL & WILLIAMS

9
10 



11 BRIAN P. EAGAN, ESQ.
12 Nevada State Bar No. 09395
13 9060 W. Cheyenne Avenue
14 Las Vegas, Nevada 89129

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

15 Attorneys for Scott Canarelli

Attorneys for Edward Lubbers

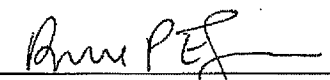
16 **IT IS SO HEREBY ORDERED.**

17 DATED this 26th day of November, 2013.



18 DISTRICT COURT JUDGE

19 Submitted by:
20 SOLOMON DWIGGINS & FREER, LTD.

21
22 

23 MARK A. SOLOMON, ESQ.
24 Nevada State Bar No. 00418
25 BRIAN P. EAGAN, ESQ.
26 Nevada State Bar No. 09395
27 9060 W. Cheyenne Avenue
28 Las Vegas, Nevada 89129

Attorneys for Petitioner, Scott Canarelli

EXHIBIT 7

SOLOMON DWIGGINS & FREER, LTD.
Attorneys At Law

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

Cheyenne West Professional Centre
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Telephone: (702) 853-5483
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December 6, 2013

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

Of Counsel
Steven E. Hollingworth

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

RE: Scott Canarelli Trusts

Dear Colby:

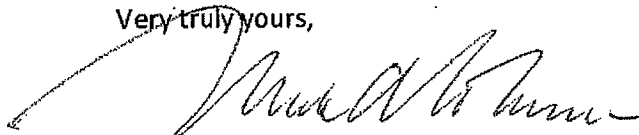
Thank you for your letter of December 6, 2013. We will direct all communications to you and serve you with a copy of any future court filings. However, until we receive the substitution of counsel, we will also be required to serve court filings upon the Lee Hernandez firm.

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

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

We look forward to working with you on this matter.

Very truly yours,



Mark A. Solomon

MAS/beb

cc: Client
Brian P. Eagan, Esq.

Email: sdfilaw@sdfnlaw.com | Website: www.sdfnlaw.com

APP000173

EXHIBIT 8



SOLOMON | DWIGGINS | FREER^{LTD}

TRUST AND ESTATE ATTORNEYS

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Steven E. Hollingworth

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

December 9, 2014

VIA HAND DELIVERY

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

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

Dear Colby:

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


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

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

J. Colby Williams, Esq.
December 9, 2014
Page Two

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

Best Regards,



Alan D. Freer

Encl.

cc: Scott Canarelli
Dan Gerety, CPA



CAMPBELL
& WILLIAMS
ATTORNEYS AT LAW

VIA EMAIL

December 12, 2014

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

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

Dear Alan:

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

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

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APP000178

Alan D. Freer, Esq.
December 12, 2014
Page 2

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

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

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

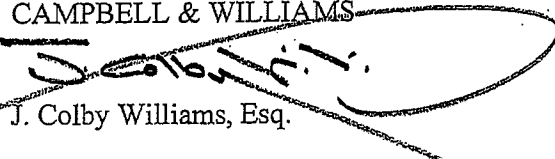
In closing, let me summarize: (i) we disagree with the allegations and insinuations contained in Mr. Gerety's latest letter and reserve the right to contest the same at the appropriate time; (ii) we will, however, reproduce the K1's in the manner set forth above and will work with you to address how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

Alan D. Freer, Esq.
December 12, 2014
Page 3

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

Very truly yours,

CAMPBELL & WILLIAMS



J. Colby Williams, Esq.

JCW/

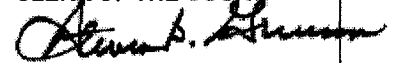
cc: Donald J. Campbell, Esq.
Mark A. Solomon, Esq.
Edward Lubbers, Esq.
(all via e-mail)

EXHIBIT 9

SUBMITTED UNDER SEAL
IN CAMERA PURSUANT TO
CONFIDENTIALITY
AGREEMENT

Consent dated November 18, 2015

EXHIBIT 10



RSPN

Dana A. Dwiggins (#7049)

Jeffrey P. Luszeck (#9619)

Tess E. Johnson (#13511)

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Attorneys for Scott Canarelli

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of

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

Case No.: P-13-078912-T

Dept. No.: XXVI/Probate

Hearing Date: July 26, 2018

Hearing Time: 9:30 a.m.

