

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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Elizabeth A. Brown
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 2 OF 7)**

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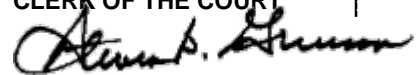
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RPLY

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DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of

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

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

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

Before the Discovery Commissioner

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

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

APP000193

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

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I. INTRODUCTION**

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16 Understanding the legal significance of the aforementioned facts, Respondents contend
17 that Bates Labels RESP013284-RESP013288 ("Lubbers' Notes")¹ and RESP78899-RESP78900
18 ("Nicolatus' Meeting Notes")² (collectively "Disputed Notes") are privileged. Respondents'
19 contention is far-fetched for reasons, including, but not limited to the following. Respondents,
20 who have the heavy burden to prove that privilege attaches to either of the Disputed Notes, have
21 failed to introduce any evidence that Lubbers' Notes are protected by the attorney-client privilege.
22 Respondents' contention that the Typed Memo was drafted as "an aid" to assist Lubbers in an
23 October 14, 2013 telephone conference with Counsel is based upon speculation and conjecture, as
24 there is no evidence that said notes were: (1) ever provided to Lubbers' Counsel; or (2) that he
25

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

28 ² *Id.* at In Camera Ex. 2.

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

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

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

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

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

3 II. RESPONSE TO RESPONDENTS' "FACTUAL BACKGROUND"

4 A. Respondents' Grossly Misstate the Purported "Adversarial Nature" of the 5 Relationship Between Petitioner and Lubbers in 2012 and 2013.

6 In a desperate attempt to "claw-back" the Disputed, Respondents grossly misstate what
7 they deem to be an "adversarial" relationship between Petitioner and Lubbers between 2012
8 through late 2015. While Petitioner concedes there was hostility between himself and the
9 Canarellis as early as 2012, said hostility did not extend to Lubbers. To the contrary, as
10 confirmed in correspondence to Respondents' Counsel, Petitioner was always fond of Lubbers
11 and never had the intention of filing suit against him except as required to proceed against Larry
12 and Heidi, at least until early 2017.³ Petitioner's position regarding Lubbers is confirmed by
13 correspondence dated November 14, 2012 ("November 2012 Letter"), the Initial Petition (upon
14 which Respondents so heavily rely) and correspondence dated December 6, 2013 ("December
15 2013 Letter").

16 Specifically, the November 2012 Letter confirms that the "threatened litigation" was
17 limited to the Family Trustees, which at that time were Larry and Heidi, for their unreasonable
18 interpretation of the HEMS standard as it related to distributions. Indeed, Article V, Section 5.01
19 of the SCIT states that the Family Trustee(s), as opposed to the Independent Trustee, makes
20 distributions.⁴ Consequently, even if litigation was "threatened" on November 14, 2012 it was
21

22 ³ See Correspondence to J. Colby Williams, Esq. dated December 30, 2015, a copy of which
23 is attached hereto as **Exhibit 1** (Attachments Omitted). Petitioner's feelings regarding Lubbers in
24 2015 are consistent with his feelings in 2012 and 2013.

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

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

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

- 12 • "Since the Irrevocable Trust's creation fifteen years ago, *Petitioner has never*
13 *received an inventory of the Irrevocable Trust's assets or an annual*
14 *accounting...*" See Opposition, Ex. 1, Initial Petition at ¶ A.10 (Emphasis
15 Added);
- 16 • "In or about May 2012, *the Family Trustees became hostile toward Petitioner*
17 *and stopped making distributions to Petitioner and/or his family...*The cessation
18 of distributions followed receipt by Petitioner of *a letter from Larry and Heidi*
19 *that read that Larry and Heidi were 'not willing to continue financing*
20 *[Petitioner's] existence' because 'it is against everything that [the Canarellis]*
21 *think is good for [Petitioner].'*" *Id.* ¶ A.13 (Emphasis Added);
- 22 • "...*Larry would not authorize the provision of an accounting and/or inventory of*
23 *the Irrevocable Trust or its assets.* Further, the Independent Trustee admitted to
24 Petitioner that he had little or no personal knowledge of the Irrevocable Trust's
25 management or its assets despite serving as Independent Trustee since 2005." *Id.* ¶
26 A.15 (Emphasis Added); and
- 27 • "Thus, *Larry had a conflict* as both Co-Family Trustee of the Irrevocable Trust, on
28 one hand, and Trustee of the Siblings Trust [sic] and manager of SJA." *Id.* ¶ A.20
(Emphasis Added).

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

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

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

20
21 ⁶ See Opposition, Ex. 1, Decl. of Williams at 15: 1-4 and 12-16.

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

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

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

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

25 Next, LHLGB's billing statements and the self-serving Declarations that were executed by
26 Attorneys Lee and Renwick do not establish that Lubbers discussed any portion of the Typed
27 Memo with them during the October 14, 2013 telephone call. It is difficult to fathom that Lee and
28

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

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

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

⁹ See Opposition, Ex. 5.

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

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

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

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

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

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

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

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

25 It is undisputed that Lubbers' Notes were produced by Respondents' on December 15,
26 2017 in their Initial Disclosure of Witnesses and Documents Pursuant to NRCP 16.1. It is also
27 undisputed that when Petitioner referenced and attached Lubbers' Notes as an exhibit to his
28 Surcharge Petition that was filed on May 18, 2018, Respondents had not taken the position that

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

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

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

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

26
27 ¹² See, e.g., Correspondence dated February 16 and 19, 2018, attached hereto as **Exhibits 4**
28 and **5** respectively.

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

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

16 Further, Lubbers' Notes were initially filed on May 18, 2018, months before the Motion
17 for Determination was filed, and as such, have been a part of the Court Docket since said time.
18 Pursuant to Section 21 of the ESI Protocol the Parties "may refer to the information contained in
19 the privilege log" in order to assist the court in ruling on the instant Motion for Determination;
20
21

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

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

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

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

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

13 **III. LEGAL ARGUMENT**

14 **A. Reply To Opposition To Motion For Determination.**

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

18 As conceded in their Opposition, Respondents have the "heavy burden"¹⁷ of establishing
19 that the attorney-client privilege exists.¹⁸ Although the Parties both agree that "[m]ere facts are
20
21

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

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

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

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

1 not privileged, but communications about facts in order to obtain legal advice are,”¹⁹ they
2 disagree as to whether Lubbers’ Notes were ever “communicated” to LHLGB and the manner so
3 communicated.

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

17
18 ¹⁹ *Id.* at Opposition at 26:17-19.

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

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

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

27 ²³ See Opposition, Ex. 1, Decl. of Williams at ¶ 12,
28

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

2. The Work Product Doctrine Does Not Apply.²⁴

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

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

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

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

²⁶ See Opposition at 19:11-2.

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

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

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

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

26
27 regarding the creation of the aforementioned notes is Lubbers, who unfortunately Petitioner was
28 unable to depose prior to his death due to reasons already known by this Court.



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

5 Even if this Court finds that the Initial Petition constitutes “adversarial litigation,”
6 however, any privilege would be limited to the discreet issues contained therein and not otherwise
7 encompass all aspects of trust administration. This Court is familiar with the fiduciary
8 exception²⁸ to privilege as it has already applied said exception with respect to Lubbers’ retention
9 of Mr. Gerety to prepare the 2014 accounting.²⁹ In other words, the fact that Petitioner requested
10 Respondents to produce an accounting and documentation regarding the Purchase Agreement
11 does not equate to an adversarial relationship as to all issues relating to the administration of the
12 SCIT.

13 Both Parties recognize that Nevada has adopted the “because of” test in determining
14 whether work was done in anticipation of litigation. However, Nevada also has adopted the
15 “totality of the circumstances” standard. Under this standard, this Court is required to look “to
16 the context of the communication and content of the document to determine whether request for
17 legal advice is *in fact* fairly implied, taking into account the facts surrounding the creation of the
18

19
20 ²⁸ *United States v. Mett*, 178 F.3d 1058, 1062–64 (9th Cir. 1999) (“The Ninth Circuit... has
21 joined a number of other courts in recognizing a “fiduciary exception” to the attorney-
22 client privilege.”); *S.E.C. v. Goldstone*, 301 F.R.D. 593, 652–53 (D.N.M. 2014) (“The common
23 law recognizes an exception to the attorney-client privilege called the fiduciary exception: “when
24 a trustee obtains legal advice related to the exercise of fiduciary duties ..., the trustee cannot
25 withhold attorney-client communications from the beneficiary of the trust.”).

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

document and the nature of the document.”³⁰ “Lastly, the court should consider “whether communication explicitly sought advice and comment.”³¹

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

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

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

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

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

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

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

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

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

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

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

23 ³⁶ See, e.g., *Hooke v. Foss Mar. Co.*, No. 13-CV-00994-JCS, 2014 WL 1457582, at *6 (N.D.
24 Cal. Apr. 10, 2014) (finding that forms do not "indicate the existence of an attorney's private
25 impressions, opinions, or theories that the heightened work product privilege is intended to
26 protect."); *Upjohn Co. v. United States*, 449 U.S. 383, 400, 101 S. Ct. 677, 688, 66 L. Ed. 2d 584
27 (1981) ("[i]n ordering discovery of such materials when the required showing has been made, the
court shall protect against disclosure of the mental impressions, conclusions, opinions or legal
theories of an attorney or other representative of a party concerning the litigation.").

28 ³⁷ See Ex. 6.

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

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

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

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

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

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

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

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

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

11 *ii. Lubbers’ death creates a compelling need for disclosure.*

12 Finally, Lubbers’ death creates a “compelling need” for disclosure⁴⁴ under NRCP 26(b)(3)
13 because Lubbers was a material witness in this case. It cannot be disputed that if Petitioner’s

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15 ⁴² See, e.g., *FTC v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 778 F.3d 142, 152
16 (D.C.Cir.2015) (reversing district court’s determination that certain investigative documents were
17 opinion work product, as opposed to fact work product because they did not reveal “counsel’s
18 legal impressions or views of the case”); *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266
19 (10th Cir. 1995) (“Because the work product doctrine is intended only to guard against divulging
20 the attorney’s strategies and legal impressions, it does not protect facts concerning the creation of
21 work product or facts contained within the work product.”); *Graff v. Haverhill N. Coke Co.*, 2012
22 WL 5495514, at *50 (S.D. Ohio Nov. 13, 2012) (“neither the attorney-client privilege nor the
23 work product doctrine applies to prevent the disclosure of underlying facts, regardless of who
24 obtained those facts”).

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

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

1 Counsel was provided an opportunity to ask Lubbers questions on the issues contained within the
2 Disputed Notes, or more importantly, the Typed Memo during a deposition, none of the subjects
3 would be protected under “opinion work product.” Indeed, even if Lubbers’ purported “mental
4 impressions” are protected under NRCP 26(b)(3), questions regarding opinions and legal
5 conclusions (even for an attorney) do not apply to deposition testimony.⁴⁵ In other words,

8 topic areas identified in the Motion for Determination, which are herein incorporated by
9 reference. Because Lubbers was a trustee of the SCIT at such time and has personal knowledge
10 of such facts, Respondents cannot hide behind the privilege or work product doctrine.

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

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

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

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



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

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

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

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

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

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

1 client's lawyer [Lubbers' Counsel, LHLGB]" on one hand, "to a lawyer representing another
2 [Larry] in a matter of common interest."⁴⁷ Here, it is undisputed that LHLGB never represented
3 Larry⁴⁸ and Larry's Counsel (to the extent he had counsel on October 14, 2013) did not participate
4 in the October 14, 2013 conference call. Consequently, NRS 49.095(3) cannot apply.⁴⁹

5 Second, Respondents have provided no evidence that the October 14, 2013 conference
6 was in the "course of an on-going and joint effort to set up a common defense strategy." Indeed,
7 although Respondents' self-servingly state that all Respondents share a common legal interest
8 they have failed to introduce any evidence that: (1) a common legal interest existed on October
9 14, 2013; and/or (2) that the October 14, 2013 telephone conference was made in an on-going and
10 joint effort to set up a common defense strategy. Respondents' omission is significant because
11 the Nevada Supreme Court has repeatedly rejected the invocation of NRS 49.095 when a party
12 fails to introduce evidence of a joint defense.⁵⁰ In other words, NRS 49.095 does not
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14 ⁴⁷ See also *FSP Stallion 1, LLC v. Luce*, 2010 WL 3895914, at *18 (D. Nev. Sept. 30, 2010)
15 (recognizing that "the majority of courts apply the common interest doctrine where parties are
16 represented by separate counsel but engaged in a common legal enterprise.").

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

21 ⁴⁹ Because Respondents' realize that NRS 49.095(3) cannot apply to the October 14, 2013
22 conference call they rely upon *dicta* from *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575,
23 578 (N.D. Cal. 2007), which recognized that parties "may communicate among themselves and
24 with the separate attorneys on matters of common legal interest..." *Nidec* is factually
25 distinguishable, however, because the exception adopted in that case was based on a treatise that
26 is contrary to the requirements set forth in NRS 49.095(3).

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

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

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

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

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22 *AB*, 2013 WL 509021, at *5 (D. Md. Feb. 11, 2013) (no common interest doctrine protection
23 where a common interest agreement was not signed until after the communications occurred and
24 did not state when the common interest arrangement began); *Byrnes v. Jetnet Corp.*, 111 F.R.D.
25 68, 72 (M.D.N.C.1986) (party cannot establish a common interest by relying "solely on counsel's
26 conclusory allegation that the communications were privileged based on the common interest in
27 the [] litigation.").

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

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

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

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

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

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

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

23 Irrespective of the fact that the email potentially references a document other than the
24 Lubbers' Notes, the fact of the matter is that the AWDI had boxes – plural – of Lubbers' hard file.
25 Indeed, during multiple meet and confers in this matter, Respondents' Counsel has represented
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27 ⁵² See Motion for Determination, Ex. 12 (Emphasis added).
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1 that Lubbers' hard files consisted of at least 7 to 9 boxes. Respondents attempt to persuade this
2 Court that the Lubbers' Notes were not contained within the boxes fails because Petitioner cannot
3 prove the same. Petitioner, however, is not required to "prove" the same. It can be reasonably
4 inferred that the boxes that were "returned" to AWDI did in fact contain Lubbers' Notes since it
5 was produced in discovery within one (1) of Dickinson Wright returning said boxes. Indeed,
6 Respondents never contend in the Opposition that Lubbers' Notes was not in the boxes.

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

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

22 The actual entity that was in possession of Lubbers' boxes was AWDI. Respondents'
23 contention that it shares a common interest with AWDI is contrary to the procedural history in
24 this matter and the representations made by Respondents and AWDI in other motions and at
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26 ⁵³ *Cotter*, 134 Nev. Adv. Op. 32, 416 P.3d at 232 (Emphasis Added).

27 ⁵⁴ *Id.*

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

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

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

14 The Canarellis further contended:

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

18 Respondents' acknowledgment that Petitioner has not asserted a claim against AWDI,
19 coupled with Respondents' acknowledgement that Respondents are only being sued in their
20 capacity as Former Trustees, completely undermines any colorable contention that Respondents
21

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

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

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

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

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

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

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26 ⁵⁷ See Opposition to Motion to Compel AWDI at 3:2-4.