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

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

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

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SOLOMON
DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS



We will compile, form the information you provide, the accounting and the related schedules for the period January 1, 2014 to December 31, 2014, to be included *in the form prescribed by the Clark County District Court of Nevada* and issue an accountants' report thereon in accordance with Statements on Standards for Accounting and Review Services issued by the American Institute of Certified Public Accountants.

The objective of a compilation is to assist you in presenting financial information in the form of financial statements. We will utilize information that is your representation without undertaking to obtain or provide any assurance that there are no material modifications that should be made to the financial statements *for them to be in conformity with the requirements prescribed by the Clark County District Court of Nevada.*³⁸

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

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

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

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

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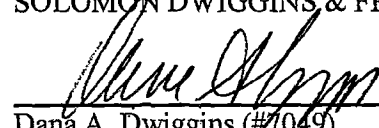
1 This is not a situation where the Discovery Commissioner has allowed Petitioner
2 unfettered access to all of Gerety's communications with Lubbers. Instead, the Discovery
3 Commissioner has undergone efforts to protect communications Lubbers may have had with
4 Gerety that related not to the Trust's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

5 **IV. CONCLUSION**

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

9 DATED this 12th day of July, 2018.

10 SOLOMON DWIGGINS & FREER, LTD.

11 
12 Dana A. Dwiggins (#7049)
13 Jeffrey P. Luszeck (#9619)
14 Tess E. Johnson (#13511)
15 9060 West Cheyenne Avenue
16 Las Vegas, Nevada 89129
17 Telephone No: (702) 853-5483

18 *Attorneys for Scott Canarelli*
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TRUST AND ESTATE ATTORNEYS

Sdf

CERTIFICATE OF SERVICE

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

Via:

- ☐ Hand Delivery
- ☐ U.S. Mail, Postage Prepaid
- ☐ Certified Mail, Receipt No.: _____
- ☐ Return Receipt Request
- ☒ E-Service through the Odyssey eFileNV/Nevada E-File and Serve System, as follows:

J. Colby Williams, Esq.
Campbell & Williams
700 S. Seventh Street
Las Vegas, NV 89101
Email: jcw@campbellandwilliams.com

Elizabeth Brickfield, Esq.
Var E. Lordahl, Esq.
Dickinson Wright, PLLC
8363 W. Sunset Road, Suite 200
Las Vegas, NV 89113
Email: ebrickfield@dickinsonwright.com
vlordahl@dickinsonwright.com

Terrie Max Reed
An Employee of Solomon Dwiggin

EXHIBIT 11

CONFIDENTIALITY AGREEMENT

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

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

The Parties hereby STIPULATE as follows:

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

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

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

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

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

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

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

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

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

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

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

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

Dated this 15 day of September, 2016

CAMPBELL & WILLIAMS



J. COLBY WILLIAMS, ESQ.

jcw@campbellandwilliams.com

WM. HUNTER CAMPBELL, ESQ.

whc@campbellandwilliams.com

700 South Seventh Street

Las Vegas, Nevada 89101

Telephone: (702) 382-5222

Facsimile: (702) 382-0340

Dated this ___ day of September, 2016

SOLOMON DWIGGINS & FREER, LTD



MARK A. SOLOMON, ESQ.

msolemon@sdfnvlaw.com

DANA A. DWIGGINS, ESQ.

ddwiggins@sdfnvlaw.com

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Dated this ___ day of September, 2016

DICKINSON WRIGHT PLLC

ELIZABETH BRICKFIELD, ESQ.

ebrickfield@dickinsonwright.com

8363 West Sunset Road, Suite 200

Las Vegas, Nevada 89113

Telephone: (702) 550-4400

Facsimile: (702) 382-1661

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

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

Dated this ___ day of September, 2016

CAMPBELL & WILLIAMS

J. COLBY WILLIAMS, ESQ.
jcw@campbellandwilliams.com
WM. HUNTER CAMPBELL, ESQ.
whc@campbellandwilliams.com
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Las Vegas, Nevada 89101
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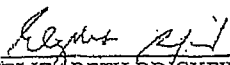
Dated this ___ day of September, 2016

SOLOMON DWIGGINS & FREER, LTD

MARK A. SOLOMON, ESQ.
msolomon@sdfnlaw.com
DANA A. DWIGGINS, ESQ.
ddwiggins@sdfnlaw.com
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Las Vegas, Nevada 89129
Telephone: (702) 853-5483
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Dated this 2nd day of September, 2016

DICKINSON WRIGHT PLLC


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