27 ⁵⁸ *Id.* at p. 12:5, 13:15 (Emphasis added).
28

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

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

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27 ⁵⁹ *Wynn Resorts*, 399 P.3d at 341.
28

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

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

5 NRPC 4.4(b) is inapplicable to this matter because neither Lubbers' Notes nor Nicolatus'
6 Meeting Notes "relate to the representation of the lawyer's client," but rather, Lubbers' citation to
7 facts. Respondents' reliance on *Merits Incentives, LLC v. Eighth Jud. Dist., Ct.*, 127 Nev. 689,
8 262 P.3d 720 (2011), is similarly misplaced because in *Merits* the documents at issue were
9 disclosed by an anonymous source, whereas here, Lubbers' Notes were disclosed by his Counsel.

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

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

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

24 Further, it would be difficult, if not impossible, for this Court to determine whether
25 Lubbers' Notes are in fact privileged without reviewing and/or being aware of its contents
26 because Respondents failed to identify the Lubbers Notes on a privilege log as required by
27 Section 21 of the ESI Protocol.
28

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**SOLOMON
DUGGINS & FREER**
TRUST AND ESTATE ATTORNEYS

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

DATED this 24th day of August, 2018.

SOLOMON DWIGGINS & FREER, LTD.

Dana A. Dwigging (#7049)
Jeffrey P. Luszeck (#9619)
Tess E. Johnson (#13511)
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone No: (702) 853-5483

Attorneys for Scott Canarelli

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

CERTIFICATE OF SERVICE

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

Via:

- ☐ Hand Delivery
- ☐ U.S. Mail, Postage Prepaid
- ☐ Certified Mail, Receipt No.: _____
- ☐ Return Receipt Request
- ☒ 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

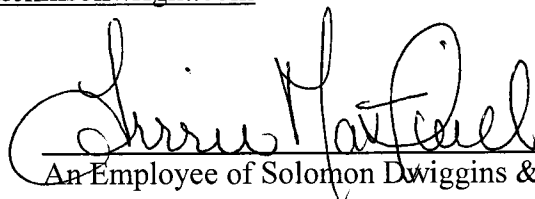

An Employee of Solomon Dwiggins & Freer, Ltd.

EXHIBIT 1

EXHIBIT 1



SOLOMON | DWIGGINS | FREER LTD

TRUST AND ESTATE ATTORNEYS

Mark A. Solomon
Dana A. Dwiggin
Alan D. Freer
Brian K. Steadman
Steven E. Hollingworth
Brian P. Eagan
Jeffrey P. Luszeck
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Jordanna L. Evans
Joshua M. Hood
Christopher J. Fowler
Jeremy M. Welland
Craig D. Friedel

Direct Dial (702) 589-3500
Email solomon@sdfnlaw.com

December 30, 2015

Via FACSIMILE & EMAIL

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

**Re: Scott Lyle Graves Canarelli Irrevocable Trust ("Trust")
SETTLEMENT COMMUNICATIONS**

Dear Colby,

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

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

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TRUST AND ESTATE ATTORNEYS

Colby Williams, Esq.
Page 2
December 30, 2015

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

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

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

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

APP000227

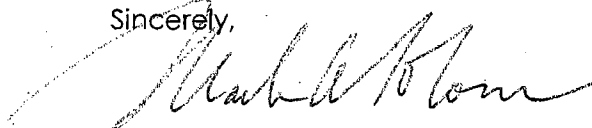
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TRUST AND ESTATE ATTORNEYS

Colby Williams, Esq.
Page 3
December 30, 2015

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

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

Sincerely,

A handwritten signature in black ink, appearing to read "Mark A. Solomon", written over a horizontal line.

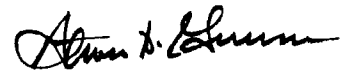
Mark A. Solomon

cc: client (w/encl.)

APP000228

EXHIBIT 2

EXHIBIT 2



CLERK OF THE COURT

PET
MARK A. SOLOMON, ESQ.
Nevada Bar No. 00418
Email: msolomon@sdfnvlaw.com
BRIAN P. EAGAN, ESQ.
Nevada Bar No. 09395
Email: beagan@sdfnvlaw.com
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Attorneys for Petitioner, Scott Canarelli

DISTRICT COURT

COUNTY OF CLARK, NEVADA

In the Matter of the

THE SCOTT CANARELLI PROTECTION
TRUST.

Case No.: P-13- 0 7 8 9 1 9 - T
Dept. No.: XXVI/PROBATE

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

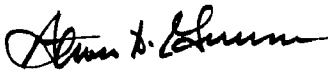
**PETITION TO ASSUME JURISDICTION OVER THE SCOTT CANARELLI
PROTECTION TRUST; TO CONFIRM TRUSTEES; TO COMPEL THE PRODUCTION
OF A FULLY EXECUTED COPY OF THE TRUST AND TO COMPEL AN INVENTORY
AND AN ACCOUNTING**

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

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EXHIBIT 3

EXHIBIT 3


CLERK OF THE COURT

PET
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Email: msolomon@sdfnlaw.com
BRIAN P. EAGAN, ESQ.
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Attorneys for Petitioner, Scott Canarelli

DISTRICT COURT

COUNTY OF CLARK, NEVADA

In the Matter of the

Case No.: P-13-078913-T

Dept. No.: XXVI/PROBATE

THE SCOTT LYLE GRAVES CANARELLI
IRREVOCABLE TRUST – SECONDARY
TRUST, dated October 27, 2006.

Hearing Date: 10/18/2013

Hearing Time: 9:30 a.m.

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

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

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

EXHIBIT 4

EXHIBIT 4



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JOEL Z. SCHWARZ
JSCHWARZ@DICKINSONWRIGHT.COM
(702) 550-4436

February 16, 2018

VIA E-MAIL

ddwiggins@sdfnvlaw.com

tjohnson@sdfnvlaw.com

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

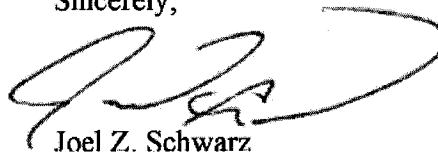
Re: Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998 (the "Trust")
District Court Case No. P-13-078912-T

Dear Counsel:

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

Thank you for your attention to this matter.

Sincerely,



Joel Z. Schwarz

JZS:lms

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

EXHIBIT 5

EXHIBIT 5



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JOEL Z. SCHWARZ
JSCHWARZ@DICKINSONWRIGHT.COM
(702) 550-4436

February 19, 2018

VIA E-MAIL

ddwiggins@sdfnvlaw.com

tjohnson@sdfnvlaw.com

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

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

Dear Counsel:

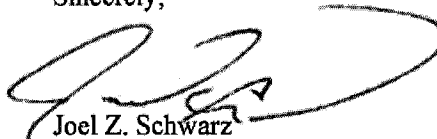
As we were reviewing the supplemental productions in this matter, we located additional items which have been marked Attorney Client and/or Accountant Client Privilege:

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

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

Thank you for your attention to this matter.

Sincerely,



Joel Z. Schwarz

JZS:lms

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

EXHIBIT 6

EXHIBIT 6



CAMPBELL
& WILLIAMS
ATTORNEYS AT LAW

VIA FACSIMILE

August 13, 2018

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

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

Dear Judge Sturman:

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

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

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

[T]he trial court must determine whether the [disputed] documents are indeed privileged. To that end, the court properly ordered JS & S to produce a privilege log and Miller and Bradford to file a response.

The trial court, however, erred by ruling that it would review all the documents to determine whether they are privileged. The court should have awaited the

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The Honorable Gloria Sturman
August 13, 2018

responses to the privilege log and considered the parties' arguments regarding privilege and waiver to determine whether in camera review was warranted for particular documents before reviewing them.

If in camera review is needed, the trial judge should consider whether another judicial officer should conduct the review in light of the possibility that a review of privileged materials may be so prejudicial as to require the judge's recusal. If the trial judge conducts an in camera review and upholds the privilege claim, the judge should consider whether recusal is then necessary.

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

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

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

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

Respectfully submitted,

CAMPBELL & WILLIAMS



J. Colby Williams, Esq.

JCW/

encl. a/s

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

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

Bradford D. **LUND**, an individual;
William S. **Lund**, and Sherry L.
Lund, husband and wife, Petitioners,
v.

The Honorable Robert D. MYERS, Judge of the
Superior Court of the State of Arizona, in and
for the County of Maricopa, Respondent Judge,
Michelle A. **Lund**, Diane Disney
Miller, Kristen **Lund** Olson, and Karen
Lund Page, Real Parties in Interest,
Jennings, Strouss & Salmon, P.L.C., Intervenor.

No. CV-12-0349-PR.

July 16, 2013.

Synopsis

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

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

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

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

Vacated and remanded.

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

West Headnotes (4)

[1] **Pretrial Procedure**

Use of items obtained

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

Cases that cite this headnote

[2] **Pretrial Procedure**

Determination

Privileged Communications and Confidentiality

In camera review

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

1 Cases that cite this headnote

[3] **Pretrial Procedure**

Use of items obtained

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

Cases that cite this headnote

[4] **Pretrial Procedure**

— Determination

Privileged Communications and Confidentiality

— In camera review

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

1 Cases that cite this headnote

Attorneys and Law Firms

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

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

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

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

OPINION

BRUTINEL, Justice.

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

I.

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

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

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

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

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

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

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

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

¶9 The court of appeals accepted jurisdiction and granted a stay. *Lund v. Myers ex rel. Cnty. of Maricopa*, 230 Ariz. 445, 449 ¶ 12, 286 P.3d 789, 793 (App.2012). The court ultimately held that although the plain language of Rule 26.1(f)(2) seemingly placed no limitations on the receiving party's right to present the inadvertently disclosed documents to the court under seal or on the court's ordering the disclosing party to do the same, such a broad reading would conflict with the receiving party's duty under that rule to "return, sequester, or destroy" the privileged documents and with Arizona Rule of Civil Procedure 26(g). *Id.* at 453 ¶¶ 25-26, 286 P.3d at

797. The court reasoned that the receiving party did not have "an unqualified right to file privileged information with the court," but could obtain in camera review only after complying with procedural rules and showing that (a) "specific documents are likely not privileged" or (b) "the privilege has been waived." *Id.* ¶ 27. Finally, the court concluded that if Miller met this threshold, a judicial officer not permanently assigned to the case should conduct the in camera review given the "unique circumstances" of the case. *Id.* at 456 ¶ 38, 286 P.3d at 800.

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

II.

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

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

claim has been resolved either through agreement or court ruling.

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

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

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

to be non-privileged may be used in the litigation and any documents determined to be privileged must be returned to the disclosing party or destroyed.

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

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

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

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

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

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

III.

¶ 21 For the foregoing reasons, we vacate the court of appeals' opinion and the trial court's January 13, 2012

order and remand to the trial court for proceedings consistent with this opinion.

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

All Citations

232 Ariz. 309, 305 P.3d 374

Footnotes

- 1 For ease of reference, we refer to all documents at issue in this case as "privileged" even though some documents are claimed only to be protected trial-preparation material.
- 2 Arizona Rule of Civil Procedure 45(c)(5)(C)(ii) provides the same procedure for a person who has inadvertently produced privileged documents in response to a subpoena. While A.R.S. § 12-2234 states that "an attorney shall not, without the consent of his client, be examined as to any communication made by the client to him," the statute does not address inadvertent document disclosure.

EXHIBIT 7

EXHIBIT 7



1 **TRAN**

2
3 **EIGHTH JUDICIAL DISTRICT COURT**
4 **CIVIL/CRIMINAL DIVISION**
5 **CLARK COUNTY, NEVADA**

6 IN THE MATTER OF THE TRUST OF:) CASE NO. P-13-078912
7 THE SCOTT LYLE GRAVES CANARELLI)
8 IRREVOCABLE TRUST, DATED) DEPT. NO. XXVI/Probate
9 FEBRUARY 24, 1998)
10 _____)

11 BEFORE THE HONORABLE BONNIE BULLA, DISCOVERY COMMISSIONER

12 FRIDAY, MARCH 2, 2018

13 **TRANSCRIPT RE:**
14 **ALL PENDING MOTIONS**

15 **APPEARANCES:**

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

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

21 **ALSO PRESENT:** SCOTT CANARELLI

22
23
24 **RECORDED BY:** Francesca Haak, Court Recorder

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

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

8 MS. DWIGGINS: Okay.

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

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

12 DISCOVERY COMMISSIONER: Thank you.

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

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

1 MR. WILLIAMS: Very good.
2 DISCOVERY COMMISSIONER: All right. Good luck.
3 MR. WILLIAMS: Thank you, Judge.
4 MS. BRICKFIELD: Thank you.
5 MS. DWIGGINS: Thank you, Your Honor.
6 DISCOVERY COMMISSIONER: Status check, I'll see you again back here --
7 what did we say, April 18th at 10:00.
8 THE CLERK: Yes.
9 MS. DWIGGINS: And then 10 days for the R&R submission, correct?
10 DISCOVERY COMMISSIONER: Correct. And I'm going to have the
11 petitioner's counsel prepare that and run it by your colleagues.
12 MS. DWIGGINS: Of course.
13 DISCOVERY COMMISSIONER: Anything further? All right, good luck.
14 MS. DWIGGINS: Thank you, Your Honor.
15 MS. JOHNSON: Thank you, Your Honor.
16 DISCOVERY COMMISSIONER: Thank you. Have a nice weekend.

17 (PROCEEDINGS CONCLUDED 12:33 PM.)

18 * * * * *

19
20 ATTEST: I do hereby certify that I have truly and correctly transcribed the
audio/video proceedings in the above-entitled case to the best of my ability.

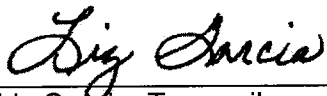
21 
22 _____
23 Liz Garcia, Transcriber
24 LGM Transcription Service

EXHIBIT 8

EXHIBIT 8

Date: Friday, May 23, 2014
 Time: 11:20AM
 User: CHERYL CORLEY

SCOTT L. GRAVES CANARELLI IRRV

Detail General Ledger - Standard

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

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 Report: 01620.rpt
 Company: SCOT007

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AP	CK	013386	08-13	000378	08/09/13		COXCO	0.00		318.38	
AP	CK	013386	08-13	000379	08/09/13		JLSLS	0.00		350.00	
AP	CK	013386	08-13	000380	08/09/13		RENDO	0.00		195.00	
AP	CK	013386	08-13	000381	08/09/13		SCOTT	0.00		490.00	
AP	CK	013386	08-13	000382	08/09/13		SCOTT	0.00		490.00	
AP	CK	013386	08-13	000383	08/09/13		SCOTT	0.00		490.00	
AP	CK	013386	08-13	000384	08/09/13		SCOTT	0.00		490.00	
AP	CK	013386	08-13	000385	08/09/13		SCOTT	0.00		490.00	
AP	CK	013386	08-13	000386	08/09/13		SOLOM	0.00		3,030.80	
AP	CK	013542	08-13	000387	08/16/13		LUBBE	0.00		5,000.00	
GJ	GL	022084	08-13	USB	08/23/13		WIRE FEE	0.00		30.00	
GJ	GL	022084	08-13	WIRE	08/23/13		DISTRIBUTION	0.00		6,500.00	
AP	CK	013749	08-13	000388	08/30/13		CROSS	0.00		2,400.00	
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AP	CK	013749	08-13	000390	08/30/13		PITBL	0.00		62.00	
AP	CK	013749	08-13	000391	08/30/13		WATER	0.00		470.07	
GJ	GL	022357	08-13	USB	08/30/13		INTEREST 2013/08	186.37		0.00	
GJ	GL	022485	09-13	DEPOSIT	09/06/13		DEPOSIT	71,708.39		0.00	
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AP	CK	014020	09-13	000393	09/18/13		JLSLS	0.00		350.00	
AP	CK	014020	09-13	000394	09/18/13		LUBBE	0.00		5,001.50	
AP	CK	014020	09-13	000395	09/18/13		NEVPO	0.00		621.31	
AP	CK	014020	09-13	000396	09/18/13		PITBL	0.00		62.00	
AP	CK	014020	09-13	000397	09/18/13		QUESD	0.00		35.00	
AP	CK	014020	09-13	000398	09/18/13		RENDO	0.00		225.00	
AP	CK	014020	09-13	000399	09/18/13		STATL	0.00		637.24	
AP	CK	014020	09-13	000400	09/18/13		STATL	0.00		489.32	
AP	CK	014020	09-13	000401	09/18/13		STATL	0.00		761.85	
AP	CK	014020	09-13	000402	09/18/13		STATL	0.00		103.75	
AP	CK	014020	09-13	000403	09/18/13		STATL	0.00		153.15	
AP	CK	014020	09-13	000404	09/18/13		STVIA	0.00		700.00	

Date: Friday, May 23, 2014
 Time: 11:20AM
 User: CHERYL CORLEY

SCOTT L. GRAVES CANARELLI IRRV

Detail General Ledger - Standard

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

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 Report: 01620.rpt
 Company: SCOTT007

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AP	CK	014541	10-13	000435	10/23/13		SWGAS		0.00	00.45	
GJ	GL	023674	10-13	USB	10/24/13		WIRE FEE		0.00	30.00	
GJ	GL	023674	10-13	WIRE	10/24/13		DISTRIBUTION		0.00	10,000.00	
AP	CK	014608	10-13	000436	10/31/13		LUBBE		0.00	5,000.25	
GJ	GL	023846	10-13	USB	10/31/13		INTEREST 2013/10	279.17		0.00	
GJ	GL	023864	11-13	DEPOSIT	11/01/13		DEPOSIT	68,625.06		0.00	
AP	CK	014726	11-13	000437	11/08/13		COXCO	0.00		308.05	
AP	CK	014726	11-13	000438	11/08/13		FORTI	0.00		1,170.00	
AP	CK	014726	11-13	000439	11/08/13		JLSLS	0.00		350.00	
AP	CK	014726	11-13	000440	11/08/13		NEVPO	0.00		348.13	
AP	CK	014726	11-13	000441	11/08/13		QUESO	0.00		25.00	
AP	CK	014726	11-13	000442	11/08/13		RENDO	0.00		195.00	
AP	CK	014726	11-13	000443	11/08/13		RHSLM	0.00		673.70	
AP	CK	014726	11-13	000444	11/08/13		SHCMA	0.00		416.68	
AP	CK	014726	11-13	000445	11/08/13		WATER	0.00		345.65	
AP	CK	014793	11-13	000446	11/13/13		LUBBE	0.00		5,033.69	
AP	CK	014793	11-13	000447	11/13/13		MCGLA	0.00		7,200.00	
GJ	GL	024277	11-13	USB	11/22/13		WIRE FEE	0.00		30.00	
GJ	GL	024277	11-13	WIRE	11/22/13		DISTRIBUTION	0.00		10,000.00	
GJ	GL	024375	11-13	USB	11/29/13		INTEREST 2013/11	272.53		0.00	
GJ	GL	024388	12-13	DEPOSIT	12/02/13		DEPOSIT	68,625.06		0.00	
AP	CK	015156	12-13	000448	12/11/13		COXCO	0.00		308.05	
AP	CK	015156	12-13	000449	12/11/13		JLSLS	0.00		350.00	
AP	CK	015156	12-13	000450	12/11/13		NEVEN	0.00		471.39	
AP	CK	015156	12-13	000451	12/11/13		PITBL	0.00		62.00	
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AP	CK	015156	12-13	000459	12/11/13		SCOTT	0.00		490.00	

Date: Friday, May 23, 2014
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SCOTT L. GRAVES CANARELLI IRRV

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Report: 01620.rpt
Company: SCOT007

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AP	CK	015156	12-13	000462	12/11/13		SCOTT		0.00	490.00	
AP	CK	015156	12-13	000463	12/11/13		SCOTT		0.00	490.00	
AP	CK	015156	12-13	000464	12/11/13		SCOTT		0.00	490.00	
AP	CK	015156	12-13	000465	12/11/13		SCOTT		0.00	490.00	
AP	CK	015156	12-13	000466	12/11/13		STVIA		0.00	700.00	
AP	CK	015156	12-13	000467	12/11/13		STVIA		0.00	700.00	
AP	CK	015156	12-13	000468	12/11/13		STVIA		0.00	700.00	
AP	CK	015156	12-13	000469	12/11/13		SWGAS		0.00	34.56	
AP	CK	015156	12-13	000470	12/11/13		WATER		0.00	289.05	
AP	CK	015177	12-13	000471	12/13/13		LUBBE		0.00	5,000.00	
AP	CK	015177	12-13	000472	12/13/13		MCGLA		0.00	3,275.00	
GJ	GL	024713	12-13	USB	12/24/13		WIRE FEE		0.00	30.00	
GJ	GL	024713	12-13	WIRE	12/24/13		DISTRIBUTION		0.00	10,000.00	
AP	CK	015359	12-13	000473	12/27/13		CAMPW		0.00	13,269.57	
AP	CK	015414	12-13	000474	12/31/13		PITBL		0.00	62.00	
AP	CK	015414	12-13	000475	12/31/13		SWGAS		0.00	49.78	
AP	CK	015414	12-13	000476	12/31/13		WATER		0.00	152.35	
GJ	GL	024834	12-13	USB	12/31/13		INTEREST 2013/12		284.41	0.00	
GJ	GL	024847	01-14	DEPOSIT	01/02/14		DEPOSIT		68,625.06	0.00	
AP	CK	015560	01-14	000477	01/10/14		MCGLA		0.00	2,000.00	
AP	CK	015642	01-14	000478	01/17/14		COXCO		0.00	250.31	
AP	CK	015642	01-14	000479	01/17/14		CROSS		0.00	2,500.00	
AP	CK	015642	01-14	000480	01/17/14		JLSLS		0.00	670.00	
AP	CK	015642	01-14	000481	01/17/14		NEVEN		0.00	804.43	
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AP	CK	015642	01-14	000483	01/17/14		RENDQ		0.00	195.00	
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GJ	GL	025309	01-14	USB	01/24/14		WIRE FEE		0.00	30.00	
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AP	CK	015760	01-14	000487	01/27/14		WATER		0.00	124.25	
AP	CK	015820	01-14	000488	01/31/14		LUBBE		0.00	5,000.00	

DCRR

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Philip R. Erwin, Esq. (11563)
CAMPBELL & WILLIAMS
700 South Seventh Street
Las Vegas, Nevada 89107

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DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of

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

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

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

Hearing Date: August 29, 2018

Hearing Time: ~~2:00~~
1:30 p.m.

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

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

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

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

2 Jennifer L. Braster
3 Andrew J. Sharples

4 Attorney for the Special Administrator for the Estate of Edward C. Lubbers: Liane K. Wakayama¹

5 **I.**
6 **FINDINGS**

7 **A. *Motion for Determination of Privilege Designation***

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

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

15 **1. Attorney/Client Privilege**

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

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

23 THE COMMISSIONER FURTHER HEREBY FINDS that although the “fiduciary
24 exception” has not yet been determined by the Nevada Supreme Court, *id.* at 30:4-5, 30:22-23, NRS
25 49.115(5) creates an exception to the attorney/client privilege as to communications relevant to

26
27 ¹ Because Ms. Wakayama departed the hearing prior to the Discovery Commissioner addressing the
28 matters that are the subject of this Report and Recommendation, her signature is not included below
as a reviewing attorney.

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

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

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

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

15 2. Attorney Work Product

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

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

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

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

26 THE COMMISSIONER FURTHER HEREBY FINDS that as a result of Lubbers’ passing
27 on April 2, 2018, he is unavailable to be deposed regarding any factual matter related to the creation
28

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

3 **3. Documents Bates Numbers RESP0013284-13288**

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

7 THE COMMISSIONER FURTHER HEREBY FINDS that Respondents clawed back the
8 documents Bates Numbered RESP0013284-13288 on June 5, 2018, less than three weeks after
9 Petitioner attached them as an exhibit to his supplemental Petition filed May 18, 2018. *Id.* at 55:23-
10 25; 57:18-58:25.

11 i. *RESP0013284*

12 THE COMMISSIONER FURTHER HEREBY FINDS that RESP0013284 appears to be
13 handwritten notes that the Commissioner assumes Lubbers made contemporaneous with a
14 teleconference he had with his lawyers on or about October 14, 2013. *Id.* at 76:20-22, 78:3-5,
15 81:21-22.

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

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

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

26 ii. *RESP0013285*

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

1 consulted with his lawyers, and the notes reflect the types of things one would discuss with his/her
2 attorney. The typed notes, therefore, appear to be an attorney-client communication. *Id.* at 93:9-
3 14.

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

7 THE COMMISSIONER FURTHER HEREBY FINDS that from the beginning of
8 RESP0013285, including the handwritten notes, to the indented paragraph starting with the word
9 "1st" is both work product and protected under the attorney-client privilege without an applicable
10 exception. *Id.* at 109:21-110:4.

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

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

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

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

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

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

8 iii. *RESP0013286 and RESP0013287*

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

12 iv. *RESP0013288*

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

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

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

25 **4. No Waiver**

26 THE COMMISSIONER FURTHER HEREBY FINDS that under *Cotter v. Eighth Judicial*
27 *District Court in and for County of Clark*, 134 Nev. Adv. Op. 32, 416 P.3d 228 (2018), even if a
28

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

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

7 **5. Documents Bates Numbered RESP0078899-78900**

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

12 THE COMMISSIONER FURTHER HEREBY FINDS that Respondents do not contend the
13 documents Bates Numbered RESP0078899-78900 are protected by the attorney/client privilege.
14 They instead contend the notes are protected by the attorney work product doctrine. *Id.* at 62:20-
15 24, 64:2-18.

16 THE COMMISSIONER FURTHER HEREBY FINDS that RESP0078899-78900 do not
17 contain Lubbers' opinions but rather information that is primarily factual in nature. *Id.* at 51:23-
18 52:2, 64:6-11, 71:1-2.

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

23 ***B. Supplemental Briefing on Appreciation Damages.***

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

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

5 THE COMMISSIONER FURTHER HEREBY FINDS that if the Court finds that there was
6 a breach of fiduciary duty, then the amount of any distribution from the Purchased Entities² post
7 March 31, 2013 to the Siblings' Trust is relevant and discoverable. *Id.* at 117:17-19, 138:5-12,
8 141:24-25, 142:3-5.

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

13 II. 14 RECOMMENDATIONS

15 A. *Motion for Determination of Privilege Designation*

16 IT IS HEREBY RECOMMENDED that RESP0013284 is subject to production. *Id.* at 73:1-
17 4, 82:24-83:5.

18 IT IS FURTHER RECOMMENDED that with respect to RESP0013285:
19
20

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

- 1 (1) from the beginning of RESP0013285, including the handwritten notes, to the
2 indented paragraph starting with the word “1st” shall be redacted, *id.* at 109:21-
3 110:1;
- 4 (2) the indented paragraph starting with the word “1st” through and including the first
5 sentence of the following paragraph that starts with “[w]hether” and ends with
6 “happened” is subject to production, *id.* at 101:19-24, 103:20-22, 104:5-16, 110:5-
7 16;
- 8 (3) the second sentence of the paragraph starting with “[w]hether” up through and
9 including the paragraph starting with the word “annual” is subject to production, *id.*
10 at 110:5-16;
- 11 (4) the final paragraph on RESP0013285 shall be redacted. *Id.* at 94:15.

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

14 IT IS FURTHER RECOMMENDED that RESP0013288 is subject to production. *Id.* at
15 77:2-3, 78:1.

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

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

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

23 **B. Supplemental Briefing on Appreciation Damages.**

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

26 IT IS FURTHER RECOMMENDED that the Siblings’ Trusts shall provide records of all
27 distributions made to the Siblings’ Trusts from the Purchased Entities during the period of January
28 1, 2014 to August 29, 2018, including the name of the entity making the distribution, the date the

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

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

7 IT IS FURTHER RECOMMENDED that the Distribution Records be given a confidential
8 designation under NRCP 26(c), thereby protecting the same from being used or attached in filings
9 or other documents submitted to this Court without redactions or an *in camera* designation. *Id.* at
10 138:13-18.

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

14 DATED this 5 day of December, 2018.

15
16 
17 DISCOVERY COMMISSIONER

18 Submitted by:

19 By: 

J. Colby Williams, Esq. (5549)

20 Philip R. Erwin, Esq. (11563)

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26 Counsel for Respondents Lawrence
27 Canarelli, Heidi Canarelli and Edward
28 Lubbers

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CASE NAME: *In re The Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998.*

CASE NUMBER: P-13-078912-T

Approved as to form and content by:

Approved as to form and content by:

By:

Jennifer L. Braster (#9982)
Andrew J. Sharples (#12866)
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By:

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

Attorneys for Petitioner

1 **NOTICE**

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

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

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

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

10 Dana A. Dwiggins
11 Jeffrey P. Luszeck
12 Tess E. Johnson
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18 _____ Placed in the folder of counsel in the Clerk's office on the _____ day of
19 _____, 20 _____.

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

22
23 By Natilie [Signature]
24 Commissioner Designee
25
26
27
28

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

ORDER

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

_____ The parties having waived the right to object thereto,

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

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

* * *

AND

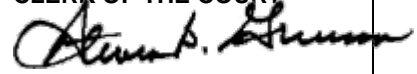
_____ IT IS HEREBY ORDERED the Discovery Commissioner's Report & Recommendations are
affirmed and adopted.

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

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

Dated this _____ day of _____, 20_____.

DISTRICT COURT JUDGE



ODCR

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

Hearing Date:
Hearing Time:

Respondents Lawrence Canarelli (“Larry”) and Heidi Canarelli (“Heidi”) (collectively “the Canarellis”), and Frank Martin, Special Administrator of the Estate of Edward C. Lubbers (“Lubbers” and, together with the Canarellis, “Respondents”), as former Family Trustees of the Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998 (the “SCIT”), through undersigned counsel, hereby object (in part) to the Discovery Commissioner’s Report and Recommendations on Motion for Determination of Privilege Designation. These Objections 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.

NOTICE OF MOTION

TO: ALL PARTIES, and

TO: THEIR COUNSEL OF RECORD

PLEASE TAKE NOTICE that the undersigned will bring the above **Objections** on for hearing before Department XXVI or other appropriate judicial officer on the **24th** day of **January**, 2019, at the hour of **9:30** **a**.m., or as soon thereafter as counsel can be heard.

DATED this 17th day of December, 2018.

CAMPBELL & WILLIAMS

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

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ELIZABETH BRICKFIELD, ESQ. (6236)
JOEL Z. SCHWARZ, ESQ. (9181)

*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

The underlying Discovery Commissioner's Report and Recommendation ("DCRR") addresses important issues of attorney-client privilege and work product protection, the ultimate resolution of which will have a significant impact on the direction of these proceedings. That is because Petitioner Scott Canarelli ("Petitioner" or "Scott") has sought to use Lubbers' privileged and protected materials (typed and handwritten notes) affirmatively to expand his claims in this action. Respondents have moved to dismiss Petitioner's Supplemental Petition based on Lubbers' notes, but that matter is on hold while the threshold privilege issues are finally determined by this Court and, if necessary, the Nevada Supreme Court.

The Discovery Commissioner found the subject notes to be protected by the attorney-client privilege and work product doctrine, at least in part. The Commissioner, however, ruled *sua sponte* that a so-called "fiduciary exception" to Nevada's attorney-client privilege requires production of portions of the notes. Respondents contend this ruling is wrong for two independent reasons. First, Nevada has not recognized the common law fiduciary exception to its statutory attorney-client privilege. Second, even if Nevada has recognized the fiduciary exception (and it has not), the exception certainly does not apply here as Lubbers prepared the subject notes for his own protection after Petitioner filed his original pleading in this action alleging that Lubbers had breached his fiduciary obligations as trustee of the SCIT.

As for work product, the Discovery Commissioner appropriately determined that Lubbers anticipated litigation with Petitioner at the time he prepared his notes. She nonetheless found that the bulk of the notes comprise "ordinary" (*i.e.*, fact)—as opposed to "opinion"—work product, and thus ordered production on grounds that Petitioner had shown a substantial need to obtain the notes due to Lubbers' death. Respondents contend these rulings are likewise erroneous.

II. BACKGROUND

A. Factual Summary

Respondents provided a lengthy factual history in their underlying Opposition filed on August 10, 2018, which they incorporate but will not repeat here. The essential facts are as follows:

Petitioner filed his Initial Petition in this action on September 30, 2013. *See* Opp’n at 6:16-8:16. Prior to that date, Petitioner’s counsel, Solomon Dwiggins & Freer (“SDF”), had threatened to file a petition seeking, *inter alia*, to remove Larry and Heidi as Family Trustees of the SCIT due to hostility between the parties and disputes over distributions. *See id.* at 5:12-6:7. Lubbers specifically noted this development in an agenda item dated November 15, 2012 (“Scott – lawsuit threatened”), which was then sent to Larry and Bob Evans of The American West Homebuilding Group. *Id.* The Initial Petition contained a number of adversarial allegations against the Canarellis and Lubbers, who was Family Trustee by that time, including that “the Family Trustee violated the fiduciary obligations due and owing to Petitioner[.]” *Id.* at 7:4-8:16.

Less than two weeks after Petitioner’s service 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). *See* Opp’n at 8:19-9:2. In anticipation of a telephone call with attorneys David Lee and Charlene Renwick on October 14, 2013, Lubbers prepared (or had prepared) typed notes. *Id.* at 9:3-11. 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. *See id.* The notes go on to describe Lubbers’ “beliefs” regarding the case, including how Respondents should respond to the Initial Petition, and how the Court may view the case. *See id.* Finally, the notes reflect Lubbers’ assessment of the strengths and weaknesses of certain legal issues. *See id.* Lubbers created additional

1 handwritten notes during his October 2013 call with LHLGB, and during a later meeting in
2 December 2013 attended by the parties, their respective counsel, Steve Nicolatus, and Bob Evans.
3 *See* Opp'n at 12:11-14:25.¹

4 Scott filed his Petition to Surcharge on June 27, 2017. Respondents' counsel inadvertently
5 produced Lubbers' October 2013 notes as part of Respondents' Initial Disclosures on December
6 15, 2017. *See* Opp'n at 11:17-12:4. Respondents' counsel inadvertently produced Lubbers'
7 December 2013 notes on April 6, 2018 as part of a supplement to Respondents' Initial
8 Disclosures. *Id.* at 12:5-9. The parties had previously agreed to a written ESI Protocol that
9 expressly governs the procedure for dealing with such inadvertent productions. *Id.* at 13:20-14:8.
10 With no forewarning, though, Petitioner unilaterally included Lubbers' October 2013 notes as an
11 exhibit to his Supplemental Petition filed on May 18, 2018. *See id.* at 12:16-13:4. Petitioner also
12 publicly quoted from Lubbers' October 2013 notes in the body of his Supplemental Petition,
13 which seeks to add fraud and expanded breach of fiduciary duty claims against Respondents. *Id.*
14 Respondents sent a letter on June 5, 2018 clawing back the October 2013 notes pursuant to the
15 parties' ESI Protocol, which prompted a series of communications between counsel for the parties
16 and ultimately led to the filing of the underlying Motion and Countermotion. *See* Opp'n at 13:5-
17 19.

18 In contrast to the manner in which Petitioner has attempted to use the *October* 2013 notes,
19 Petitioner did not seek to make unilateral use of Lubbers' separately-produced *December* 2013
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23 ¹ Petitioner provided copies of Lubbers' notes to the Discovery Commissioner *in camera* as
24 sealed Exhibits 1 and 2 to his underlying Motion. In the context of moving to dismiss Petitioner's
25 Supplemental Petition filed on May 18, 2018, which attached certain of the notes at issue herein
26 as Exhibit 4 thereto, Respondents notified the Court that it may wish to exercise caution before
27 reviewing Lubbers' typed notes so that it did not become unwittingly tainted as the notes reflect
28 Lubbers' beliefs as to how the Court may view this litigation. *See* Letter from C. Williams dated
August 13, 2018. Respondents wish to remind the Court of this issue so that it has the chance to
consider how best to proceed with the review of the DCRR.

notes. *See id.* at 14:17-25. His counsel instead notified Respondents’ counsel of the potential inadvertent production of those notes, after which the parties engaged in the clawback procedure set forth in the ESI Protocol and narrowed their dispute to two pages of documents. *See id.*

B. Procedural History

Petitioner filed his Motion for Determination of Privilege Designation of RESP013284-RESP013288 and RESP78899-RESP78900 on July 13, 2018; Respondents filed their Opposition and Countermotion for Remediation of Improperly Disclosed Attorney-Client Privileged and Work Product Protected Materials on August 10, 2018; Petitioner filed his Reply and Opposition on August 24, 2018, and the Discovery Commissioner conducted a thorough hearing on August 29, 2018.

As a threshold matter, the Discovery Commissioner found that Lubbers anticipated litigation at the time he prepared the typed and handwritten notes in or about October 2013 shortly after Scott filed his Initial Petition. *See, e.g.,* Hr’g Tr. dated Aug. 29, 2018 at 87:22-88:4; 89:15-17; 90:19-25.² The Commissioner further found that the typed notes “reflect things that you would talk with your lawyer about. And if we want to say an attorney/client communication, I think this is probably more than anything else I’ve reviewed in camera appears to be that.” *Id.* at 93:9-14. In the end, the Commissioner found that the notes reflected attorney-client communications, *see id.* at 109:1-5 (“I think it is attorney/client”), but found that the fiduciary exception permitted disclosure of portions of the notes to Petitioner. *See id.* at 109:5-12. To her credit, the Commissioner acknowledged that “the fiduciary privilege has not been determined in Nevada yet,” *see id.* at 30:4-5, and that this “critical issue” would likely need to go “all the way

² True and correct excerpts of the Hearing Transcript dated August 29, 2018 are attached hereto as Exhibit 1.

up” to the Nevada Supreme Court. *See, e.g., id.* at 50:1-10; 77:12-13; 103:13-15.

The Commissioner further found that the notes reflected work product, including opinion work product, but found that Petitioner had a substantial need to obtain portions of the notes. *Id.* at 109:19-110:16. The Commissioner thereafter recommended that the notes be disclosed to Petitioner in redacted form, but stayed enforcement of her recommendations under EDCR 2.34(e) to permit Respondents to file objections with the district court. *Id.* at 110:19-23.

C. Respondents’ Objections to the DCRR

The Discovery Commissioner entered the DCRR on December 6, 2018.³ Respondents object, in part, to the DCRR as follows (objected to language is in bold, italicized text):

Findings

1. Finding I(A)(1), Page 2, ll. 18-21: “even if the disputed Documents are protected by the attorney-client privilege *certain of them (or portions thereof) are subject to disclosure under the ‘fiduciary exception’ to the extent that said documents pertain to administration of The Scott Lyle Graves Canarelli Irrevocable Trust (the “SCIT”).*”

2. Finding I(A)(1), Page 2, l. 23-Page 3, l. 3: “although the ‘fiduciary exception’ has not yet been determined by the Nevada Supreme Court . . . *NRS 49.115(5) creates an exception to the attorney-client privilege as to communications relevant to matters of common interest between two or more clients when the communication was made by any of them to a lawyer retained or consulted in common when offered in an action between any of the clients.*”

3. Finding I(A)(1), Page 3, ll. 8-9: “*So, the actions he [Lubbers] was taking were for the benefit of the SCIT, arguably triggering the fiduciary exception.*”

RESP0013284

4. Finding I(A)(3)(i), Page 4, ll. 16-19: “RESP0013284 is probably protected by the attorney-client privilege, *but it nonetheless falls under the ‘fiduciary exception’ and NRS 49.115(5) because it deals with Lubbers’ preparation of an accounting for the SCIT, which is for the benefit of Petitioner.*”

5. Finding I(A)(3)(i), Page 4, ll. 20-23: “to the extent RESP0013284 may be considered work product because it was created in anticipation of litigation, *it falls*

³ A true and correct copy of the DCRR is attached hereto as Exhibit 2.

under the exception of substantial need since there is no other reasonable way for Petitioner to obtain the information contained therein from Lubbers.”

6. Finding I(A)(3)(i), Page 4, ll. 24-25: “*RESP0013284 contains fact as opposed to opinion information.*”

RESP0013285

7. Finding I(A)(3)(ii), Page 5, ll. 11-14: “*the indented paragraph starting with the word ‘Ist’ on RESP0013285 through and including the first sentence of the following paragraph that starts with ‘whether’ and ends with ‘happened’ are factual in nature (hereinafter the ‘Factual Statements’).*”

8. Finding I(A)(3)(ii), Page 5, ll. 15-19: “while certain portions of RESP0013285 may constitute opinion work product, *the Factual Statements constitute ordinary work product.* To the extent the Factual Statements are intertwined with opinion work product, *there is nonetheless substantial need to have this information disclosed as Petitioner has no other reasonable way to obtain the information referenced in the Factual Statements.*”

9. Finding I(A)(3)(ii), Page 5, ll. 20-23: “to the extent the Factual Statements are contained within an attorney-client privileged communication, *they nevertheless fall under the ‘fiduciary exception’ and NRS 49.115(5) because the topics are administrative in nature – e.g. management of the SCIT – and are otherwise factual in nature.*”

10. Finding I(A)(3)(ii), Page 5, l. 25 – Page 6, l. 4: “*the second sentence of the paragraph starting with ‘whether’ up through and including the paragraph starting with the word ‘annual’ is subject to disclosure. . . . Said portion of RESP0013285 is factual in nature, and there is substantial need to have this information disclosed as Petitioner has no other reasonable way for Petitioner to obtain the same. . . .* To the extent this portion of RESP0013285 may be protected under the attorney/client privilege, *it nonetheless falls under the ‘fiduciary exception’ because the topics are administrative in nature – e.g. management of the SCIT – and are otherwise factual in nature.*”

RESP0013288

11. Finding I(A)(3)(iv), Page 6, ll. 13-16: “it is unclear when Lubbers composed the notes labeled RESP0013288 because there is no date on them . . . *but they appear to contain facts about the SCIT and the petition for accounting, not Lubbers’ opinions.*”

12. Finding I(A)(3)(iv), Page 6, ll. 17-21: “*no reason to find RESP0013288 protected under the attorney/client privilege because it contains factual information pertaining to the Initial Petition. . . .* To the extent RESP0013288 is

protected by the attorney/client privilege, *it nonetheless falls under the ‘fiduciary exception’ because it primarily discusses an accounting for the SCIT.*”

13. Finding I(A)(3)(iv), Page 6, ll. 22-24: “to the extent RESP0013288 is considered work product, *it falls under the exception of substantial need and contains facts as opposed to opinion.*”

RESP0078899-78900

14. Finding I(A)(5), Page 7, ll. 16-17: “**RESP0078899-78900 do not contain Lubbers’ opinion but rather information that is primarily factual in nature.**”

15. Finding I(A)(5), Page 7, ll. 19-22: “even if RESP0078899-78900 constitute work product, *there is substantial need that the documents not be deemed protected because there is no other way for Petitioner to obtain said information from Lubbers via deposition or other means.*”

Recommendations

a. Recommendation II(A), Page 8, ll. 16: “**RESP0013284 is subject to production.**”

b. Recommendation II(A), Page 8, l. 18 – Page 9, l. 10: “with respect to RESP0013285: (2) *the indented paragraph starting with the word ‘Ist’ on RESP0013285 through and including the first sentence of the following paragraph that starts with ‘whether’ and ends with ‘happened’ is subject to production;* (3) *the second sentence of the paragraph starting with ‘whether’ up through and including the paragraph starting with the word ‘annual’ is subject to production.*”

c. Recommendation II(A), Page 9, ll. 14: “**RESP0013288 is subject to production.**”

d. Recommendation II(A), Page 9, ll. 16: “**RESP0078899-78900 are subject to production.**”

III. ARGUMENT

A. Standard of Review.

The District Court should “accept the [Discovery Commissioner’s] findings of fact unless they are clearly erroneous.” *In re Hansen*, 2008 WL 6113446, at *1 (Nev. Nov. 19, 2008) (citing NRC 53(e)(2)). Additionally, the Court should adopt a report and recommendation “unless the findings are based upon material errors in the proceedings or a mistake in law; or are unsupported

by any substantial evidence; or are against the clear weight of the evidence.” *Id.* (quoting *Russell v. Thompson*, 96 Nev. 830, 834 n.2, 619 P.2d at 537, 539-40 n.2 (1980)). The Court is also free to modify the report, reject it, receive further evidence, or recommit it with instructions. *See* NRCP 53(e)(2); *but see Valley Health Sys., LLC v. Eighth Judicial Dist. Ct.*, 127 Nev. 167, 172-73, 252 P.3d 676, 679-680 (2011) (neither district court nor Supreme Court will consider new arguments that could have been raised before Discovery Commissioner but were not).

B. Nevada Does Not Recognize A “Fiduciary Exception” To The Attorney-Client Privilege.

Despite finding (correctly) that RESP0013284 and RESP0013285 contained attorney-client privileged communications, the Discovery Commissioner nevertheless determined that RESP0013284 and portions of RESP0013285 were subject to production under a “fiduciary exception” to the attorney-client privilege. This is Respondents first opportunity to brief the issue as the Discovery Commissioner raised it *sua sponte* at the August 29, 2018 hearing. *See* Ex. 1 at 50:7-8 (“The commissioner is now raising it as an issue.”). Having now had a meaningful chance to address the matter, the fiduciary exception clearly has no application here.⁴

1. Recognition of a Fiduciary Exception to the Attorney-Client Privilege is the Province of the Legislature, not the Courts.

The attorney-client privilege in Nevada is a creature of statute. *See* NRS 49.095. It is not a common law privilege as in the federal courts and those states that have adopted a fiduciary

⁴ Notably, Petitioner never argued in his underlying Motion that the fiduciary exception rendered Lubbers’ notes fair game, *see* Mot. dated July 13, 2018 (on file), so Respondents had no reason to address this nonexistent assertion in the briefing below. *See* Ex. 1 at 49:11-50:4. Though Petitioner did make passing reference to the fiduciary exception for the first time in his Reply, *see id.* at 16:5-12, he only did so in support of the generalized contention that a finding as to the adversarial nature of his Initial Petition would not “equate to an adversarial relationship as to all issues relating to the administration of the SCIT.” *Id.* Again, Petitioner never analyzed the fiduciary exception in the context of the notes at issue.

1 exception to the privilege. Nevada’s statutory scheme expressly provides for five exceptions to
2 the attorney-client privilege. *See* NRS 49.115. None of them embody the fiduciary exception
3 relied upon by the Discovery Commissioner. *See id.*⁵

4 When engaging in statutory interpretation, Nevada has long followed the maxim *expressio*
5 *unius est exclusio alterius*, which means the expression of one thing is the exclusion of another.
6 *See, e.g., Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967) (“The maxim
7 ‘expressio Unius Est Exclusio Alterius’, the expression of one thing is the exclusion of another,
8 has been repeatedly confirmed in this State.”). Employing this principle, the Nevada Supreme
9 Court has repeatedly concluded that where a statutory or constitutional provision provides a single
10 exception, no additional exceptions exist beyond those expressly stated. *See, e.g., Thomas v.*
11 *Nevada Yellow Cab Corp.*, 130 Nev. 484, 488, 327 P.3d 518, 521 (2014); *Ramsey v. City of N.*
12 *Las Vegas*, 133 Nev. ---, ---, 392 P.3d 614, 619 (2017) (collecting cases). Accordingly, the
13 legislature’s failure to include a fiduciary duty exception within the framework of NRS 49.115
14 (or elsewhere) should be deemed an intentional omission. *See Ashokan v. Dept. of Ins.*, 109 Nev.
15 662, 670, 856 P.2d 244, 249 (1993) (recognizing “legislature’s demonstrated ability to draft
16 privilege statutes within very precise parameters”).

17 The Nevada Supreme Court has rejected previous attempts to engraft judicially-created
18 exceptions onto statutory privileges. *See, e.g., State ex rel. Tidvall v. Eighth Judicial Dist. Ct.*,
19 91 Nev. 520, 539 P.2d 456 (1975). In *Tidvall*, a bank sued its customer to recover money and
20 personalty in which it claimed a security interest. *Id.* at 522-23, 539 P.2d at 457-58. The customer
21 served subpoenas and Rule 34 document requests seeking *inter alia* certain bank reports deemed
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26 ⁵ Succinctly stated, the fiduciary exception to the attorney-client privilege “provides that a
27 fiduciary, such as a trustee of a trust, is disabled from asserting the attorney-client privilege
28 against beneficiaries on matters of trust administration.” *See Murphy v. Gorman*, 271 F.R.D. 296,
305 (D.N.M. 2010) (citations omitted).

absolutely privileged under NRS 665.055, *et seq.* *Id.* When the district court denied the bank’s objections and ordered production, the bank sought writ relief. *Id.* In granting writ relief to the bank, the Nevada Supreme Court determined that NRCP 34 (governing production of documents in civil litigation) did not override the legislative enactment of absolute privilege: “[t]he privilege at issue in the present case is a statutory privilege, and as such, is a pronouncement of public policy. The legislature or the people, as the case may be, formulate policy.” *Id.* at 524, 539 P.2d at 459 (quoting *Grant and McNamee v. Payne*, 60 Nev. 250, 258, 107 P.2d 307, 311 (1940) (cautioning against “judicial legislation” as “[t]he courts are given no hand in [formulating policy].”)).

The same reasoning is persuasive here. While the attorney-client privilege is not absolute in its application, the salient point is that the five exceptions to the privilege under NRS 49.115 have already been codified by the legislature and reflect the public policy of the State. Accordingly, if there is to be a sixth exception to the attorney-client privilege in the form of a “fiduciary exception,” such a change must be enacted by the legislature, not the courts.⁶

Marshall v. Eighth Judicial Dist. Ct., 128 Nev. 915, 381 P.3d 637, 2012 WL 2366435 (2012) (unpublished), cited by the Discovery Commissioner below, does not compel a different result. As a threshold matter, the case is unpublished and not precedent as the Commissioner

⁶ Other jurisdictions with statutory attorney-client privileges are in accord. *See, e.g., Wells Fargo Bank v. Superior Court*, 990 P.2d 591, 595-97 (Cal. 2000) (“What courts in other jurisdictions give as common law privileges they may take away as exceptions. We, in contrast, do not enjoy the freedom to restrict California’s statutory attorney-client privilege based on notions of policy or ad hoc justification.”); *Huie v. DeShazo*, 922 S.W.2d, 920, 924-25 (Tex. 1996) (“If the special role of a fiduciary does justify such an exception, it should be instituted as an amendment to Rule 503 through the rulemaking process, rather than through judicial interpretation.”); *Murphy*, 271 F.R.D. at 318-19 (predicting the New Mexico Supreme Court “would not permit a judicially created expansion of the exceptions to the attorney-client privilege to add a fiduciary exception, which has not been recognized in the New Mexico Constitution or the New Mexico Rules of Evidence.”).

properly recognized. *See* Ex. 1 at 31:9-18 (“it’s unpublished, it’s an early decision, so technically is [sic] has no business being cited.”). Regardless, the *Marshall* court did not adopt a fiduciary exception but merely observed that “Nevada does not appear to have resolved the issue [*i.e.*, whether a beneficiary is entitled to inspect opinions of counsel the trustee procures in administering the trust] and its related work product implications.” 2012 WL 2366435, at *2. *Marshall*, hence, has no bearing on whether a fiduciary exception exists in Nevada. *See Jackson v. Harris*, 64 Nev. 339, 351, 183 P.2d 161, 166 (1947) (cases cannot be urged as authority for points which may be lurking in the record but which were not put in issue); *In re Tartar*, 339 P.2d 553, 557 (Cal. 1959) (“Cases are not authority for propositions not considered.”).

2. NRS 49.115(5) Does Not Justify Disclosure of Lubbers’ Notes.

Though the DCRR repeatedly invokes NRS 49.115(5) as an additional basis for justifying production of Lubbers’ notes, or portions thereof, this exception to the attorney-client privilege cannot apply as it is limited to situations where an attorney is employed by two or more clients to give advice on a matter in which they have a common interest. *See* NRS 49.115(5) (communication is not privileged when “relevant to a matter of common interest between *two or more clients* if the communication was made by any of them *to a lawyer retained or consulted in common*, when offered in an action between any of the clients.”) (emphasis added). Should the clients later become adverse, either client is then permitted to examine the lawyer as a witness regarding the communications made when the lawyer was acting for all. *See id.*; *see also Hall CA-NV, LLC v. Ladera Dev., LLC*, 2018 WL 6272890, at *6 (D. Nev. Nov. 30, 2018) (“Under Nevada law, ‘when a lawyer acts as the common attorney of two parties, their communications to him are privileged as far as they concern strangers, but as to themselves they stand on the same footing as to the lawyer, and either can compel him to testify against the other as to their negotiations.’”) (quoting *Livingston v. Wagner*, 23 Nev. 53, 42 P. 290, 292 (1895)).

Dual representation, in other words, is the lynchpin to this exception. Here, however, Petitioner has never argued—and there is zero evidence in the record—that LHLGB was ever retained or consulted by Lubbers *and* Scott on any matter. That Lubbers was Family Trustee of the SCIT and, thus, a fiduciary to Scott does not mean that LHLGB represented Scott or owed him any fiduciary duties by virtue of its status as Lubbers’ counsel. *See* NRS 162.310(1) (“An attorney who represents a fiduciary does not, solely as a result of such attorney-client relationship, assume a corresponding duty of care or other fiduciary duty to a principal.”). Because LHLGB represented Lubbers only, the Discovery Commissioner’s reliance on NRS 49.115(5) to justify production of Lubbers’ notes constitutes an additional mistake in law.

C. Assuming *Arguendo* That A Fiduciary Exception Exists In Nevada, It Does Not Justify Production Of Lubbers’ Notes.

Even if Nevada recognized a fiduciary exception to the attorney-client privilege, and it does not, the Discovery Commissioner nonetheless erred when she found that the exception required production of Lubbers’ notes, or portions thereof. Lubbers did not prepare his notes in connection with administration of the SCIT. Lubbers instead prepared them for his own protection *after* Scott filed his Initial Petition alleging that Lubbers (as well as Larry and Heidi) had breached fiduciary duties owed to Scott as the beneficiary of the SCIT.

The fiduciary exception, even in those jurisdictions where it is recognized, has limited application. “The rationales underlying the fiduciary exception are not present when a trustee seeks legal advice in a personal capacity on matters not of trust administration.” *In re Kipnis Section 3.4 Trust*, 329 P.3d 1055, 1062 (Ariz. Ct. App. 2014); *see also Riggs National Bank v. Zimmer*, 355 A.2d 709, 711 (Del.Ch. 1976) (requiring production of legal opinion where advice “was prepared ultimately for the benefit of beneficiaries of the trust *and not for the trustees’ own defense in any litigation*[.]”) (emphasis added). Where, as here, a trustee retains counsel in order

1 to defend himself against the beneficiary, the attorney-client privilege remains intact. *See United*
2 *States v. Mett*, 178 F.3d 1058, 1063-64 (9th Cir. 1999); Restatement (Third) of Trusts § 82 cmt. f
3 (“A trustee is privileged to refrain from disclosing to beneficiaries or cotrustees opinions obtained
4 from, and other communications with, counsel retained for the trustee’s personal protection in the
5 course, or in anticipation, of litigation[].”).⁷

6 The Discovery Commissioner correctly found that Lubbers anticipated litigation with Scott
7 at the time he prepared he prepared his notes in October 2013. *See* Ex. 1 at 89:15-17 (“I agree
8 that when the petition was filed, anticipation of litigation, including litigation of Mr. Lubbers, had
9 to be considered.”); 90:22-25 (“based on this typewritten document, 13285 dated 10/14/13, it
10 appears to me that there were considerations of – of concern.”). Indeed, Lubbers was already in
11 litigation with Scott at the time he prepared his notes in October 2013 as Scott filed his Initial
12 Petition on September 30, 2013. *See id.* at 87:24-25 (“I think the work product privilege does
13 apply. I think it wasn’t just anticipated. There was actual litigation.”). While Petitioner attempted
14 below to recharacterize this filing as a benign pleading that sought nothing more than an
15 accounting, the reality is that the Initial Petition contained multiple adversarial allegations,
16 including that there had been a falling out between Scott and his parents, that hostility existed
17 between them, that the Family Trustees (including Lubbers) had breached their fiduciary duties
18 to Scott, that the parties had a conflict of interest when entering in to the Purchase Agreement at
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24 ⁷ Though their opinions are not precedential, two Nevada courts have likewise recognized the
25 limitations of the fiduciary exception. *See Marshall*, 2012 WL 2366435, at *2 (“when there is a
26 conflict of interest between the trustee and the beneficiaries and the trustee procures an opinion
27 of counsel for the trustee’s own protection, the beneficiaries are generally not entitled to inspect
28 it.”); *Haigh v. Constr. Indus. & Laborers Joint Pension Tr. for S. Nevada, Plan A & Plan B*, 2015
WL 8375150, at *4 (D. Nev. Dec. 9, 2015) (“Once the interests of the [] fiduciary and beneficiary
diverge the fiduciary exception no longer applies[.]”) (quotations omitted).

1 issue herein, and that the Purchase Agreement was designed to punish Scott or otherwise harm
2 his financial interests. *See* Opp’n at 7:4-8:16 (summarizing allegations).⁸

3 The Initial Petition, moreover, had been preceded by a letter from Scott’s counsel in
4 November 2012 alleging that Lubbers’ conduct toward Scott was “*per se* bad faith” and
5 threatening to file suit to remove the trustees of the SCIT as their “neutrality [was] compromised.”
6 *See* Opp’n at 5:16-6:3 and Ex. 2. Lubbers specifically noted the threat of litigation in an agenda
7 prepared the next day. *See id.* at 6:4-8 and Ex. 4. After filing his Initial Petition, Scott
8 continuously reserved his right to challenge the appropriateness of the Purchase Agreement and
9 the actions of the Trustees in connection therewith. *See id.* at Exs. 6-7. That Lubbers was
10 reasonable in anticipating litigation when he retained LHLGB in October 2013 is not only borne
11 out by the Initial Petition and the events that preceded it, but also because Scott expanded on his
12 Initial Petition against Lubbers (and now his estate) in June 2017 and again in May 2018 to pursue
13 claims premised on the very conduct he had reserved back in 2013—*i.e.*, “the actions of such
14 Trustees, vis-à-vis the Purchase Agreement, dated May 31, 2013.” *Id.*, Ex. 6 at 3:10-13.

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17 Lubbers’ attorneys at LHLGB have provided sworn testimony regarding the matters they
18 discussed with Lubbers in October 2013. *See* Opp’n at 9:12-17; Lee Decl. ¶¶ 4-8; Renwick Decl.
19 ¶¶ 4-7; and Ex. 5. Those matters are wholly consistent with the content of Lubbers’ typed notes
20 (Bates No. RESP0013285). While Respondents will not divulge the contents of the notes in this
21 public filing, they clearly have nothing to do with administration of the SCIT. To the contrary,
22 they seek advice regarding how to respond to Scott’s petitions, they contain Lubbers’ mental
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25 ⁸ Petitioner brought his Initial Petition pursuant to NRS 164.010, 164.015, 153.031 and 164.030,
26 specifically referencing and relying on 153.031(1)(f). *See* Opp’n, Ex. 1 ¶ C.2. That statute and
27 the Initial Petition refer to “settling the accounts and reviewing the acts of the trustee, including
28 the exercise of discretionary powers.” *Id.* A request by a beneficiary that the Court review the
trustee’s acts and exercise of powers is, by definition, adversarial.

impressions about the strengths and weaknesses of Respondents’ legal positions, and they reflect his beliefs as to how the Court may view the case. The notes, simply put, seek advice for Lubbers’ own protection, not for administration of the SCIT. As such, the fiduciary exception is inapplicable—even if one existed in Nevada.

D. Lubbers’ Work Product-Protected Notes Are Not Discoverable Based On “Substantial Need.”

The Discovery Commissioner correctly found that Lubbers anticipated litigation at the time he prepared his notes. *See* Ex. 2 at 3:23-25. And though the Commissioner found that Lubbers was not acting in his capacity as an attorney at the time he prepared his notes, *see id.* at 3:18-19, she properly found that non-attorneys can prepare protected work product. *See id.* at 3:20-21; *see also Goff v. Harrah's Operating Co.*, 240 F.R.D. 659, 660 (D. Nev. 2007) (“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.’”) (quotation omitted). Despite finding that Lubbers’ notes would be subject to work product protection because they were prepared in anticipation of litigation, the Discovery Commissioner determined that portions of the notes were subject to production because they contained “facts,” and Petitioner had shown a substantial need to obtain them given that Lubbers had passed away and was no longer able to be deposed. Respectfully, these findings are against the clear weight of the evidence and constitute mistakes in law.

1. RESP0013285

As it relates to Lubbers’ typed notes (RESP0013285), even Petitioner recognized below 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. The Discovery Commissioner acknowledged as much, *see* Ex. 1 at 95:1-6 (“a belief is not a -- a fact. . . . It’s not a fact.”), but

found that RESP0013285 contained a mix of facts and opinions, and ordered certain portions of the document produced. *See* Ex. 2 at 5:11-19.

Respondents submit that a review of RESP0013285 makes clear that it is comprised of Lubbers' questions, analyses, and beliefs regarding the Initial Petition and the Purchase Agreement at issue herein. As such, this material constitutes "opinion" work product, not "ordinary" fact work product. While ordinary work product may be subject to production based on a showing of substantial need under NRCP 26(b)(3), "[o]pinion 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.

Moreover, even if a portion of the typed notes is deemed to contain "facts," which is not the case, those "facts" are still contained in a communication with counsel that should remain privileged and protected from production. *See Wardleigh v. Second Judicial Dist. Ct.*, 111 Nev. 345, 352, 891 P.2d 1180, 1184 (1995) ("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.”). Again, the Discovery Commissioner recognized this principle, *see* Ex. 1 at 103:24-104:1 (“facts [] contained in an attorney/client privileged communication, to make that communication remain privileged”), and found that notes did, in fact, constitute an attorney-client communication. *See* Ex. 2 at 4:27-5:13.

Notwithstanding her threshold findings of privilege, the Commissioner found that a portion of the notes was subject to production either because the fiduciary exception applied or because that portion of the notes was factual, and Petitioner had shown substantial need. Respondents have already addressed the inapplicability of the fiduciary exception above. Regarding the Commissioner’s commendable efforts to draw a line between discoverable facts and otherwise attorney-client privileged and/or work product protected material, the unmistakable reality is that any purported “facts” contained within RESP0013285 are inextricably intertwined with Lubbers’ mental impressions and opinions—specifically Lubbers’ belief as to how this Court may view the instant litigation. The notes should not, therefore, 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.”).

2. RESP0013284

The Commissioner found that RESP0013284 was likely protected by the attorney-client privilege, but found that it was subject to production under the fiduciary exception. *See* Ex. 2 at 4:16-19. Generally described, these notes contain a question from Lubbers and reflect items that Lubbers needed to provide to his attorney, David Lee. In other words, they relate to Lubbers’

1 responses to Scott's multiple petitions filed on September 30, 2013, not trust administration. As
2 such, any fiduciary exception would not apply to these notes either.

3 The Commissioner also found that the notes constituted protected work product because
4 they were prepared because of litigation, but that Petitioner had shown a "substantial need" to
5 obtain them under NRCP 26(b)(3) on account of Lubbers' death. *See* Ex. 2 at 4:20-23. Again,
6 however, any facts contained in RESP0013284 are embodied within an attorney-client privileged
7 communication and not subject production regardless of any alleged "substantial need." *See*
8 *Wardleigh, supra; Upjohn, supra.*

9
10 **3. RESP0013288**

11 The Commissioner did not find that RESP0013288 was protected by the attorney-client
12 privilege, but found the notes would be subject to production based on the fiduciary exception
13 even if they were. *See* Ex. 2 at 6:17-21. The notes reflect a question posed by Lubbers and a
14 recitation of sections from the Initial Petition. The notes, once more, do not deal with trust
15 administration. Nor do the notes reflect facts that are discoverable based on substantial need.
16 They instead reflect Lubbers' mental impressions as to what he deemed worth memorializing
17 from the Initial Petition.

18
19 **4. RESP0078899-RESP0078900**

20 Finally, Petitioner cannot satisfy the "substantial need" standard required to obtain any
21 facts contained in Lubbers' December 2013 notes (RESP0078899-RESP0078900) because he has
22 other ways to obtain evidence of what occurred at the December 19, 2013 meeting at which the
23 notes were taken. After all, Petitioner and his counsel were in attendance and should already
24 know what occurred at the meeting. Additionally, Petitioner could also seek to depose Steve
25 Nicolatus or Bob Evans, both of whom were also present at the meeting. *See In re Western States*
26 *Wholesale Natural Gas Antitrust Litig.*, 2016 WL 2593916, at *8 (D. Nev. May 5, 2016) (denying
27
28

access to work product materials where party could obtain the substantial equivalent without undue hardship). The simple truth is that Scott is obviously more interested in obtaining these notes so he can see what Lubbers considered to be significant during the subject meeting. That, of course, is improper as such mental impressions are not discoverable regardless of any purported substantial need.

CONCLUSION

Based on the foregoing, the Court should sustain Respondents' objections and find that Lubbers' notes are not subject to production as Nevada does not recognize a fiduciary exception to the attorney-client privilege and, regardless, any such exception has no application to the notes at issue. Additionally, the notes are not subject to production based on substantial need as they reflect Lubbers' mental impressions (not facts) and, in any event, are otherwise contained in attorney-client privileged communications.

DATED this 17th day of December, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of December, 2018, I caused a true and correct copy of the foregoing **Respondents' Objections, In Part, to Discovery Commissioner's Report and Recommendations for Determination of Privilege Designation** to be served through the Eighth Judicial District Court's electronic filing system, to the following parties:

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EXHIBIT 1

1 **RTRAN**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 IN THE MATTER OF THE TRUST OF:) Case No. P-13-078912-T
7 THE SCOTT LYLE GRAVES CANARELLI)
8 IRREVOCABLE TRUST, DATED) DEPT. XXVI/Probate
9 FEBRUARY 24, 1998)
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BEFORE THE HONORABLE BONNIE BULLA,
DISCOVERY COMMISSIONER

WEDNESDAY, AUGUST 29, 2018

TRANSCRIPT OF PROCEEDINGS RE:
ALL PENDING MOTIONS AND ADDITIONAL BRIEFING

APPEARANCES:

For the Petitioner: DANA ANN DWIGGINS, ESQ.
TESS E. JOHNSON, ESQ.
JEFFREY P. LUSZECK, ESQ.

For the Trustee/Respondent(s): JON COLBY WILLIAMS, ESQ.
ELIZABETH BRICKFIELD, ESQ.
PHILIP R. ERWIN, ESQ.
JOEL Z. SCHWARZ, ESQ.

For the Nonparty Witnesses: JENNIFER L. BRASTER, ESQ.
ANDREW J. SHARPLES, ESQ.

For the Special Administrator: LIANE K. WAKAYAMA, ESQ.

RECORDED BY: FRANCESCA HAAK, COURT RECORDER

1 going to have to bear with me through this, because --

2 MS. BRASTER: That's fine, Your Honor.

3 DISCOVERY COMMISSIONER: -- I want to start in a different
4 order.

5 I'm going to start for the Motion for Determination of Privilege
6 Designation. There are two groups of records at issue. The first group
7 is RESP013284 through RESP013288. And the second group of
8 documents is RESP7899 through RESP78900. There are so many
9 issues here. And I don't think that counsel thought through all of the
10 issues. And I can tell you this, because we've spent quite a bit of time
11 looking at it and thinking them through ourselves. I think that my first
12 question for everybody is who's the client in 2012, 2013? Who's the
13 client?

14 MS. DWIGGINS: I could answer that. I have an engagement
15 letter. It is Mr. Lubbers in his capacity as trustee. I assume you're
16 talking of the Lee Hernandez firm?

17 DISCOVERY COMMISSIONER: Do you think Mr. Lubbers is
18 the client?

19 MS. DWIGGINS: Yes, I do. In his capacity as a trustee.

20 DISCOVERY COMMISSIONER: I think it's possible Scott's
21 the client.

22 MS. DWIGGINS: Well, I think the fiduciary exception would
23 apply, which I reference in my brief, which is one of the reasons why I
24 don't think it's privileged.

25 DISCOVERY COMMISSIONER: Well --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 MR. WILLIAMS: Correct.

7 DISCOVERY COMMISSIONER: Okay.

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

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

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

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

22 DISCOVERY COMMISSIONER: I -- I agree with you.

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

1 Mr. Lee and say, Review these notes, tell me if you talked to Ed about
2 these, because then what would we hear? I refreshed his recollection or
3 I've made testimonial use of those notes.

4 So I can't -- I can only use the lawyers to give you general
5 descriptions of what was discussed.

6 DISCOVERY COMMISSIONER: Unless there's a trustee
7 exception, in which case the beneficiaries can talk with the lawyers. I
8 mean, that's -- that's one of the issues that nobody really talked about --
9 well, I know Ms. Dwiggins raised it. But I don't think it was really
10 addressed all that thoroughly, and this is just --

11 MS. DWIGGINS: Well, I --

12 DISCOVERY COMMISSIONER: -- Commissioner Bulla's
13 impression.

14 MR. WILLIAMS: Your Honor, most respectfully, the words
15 fiduciary exception to peers in their reply brief, but they -- and this is a
16 new -- this was never argued by the petitioner that they were entitled to
17 these notes because of fiduciary exception. So if I might, Your Honor, I
18 just --

19 DISCOVERY COMMISSIONER: Yeah, well --

20 MR. WILLIAMS: Get a few things out.

21 DISCOVERY COMMISSIONER: -- because this is one of the
22 issues that I think you do have to address.

23 MR. WILLIAMS: Well --

24 DISCOVERY COMMISSIONER: I mean, this is an issue
25 and -- and it's one if commissioner Bulla's going to make a ruling, she's

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

4 MR. WILLIAMS: Sure.

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

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

14 MR. WILLIAMS: But, Your Honor --

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

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

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

25 MR. WILLIAMS: But you talked about mental impressions and

1 opinions, which is work product.

2 DISCOVERY COMMISSIONER: Right. I understand that.
3 But I just -- I -- you're right. But I want to try to get -- see, there's been
4 two privileges asserted, attorney/client. And yes, to the extent that --
5 that unless the trustee exception applies to the extent that Mr. Lubbers
6 had conversations with Mr. Lee as his attorney, unless the trustee
7 exception applies, then they would be privileged.

8 MS. DWIGGINS: Well, that's the key word, whether or not
9 those communications took place. And --

10 DISCOVERY COMMISSIONER: Well, clearly, Ms. Dwiggins,
11 communications took place. They produced --

12 MS. DWIGGINS: Well --

13 DISCOVERY COMMISSIONER: What was discussed, we will
14 not know. And the whole point of the privilege is that we will not know.
15 But that's not -- I don't really care about that. Okay? Because we don't
16 know what was discussed and that's not really the issue.

17 The bigger issue we have on the two sets of documents that
18 were "inadvertently produced" is, number one, was the clawback
19 provision timely utilized, and number two, if the documents do not fall
20 within the attorney/client privilege, and again, Mr. Lubbers and -- and
21 why I say this --

22 And -- I'm sorry, Mr. Williams, sometimes I get going and I
23 don't --

24 MR. WILLIAMS: It's okay.

25 DISCOVERY COMMISSIONER: -- I need to just kind of

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

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

9 DISCOVERY COMMISSIONER: Right.

10 MR. WILLIAMS: Wait a second --

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

13 MR. WILLIAMS: I didn't --

14 DISCOVERY COMMISSIONER: And the opinion work
15 product --

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

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

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

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

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

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

1 that.

2 DISCOVERY COMMISSIONER: I know you do. But --

3 MR. WILLIAMS: Most -- most respectfully. I mean, the -- the
4 case law is clear that parties can create work product. The lawyer does
5 not have to be involved. I've cited you --

6 DISCOVERY COMMISSIONER: Oh, no. No.

7 MR. WILLIAMS: Okay.

8 DISCOVERY COMMISSIONER: I agree with that.

9 MR. WILLIAMS: And so --

10 DISCOVERY COMMISSIONER: No, I'm getting back --

11 MR. WILLIAMS: So now you're talking about opinions?

12 DISCOVERY COMMISSIONER: Right. I --

13 MR. WILLIAMS: So -- and that's part of --

14 DISCOVERY COMMISSIONER: He's not -- he's --

15 MR. WILLIAMS: -- the work product analysis, Your Honor.

16 None of the cases that say that work product can be created by the
17 party --

18 DISCOVERY COMMISSIONER: I understand that --

19 MR. WILLIAMS: -- none of them say --

20 DISCOVERY COMMISSIONER: -- it can. I'm so sorry. I'm
21 just taking this one step at a time.

22 MR. WILLIAMS: Right.

23 DISCOVERY COMMISSIONER: I'm not protecting the work
24 product because he was the lawyer giving opinions. Okay. He's not the
25 lawyer. He's the client.

1 MR. WILLIAMS: Understood.

2 DISCOVERY COMMISSIONER: Can he create work

3 product? Yes.

4 MR. WILLIAMS: Okay.

5 DISCOVERY COMMISSIONER: He can.

6 MR. WILLIAMS: Understood.

7 DISCOVERY COMMISSIONER: I understand that.

8 MR. WILLIAMS: Okay.

9 DISCOVERY COMMISSIONER: I'm just taking this one level

10 at a time. The first level is, is it work product by a lawyer? No. He's the

11 trustee.

12 MR. WILLIAMS: Okay.

13 DISCOVERY COMMISSIONER: He wears two hats. He has

14 a lawyer hat, he has a trustee hat. Which hat is he wearing here? He's

15 wearing the trustee hat. So it's not work product by a lawyer.

16 Can it be work product by the client? Yes. Sure. Can it be

17 work product by a third party? Sure.

18 MR. WILLIAMS: Understood. That makes sense, Your

19 Honor.

20 DISCOVERY COMMISSIONER: I absolutely understand that.

21 I may not be articulating it very well, but I do understand it.

22 So now we're in the realm of work product by a client. Did he

23 have opinions contained within this information? And what I'd like to do

24 now, I've got to break this up into groups. I'm going to take Group 78899

25 through 78900 first.

1 MS. DWIGGINS: Your Honor, before you do, I guess I just
2 want to clarify. Because my understanding is opinion work product only
3 applies to opinions by an attorney.

4 DISCOVERY COMMISSIONER: Well, now, that is why -- I --

5 MS. DWIGGINS: Because there are mental impressions,
6 opinions, and -- hold on, let me get the other language -- by an attorney.
7 Let me find the language, sorry.

8 DISCOVERY COMMISSIONER: I uphold my case, if I can
9 find it.

10 MS. DWIGGINS: I don't know why I -- just give me a moment,
11 because I have way too many tags here.

12 DISCOVERY COMMISSIONER: It can be a representative --

13 MS. DWIGGINS: There -- mental impression, collusions,
14 opinions, or legal theories of an attorney --

15 DISCOVERY COMMISSIONER: It can be representative.

16 MS. DWIGGINS: -- or other representative of a party.

17 MR. WILLIAMS: Right.

18 DISCOVERY COMMISSIONER: Yeah. It can --

19 MS. DWIGGINS: Okay. Well, then that -- wouldn't that by
20 definition mean someone other than Lubbers? Not the client.

21 DISCOVERY COMMISSIONER: Oral representative
22 concerning litigation.

23 MS. DWIGGINS: To me that means someone other than
24 Lubbers.

25 DISCOVERY COMMISSIONER: Well, what if the client --

1 they're the lawyer, said to Mr. Lubbers, Put your analysis down on paper
2 for me.

3 MR. WILLIAMS: Right. Your Honor, I mean -- and again,
4 we're jumping around. And I -- I -- this is complicated stuff.

5 DISCOVERY COMMISSIONER: It is.

6 MR. WILLIAMS: And let me be the first to tell you I know we
7 put too much paper in front of you. But they raised a number of
8 arguments with respect to waiver and everything else I'm sure we'll talk
9 about that we had to address. So I apologize for the length of the
10 briefing.

11 But -- but it's absolutely our position that a party can create
12 opinion work product. We see here that the repeated refrain that --
13 with -- Mr. Lubbers was sitting in a deposition, I could ask him about all
14 this.

15 DISCOVERY COMMISSIONER: Okay.

16 MR. WILLIAMS: Most respectfully, if I were defending that
17 deposition and the questioner asked, Mr. Lubbers, tell us what you think
18 the strengths of your -- of your case are, tell us what you think the
19 weaknesses are, I would be objecting and instructing not to answer
20 based on his views.

21 Now, maybe I've practiced in a different realm for 25 years
22 and I've had that wrong. But I'm not aware of any court that require
23 Mr. Lubbers to answer that question if he were still here, or if that same
24 type of question was posed to Mr. Canarelli. Those are the mental
25 impressions of a client or the opinions of a client about the litigation.

1 And that's what, most respectfully, I submit are contained in the notes.

2 And that raises a concern for me. I don't know where we're
3 going to go here, but I just, before we do, want to put on the record I
4 don't think it's appropriate for a public hearing where the transcripts
5 arguably are going to be public, to be talking about the contents of the
6 notes that we contend are privileged or work product protected. I think
7 that just exacerbates --

8 DISCOVERY COMMISSIONER: I can't seal this hearing and I
9 won't. So if you want the hearing sealed, you'll have to ask the district
10 court judge to do that.

11 MR. WILLIAMS: Your Honor, most respectfully, I'm not asking
12 you to seal the hearing. What I'm asking everyone to do is as we go
13 through this, to exercise discretion, and when they talk about the notes,
14 in other words, for example, if we wanted to talk about the typewritten
15 notes, as they've been referred, the way I would handle it, Your Honor,
16 would be to say let's look at the first three lines, you know, without
17 reading them into the record. Because we're just --

18 DISCOVERY COMMISSIONER: It wasn't my plan to read
19 them into the record.

20 MR. WILLIAMS: And I didn't know that -- I didn't know where
21 the Court's going. I just wanted that to be on the record before any of us
22 went anywhere. I'm not saying the Court was going to, but I just wanted
23 to make that clear.

24 DISCOVERY COMMISSIONER: I appreciate that.

25 MS. DWIGGINS: Your Honor, I guess let's avoid the elephant

1 in the room. We obviously are all concerned about one portion. This all
2 boils down to one portion of that typed memo.

3 MR. WILLIAMS: Most respectfully it doesn't, Your Honor.
4 That's my point. Because --

5 DISCOVERY COMMISSIONER: Well, I don't know if I saw it
6 that way. Now, you all might see it that way, because you're litigating --

7 MR. WILLIAMS: I don't.

8 DISCOVERY COMMISSIONER: -- the cases. I looked at it. I
9 think the *Kotter* case that the supreme court recently came down with,
10 suggests that they want the in camera review done --

11 MS. DWIGGINS: Uh-huh.

12 DISCOVERY COMMISSIONER: -- to determine whether or
13 not it, you know, it is a document that -- that should be made privileged.
14 So that's what I did --

15 MR. WILLIAMS: Your Honor, absolutely.

16 DISCOVERY COMMISSIONER: -- even though
17 unfortunately, a lot of this documentation is already in the public record.

18 MR. WILLIAMS: Right.

19 DISCOVERY COMMISSIONER: And, you know, I feel like
20 we're jumping around and I really wanted to try to do this in a reasonable
21 order. So if you can just bear with me --

22 MR. WILLIAMS: I will.

23 DISCOVERY COMMISSIONER: -- let me try to at least give
24 you some direction of where I'm going. And then I'll let you argue your
25 position.

1 MR. WILLIAMS: Fair enough, Your Honor. Thank you.

2 DISCOVERY COMMISSIONER: Okay. So let me just start
3 quickly with the document range that I wanted to, 78899-78900. Let me
4 tell you what bothers me about this particular production is it didn't have
5 Bates labels on the production. This is the one, right? There were two
6 pages without Bates labels.

7 MR. WILLIAMS: You're talking about Exhibit 2 to the motion,
8 right?

9 MS. DWIGGINS: Is that the Nicolatus meeting?

10 MR. WILLIAMS: These are what Petitioners call the Nicolatus
11 notes. They have a date, I think I can say this without a problem,
12 of 12/19/2013.

13 MS. DWIGGINS: And these, just to put them in context, were
14 part of a --

15 DISCOVERY COMMISSIONER: Correct.

16 MS. DWIGGINS: -- 48-page document.

17 DISCOVERY COMMISSIONER: Right.

18 MS. DWIGGINS: You're right, they weren't Bate labeled. I
19 actually brought them to their attention.

20 DISCOVERY COMMISSIONER: When?

21 MS. DWIGGINS: May 3rd or -- no, I don't --

22 MR. WILLIAMS: Your Honor, I -- I can --

23 MS. DWIGGINS: I brought them to their attention, because, to
24 be quite candid, I thought they might have been Mr. Williams' notes.

25 DISCOVERY COMMISSIONER: Whose notes?

1 Mr. Williams'?

2 MS. DWIGGINS: Mr. Williams', which apparently they were.

3 DISCOVERY COMMISSIONER: They're his notes?

4 MS. DWIGGINS: Yes.

5 MR. WILLIAMS: These are Mr. Lubbers'.

6 MS. DWIGGINS: Yes, these are. But there was a
7 combination of 48 pages of one document.

8 DISCOVERY COMMISSIONER: Okay.

9 MS. DWIGGINS: On the first part of it, I believe they might
10 have been Mr. Williams'. So when I saw them, I brought them -- I
11 actually called them or sent an e-mail asking if they were available, if
12 they were near a computer that they could pull them up, so they're -- I
13 wasn't transmitting them and creating another copy. And as soon as
14 Mr. Williams pulled them up and they were on the phone, he said, Those
15 are my notes.

16 MR. WILLIAMS: Exactly.

17 MS. DWIGGINS: And we went --

18 DISCOVERY COMMISSIONER: Okay. So we clawed back
19 that part of the production, correct?

20 MS. DWIGGINS: Which was actually --

21 DISCOVERY COMMISSIONER: Everybody agreed to.

22 MS. DWIGGINS: -- all but it was, I think, what, 46 of the 48
23 pages? Because there was Hunter Williams notes at his office, and I
24 think somebody else's. I -- I agreed without a question that Mr. Williams'
25 notes --

1 DISCOVERY COMMISSIONER: Okay. So this part of the
2 production, though, was -- these two pages were actually part of that
3 production as well.

4 MS. DWIGGINS: Correct. And we --

5 DISCOVERY COMMISSIONER: Did you see those two
6 pages at that time? Did you bring to Mr. Williams' attention, hey, there's
7 two pages without Bates labels here?

8 MS. DWIGGINS: We went through the entire 48 pages
9 together on the phone and I -- I honestly --

10 DISCOVERY COMMISSIONER: Including --

11 MS. DWIGGINS: Yes.

12 DISCOVERY COMMISSIONER: -- 899 and 900?

13 MS. DWIGGINS: Yes. And I can't remember, and you can
14 refresh -- they were both on the phone -- whether or not they had to
15 double check as to whether or not those were Mr. Lubbers' handwriting
16 or whether they said they were. I know there was some writing on
17 something that they had to confirm.

18 MR. WILLIAMS: Right. Your Honor, this is -- and I'm glad
19 we're talking about these. This is, respectfully, the way that the process
20 should work. The example that you're talking about, these two notes --
21 these two pages of notes. Because Ms. Dwiggins is exactly right. On
22 June 14th, she called my office and asked if I could get by a computer
23 because she believed that there may have been documents
24 inadvertently produced that contained attorney/client privilege -- or either
25 work product or attorney/client privilege, whatever -- notes.

1 And so I got on the phone with Mr. Erwin and Ms. Dwiggins,
2 and I don't know if Ms. Johnson was on the phone --

3 DISCOVERY COMMISSIONER: But what raised her
4 suspicion weren't these two pages, they were pages around it.

5 MR. WILLIAMS: Correct.

6 DISCOVERY COMMISSIONER: I'm not faulting her for not
7 calling you on these two pages.

8 MR. WILLIAMS: I'm not either. I'm not either.

9 DISCOVERY COMMISSIONER: Okay.

10 MR. WILLIAMS: No, no. I'm --

11 DISCOVERY COMMISSIONER: I'm faulting you all for
12 producing them --

13 MR. WILLIAMS: No, no, no. Your Honor --

14 DISCOVERY COMMISSIONER: -- if you really thought it was
15 privilege.

16 MR. WILLIAMS: I'm not -- I'm not faulting Ms. Dwiggins for
17 these two pages of notes either. In fact, I -- that's why I say in the
18 papers this I how it was supposed to work. She under the ESI protocol,
19 but more importantly, Rule 4.4(b), she saw something that looked
20 potentially protected. She called me. She gave me notice that it looked
21 like there's something that was inadvertently produced and then we
22 worked, Your Honor, most respectfully, let me just walk through it.
23 There were 48 pages, give or take, in this packet. We went through
24 them. We then clawed them back under the ESI protocol. She had --
25 she agreed with certain items that were clawed back, she disagreed with

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

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

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

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

11 MR. WILLIAMS: The typed notes?

12 DISCOVERY COMMISSIONER: Yeah.

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

14 DISCOVERY COMMISSIONER: I mean, there is a --

15 MS. DWIGGINS: -- fiduciary exception applied.

16 DISCOVERY COMMISSIONER: Huge production.

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

23 DISCOVERY COMMISSIONER: Which court applied that the
24 fiduciary exception?

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

1 But we had already -- you.

2 MR. WILLIAMS: Your Honor, again --

3 DISCOVERY COMMISSIONER: Me?

4 MR. WILLIAMS: -- I just want to --

5 MS. DWIGGINS: Yeah. In connection with --

6 DISCOVERY COMMISSIONER: I don't remember looking at
7 it before, so that's a problem.

8 MS. DWIGGINS: It was in connection with Lubbers' retention
9 of Gerety and I was seeking his communications with Gerety.

10 DISCOVERY COMMISSIONER: Right.

11 MR. WILLIAMS: Your Honor, nowhere in the moving papers
12 or in the reply papers has Petitioner ever argued -- ever -- that the notes
13 are subject to production because they're encompassed within a
14 fiduciary exception to the attorney/client privilege. That's never been
15 argued. The fact that you raised it, Petitioner's now trying to capitalize
16 on it as if that was --

17 MS. DWIGGINS: It is in my reply brief.

18 MR. WILLIAMS: -- was in --

19 DISCOVERY COMMISSIONER: So it is --

20 MR. WILLIAMS: -- their mind with respect --

21 DISCOVERY COMMISSIONER: -- imperative on the lawyers
22 to raise to the Court law, the legal issues, whether --

23 MR. WILLIAMS: Right. And had --

24 DISCOVERY COMMISSIONER: -- they may or may not be --

25 MR. WILLIAMS: Had that --

1 DISCOVERY COMMISSIONER: And this is a critical issue in
2 this case.

3 MR. WILLIAMS: Had that been raised in the motion, Your
4 Honor, I would have addressed it in the opposition, but it wasn't. And if
5 they're going to point to somewhere in the reply where it's mentioned --
6 because it is mentioned, but not in this context --

7 DISCOVERY COMMISSIONER: The commissioner is now
8 raising it as an issue. Do you want to have time to supplement on it?
9 Because I do think it's an issue in this case that may end up going all the
10 way up.

11 MR. WILLIAMS: I -- I --

12 DISCOVERY COMMISSIONER: Because it is critical to the
13 analysis and the determination of whether -- you know, we've got so
14 many issues with these documents. That is one. That is --

15 MR. WILLIAMS: Right.

16 DISCOVERY COMMISSIONER: -- the start. But there are
17 more issues. Let me tell you what I'm concerned about with 889
18 and 900.

19 MR. WILLIAMS: Okay.

20 DISCOVERY COMMISSIONER: These are -- appear to me,
21 without giving too much information out, I'm not reading them into the
22 record, but that they do document a telephone call. I think we can say
23 that.

24 MS. DWIGGINS: I think that was -- every December -- I'm
25 sorry, the Nicolatus notes that we --

1 DISCOVERY COMMISSIONER: That -- okay.

2 MS. DWIGGINS: -- refer to those.

3 DISCOVERY COMMISSIONER: So let's talk about it.

4 Nicolatus.

5 MS. DWIGGINS: That was the meeting.

6 DISCOVERY COMMISSIONER: The fact that he participated,

7 as I understand it in the phone call, can we say that?

8 MS. DWIGGINS: It was --

9 MR. WILLIAMS: It's a meeting.

10 MS. DWIGGINS: It was a meeting.

11 MR. WILLIAMS: It's a meeting, Your Honor.

12 DISCOVERY COMMISSIONER: A meeting? Yeah. I -- I

13 think that waives any type of attorney/client privilege and --

14 MR. WILLIAMS: I'm --

15 DISCOVERY COMMISSIONER: -- okay. I think it waives it.

16 Because there should have been no expectation with an independent

17 appraiser present that you were going to be able to protect that

18 conversation.

19 Now, the work product issue of -- okay. So let's go one at a

20 time.

21 MR. WILLIAMS: Right.

22 MS. DWIGGINS: Well, Mr. --

23 DISCOVERY COMMISSIONER: Attorney/client, no. Work

24 product. Then we get back to the same situation that we kind of left off a

25 few minutes ago, which is the difference, I guess, between fact and

1 opinion. I think there is an argument that both are present, but the
2 opinions that he is giving is not as a lawyer. It is as the trustee.

3 Now, work product. Can you waive it? If you disclose it, is it
4 waived?

5 MR. WILLIAMS: Only if it's to your adversary. Not if it's to a
6 third party.

7 DISCOVERY COMMISSIONER: Right. That's the *Kotter*
8 case.

9 MR. WILLIAMS: Correct.

10 DISCOVERY COMMISSIONER: That's the new case where
11 they explain you can waive attorney/client, but not work product.

12 But work product is what? What kind of privilege is work
13 product? I feel like I'm running a Jeopardy! game. What kind of
14 privilege is work product? Absolute?

15 MS. DWIGGINS: No.

16 DISCOVERY COMMISSIONER: Qualified? Qualified
17 privilege. So what's the test?

18 MR. WILLIAMS: Well, the distinction is --

19 MS. DWIGGINS: Substantial need under ordinary and
20 extraordinary under --

21 DISCOVERY COMMISSIONER: Circumstance.

22 MS. DWIGGINS: -- under opinion.

23 MR. WILLIAMS: Your Honor, my understanding is if work
24 product applies, it applies. Okay. Rule 26(b)(3). Now, if it's ordinary
25 work product or fact work product, as it's been referred to, then you can

1 get it with substantial need.

2 DISCOVERY COMMISSIONER: Do you think our statute's
3 delineated?

4 MR. WILLIAMS: 26 -- NRCP 26(b)(3).

5 DISCOVERY COMMISSIONER: Well, let's take a look.

6 MR. WILLIAMS: Let's do it.

7 DISCOVERY COMMISSIONER: There -- it talks about it in
8 context of both expert and nonexpert. So I think we have to look at the
9 nonexpert one.

10 MR. WILLIAMS: Right. That's the first one, I think, Your
11 Honor.

12 DISCOVERY COMMISSIONER: Uh-huh.

13 MR. WILLIAMS: The way it's numbered is a little complicated
14 to find sometimes.

15 DISCOVERY COMMISSIONER: It always is complicated, I
16 know.

17 So I think we're looking at 26(a) -- I'm sorry, 26(b)(3)?

18 MR. WILLIAMS: Right.

19 DISCOVERY COMMISSIONER: Trial preparation? And --
20 trying to think of how much of this I can actually stand to read into the
21 record.

22 Subject to the provisions of Subdivision (b)(4) of the rule, a
23 party may obtain discovery of documents and tangible things
24 otherwise discoverable under Subdivision (b)(1) of this rule and
25 prepared in anticipation of litigation or for trial by or for another party

1 or by or for that other party's representative, including the other
2 party's attorney, consultant, surety indemnity, insurer, or agent.
3 Only upon a showing that the party seeking discovery has
4 substantial need of the materials in the preparation of the party's
5 case and that the party is unable without undue hardship to obtain
6 the substantial equivalent of the materials by other means. Okay.

7 So before April --

8 MR. WILLIAMS: Now, Your Honor -- but keep -- but keep
9 reading the next sentence, because that's the distinction between what
10 you just read, it relates to ordinary work product and then --

11 DISCOVERY COMMISSIONER: In ordering discovery of
12 such materials when required showing has been made, the Court
13 shall protect against the disclosure of the mental impressions,
14 conclusions, opinions, or legal theory of an attorney or other
15 representative of a party concerning the litigation.

16 MR. WILLIAMS: Correct.

17 DISCOVERY COMMISSIONER: But it doesn't say a party.
18 And I -- maybe that's what we need the briefing on.

19 MS. DWIGGINS: Well, and I think the whole preface before
20 that, Your Honor, is it be in anticipation of litigation, which I don't believe
21 it was. And, I mean, that's part of my argument I -- I want to walk
22 through as far as whether or not there was anticipation of litigation
23 against Lubbers.

24 DISCOVERY COMMISSIONER: Well, I agree that that is an
25 issue, because as I started this discussion, started the discussion by

1 talking about the trustee exception. Because the initial petition was only
2 for accounting.

3 MR. WILLIAMS: Right, Your Honor. But whether litigation is
4 adversarial for purposes of anticipating it under the work product
5 doctrine, is not tied to whether a claim is asserted against the other
6 party. They haven't cited you one case for that.

7 DISCOVERY COMMISSIONER: Well, that's why it's
8 anticipation.

9 MR. WILLIAMS: It's anticipation, right. Now --

10 DISCOVERY COMMISSIONER: Okay. So I buy your
11 position on this. Okay?

12 MR. WILLIAMS: Okay.

13 DISCOVERY COMMISSIONER: I'm going to buy your
14 position that Mr. Lubbers was concerned and felt that there would be the
15 need of potential litigation. Here's my problem.

16 MR. WILLIAMS: Okay.

17 DISCOVERY COMMISSIONER: And independent of how you
18 might characterize these notes, upon my in camera review, I felt that
19 there was mostly factual information there, and discussion of that
20 information, and while before April, we might have had a different
21 remedy by taking Mr. Lubbers' deposition, that is no longer an option,
22 sadly enough.

23 So the only thing we have to go on terms of what his -- if you
24 consider it to be his work product or opinion, is his notes. And then on
25 top of that, I have this issue of waiting six months to claw them back,

1 and there is an issue in Federal Court and there are a couple of cases
2 that talk about once you get these documentation in the public eye, or
3 in -- or attached to some sort of a dispositive type motion, which
4 arguably they are, that motion's pending in front of the judge, then they
5 become presumptively public.

6 MR. WILLIAMS: No, Your Honor. I think -- I understand what
7 you're talking about. If I were to file a dispositive motion, a Motion for
8 Summary Judgment, for example, and --

9 DISCOVERY COMMISSIONER: But you're not in that
10 situation.

11 MR. WILLIAMS: No, I'm not.

12 DISCOVERY COMMISSIONER: You're with petitions and --
13 and --

14 MR. WILLIAMS: Exactly.

15 DISCOVERY COMMISSIONER: -- and I understand that.

16 MR. WILLIAMS: And I didn't do it. They filed it as part of their
17 petition seeking to expand their claims. I didn't attach them as part of
18 my motion to have that dismissed.

19 DISCOVERY COMMISSIONER: But it's -- see, the problem is
20 it's any -- it's any side bringing it. And the --

21 MR. WILLIAMS: No.

22 DISCOVERY COMMISSIONER: -- petition is -- I -- I disagree
23 with you.

24 MR. WILLIAMS: Okay.

25 DISCOVERY COMMISSIONER: -- because the problem is

1 that the documents were out there. That's why you have to claw back
2 quickly and you have to have procedures in place. Once you do a huge
3 document production, you go back through. Once they had a telephone
4 call with you and some of the documents in this range were privileged,
5 did you look again? Did you assert a privilege? It wasn't until they
6 actually filed the petition with the attachment of the documents that the
7 red flag went up. I think that might be too late. Six months later from the
8 initial production.

9 MS. DWIGGINS: And they waited --

10 DISCOVERY COMMISSIONER: Don't shake your head at
11 me.

12 MR. WILLIAMS: I'm -- I don't know if you're talking to me. I
13 was --

14 DISCOVERY COMMISSIONER: No, I'm not.

15 MR. WILLIAMS: I was -- okay. Your Honor, so --

16 DISCOVERY COMMISSIONER: Be respectful to the Court,
17 please.

18 MR. WILLIAMS: Just for chronological purposes, the -- the
19 notes that we were just talking about .the two pages of handwritten
20 notes where Ms. Dwiggins called me in June, that occurs after the filing
21 of the petition, dealing with the typewritten notes. That occurs on
22 May 18th.

23 DISCOVERY COMMISSIONER: Which is even more
24 problematic, because you didn't move to object to them.

25 MR. WILLIAMS: No, no. Your Honor -

1 MS. DWIGGINS: They waited --
2 MR. WILLIAMS: Okay.
3 MS. DWIGGINS: -- three --
4 DISCOVERY COMMISSIONER: She's attached them --
5 MS. DWIGGINS: They --
6 DISCOVERY COMMISSIONER: -- to the petition --
7 MR. WILLIAMS: Right.
8 DISCOVERY COMMISSIONER: Is there any movement
9 afoot?
10 MR. WILLIAMS: Yes. Yes.
11 MS. DWIGGINS: They wait almost three weeks before they
12 send us a letter.
13 MR. WILLIAMS: Ms. Dwiggins -- most respectfully, Your
14 Honor, if I could just --
15 DISCOVERY COMMISSIONER: Okay. You don't need to
16 keep saying most respectfully, I understand you're being respectful.
17 MR. WILLIAMS: No. I'm saying I just would like to be able to,
18 if I'm talking, not be interrupted by counsel.
19 So they filed it on May 18th. We have an ESI protocol that
20 governs, at least ostensibly, the way we're supposed to handle these.
21 We agreed to it, Your Honor. And that's attached as an exhibit to the
22 papers.
23 DISCOVERY COMMISSIONER: Exhibit 3.
24 MR. WILLIAMS: We sent written notice less than three weeks
25 later, one week -- we were made aware of it as attached as an exhibit,

1 we sent a notice clawing it back. They then said, We disagree with you,
2 we don't think it's -- and we're not going to take any of the public
3 references to the document out of our pleading. Okay.

4 Now, the ESI protocol says even if you disagree with us, you
5 don't debate the matter in the letters. You agree to either destroy it or if
6 you're going to contest it, you sequester it. They didn't agree to do that
7 in the first letter. We then wrote back again and said, here is a more
8 detailed explanation from our position. In addition, there's an ESI
9 protocol, there's Rule 4.4(b) and there's merits incentives, all of which
10 compel you to follow a certain process here.

11 DISCOVERY COMMISSIONER: But that process does not
12 apply to the inadvertent production. It's two separate paragraphs. And
13 on the inadvertent production on the last line, it says:

14 A producing party may not request a return of the document
15 pursuant to this section if the document contains any discoverable
16 information .

17 MR. WILLIAMS: Wait a sec. Your Honor, that's not -- that's
18 the wrong section. Most -- again, that's -- the ESI protocol provision that
19 we're talking about is 21.

20 DISCOVERY COMMISSIONER: But then you have 22.

21 MR. WILLIAMS: But that --

22 DISCOVERY COMMISSIONER: Who drafted this document?

23 MR. WILLIAMS: But 22 deals with nonresponsive information.
24 That's like if I produced -- if I produced Ed Lubbers' vacation schedule to
25 go somewhere, and it -- because it's not responsive to any requests,

1 then I can seek to claw that back. That's what 22 addresses. It has --
2 most -- again, it doesn't have anything to do with this issue. We're
3 talking only about 21. It's only 21.

4 MS. DWIGGINS: Irrespective, Your Honor, the first part of 21
5 says:

6 You agree to promptly return, sequester, or destroy.

7 It's already public record at that point in time.

8 MR. WILLIAMS: But that's not --

9 MS. DWIGGINS: They wait three weeks --

10 DISCOVERY COMMISSIONER: Yeah.

11 MS. DWIGGINS: -- to even write us the letter, and they make
12 no effort to seal it, extract it from the record, or anything.

13 MR. WILLIAMS: Your Honor, the irony of this? We were just
14 in front of Judge Sturman where she was moving to sanction us for
15 conduct that went on in bankruptcy court where she contended lawyers
16 for the respondents or affiliates of the respondents publicly filed
17 documents in violation of a confidentiality agreement that she never
18 moved to seal or did any -- she just -- damage done.

19 MS. DWIGGINS: Well, hold --

20 MR. WILLIAMS: And now we're here saying --

21 MS. DWIGGINS: Hold on.

22 MR. WILLIAMS: Now we're here saying that we were
23 obligated to move to seal these? We have followed a protocol, Your
24 Honor. We followed a protocol.

25 MS. DWIGGINS: Your Honor, that was a --

1 MR. WILLIAMS: They then --

2 MS. DWIGGINS: -- different situation.

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

4 DISCOVERY COMMISSIONER: Don't interrupt, please.

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

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

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

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

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

22 MR. WILLIAMS: Right.

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

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

3 MR. WILLIAMS: Your Honor --

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

6 MR. WILLIAMS: Which set?

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

10 MR. WILLIAMS: Nicolatus's?

11 DISCOVERY COMMISSIONER: Yeah.

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

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

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

17 DISCOVERY COMMISSIONER: I broke them into --

18 MR. WILLIAMS: -- the public record.

19 DISCOVERY COMMISSIONER: -- two different groups.

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

22 DISCOVERY COMMISSIONER: Okay.

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

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

1 MR. WILLIAMS: Exhibit 2?

2 DISCOVERY COMMISSIONER: I'm -- I'm raising the white
3 flag right now.

4 MR. WILLIAMS: Exhibit 2 was -- was submitted to you in
5 camera. As an exhibit. My complaint with Exhibit 1 is that they were
6 likewise submitted to you in camera as an exhibit, but those --

7 DISCOVERY COMMISSIONER: So do I need to address --

8 MR. WILLIAMS: -- are the ones that are also --

9 DISCOVERY COMMISSIONER: -- Exhibit 2 at all?

10 MR. WILLIAMS: -- publicly quoted. Your Honor, Exhibit 2 in
11 my view is less important than Exhibit 1, and in particular, the typewritten
12 notes. Now --

13 DISCOVERY COMMISSIONER: Can you guys move to claw
14 this back?

15 MR. WILLIAMS: Yes. Yeah.

16 DISCOVERY COMMISSIONER: Exhibit 2?

17 MR. WILLIAMS: Yes. Absolutely. That's how we got here is
18 that -- was that negotiation process --

19 DISCOVERY COMMISSIONER: I thought --

20 MR. WILLIAMS: -- I told you about that was 48 pages and we
21 ended up only having a dispute over two.

22 DISCOVERY COMMISSIONER: Okay. So Exhibit 2 is not
23 yet part of a public record?

24 MR. WILLIAMS: Exhibit 2 is not part of a public record.

25 DISCOVERY COMMISSIONER: Okay.

1 MR. WILLIAMS: It's been submitted to you in camera.

2 DISCOVERY COMMISSIONER: All right. So would you
3 agree with me that if there's any privilege that protects it, it's the work
4 product privilege?

5 MR. WILLIAMS: I would absolutely agree with you on that.

6 DISCOVERY COMMISSIONER: And would you agree with
7 me that -- I just don't see any opinion in here, unless I'm not able to read
8 the writing.

9 MR. WILLIAMS: Your Honor, I --

10 DISCOVERY COMMISSIONER: I think this is all pretty much
11 factual information based on a discussion and Mr. Nicolatus is present.

12 MR. WILLIAMS: Right.

13 MS. DWIGGINS: So was Mr. Solomon and my client.

14 MR. WILLIAMS: Right. And --

15 DISCOVERY COMMISSIONER: Yeah.

16 MR. WILLIAMS: -- and Your Honor, that's -- that's why I never
17 for once argued that it was attorney/client. Anything discussed in that
18 room wasn't going to be protected because there were third parties --

19 DISCOVERY COMMISSIONER: Right.

20 MR. WILLIAMS: -- the opposing party. But -- but to -- a
21 lawyer or a party taking notes in a meeting, even if the other parties --
22 Your Honor, take a deposition as an example. If I'm at a deposition, of
23 course, the other party's at the deposition. If my client's taking notes
24 during the deposition, they don't become subject of waiver just because
25 the other party was in the room. They can still be work product.

1 DISCOVERY COMMISSIONER: Okay.

2 MR. WILLIAMS: That's my point.

3 DISCOVERY COMMISSIONER: All right. So let's say that
4 Exhibit 2 is work product.

5 MR. WILLIAMS: Okay.

6 DISCOVERY COMMISSIONER: All right. Which I don't
7 disagree with your analysis there. But then we have to look at it. And
8 this is Mr. Lubbers' work product. There's no other way to get this
9 information. There's no other way to find out what he wrote down or
10 what he thought was important from that meeting other than these notes.
11 There is no other way to do it.

12 MR. WILLIAMS: Right. Well, Your Honor, but what
13 Mr. Lubbers decided to take down as being important in that meeting are
14 Mr. Lubbers' mental impressions or his opinions as to what was
15 important to take down, as to what went on in the meeting, this deals
16 with substantial need. And with respect to what went on in the meeting,
17 they can get that from either -- depose Nicolatus. Depose -- I mean,
18 most respectfully, Scott was there. Mr. Solomon was there. Bob Evans
19 was there. There are other people there who can be deposed that can
20 tell what happened in that meeting if they -- if that's important to them.
21 But they were there.

22 I don't think that's what's critically important here, Your Honor,
23 insofar as from their perspective or to be perfectly with the Court, from
24 mine. I have an obligation to protect what I believe are protected
25 records.

1 I think the more important issue here is the set of documents
2 at Exhibit 1, and in particular -- of those, the typewritten notes. Because
3 the typewritten notes are the ones that have been made public. It's the
4 typewritten notes that have been repeatedly made public in different
5 briefing after being on notice of what our position is.

6 So on those two pages that you -- you've started with, Your
7 Honor, I don't think there's much -- I don't think we're talking past each
8 other on those. I understand the Court's position and I hope you
9 understand mine.

10 MS. DWIGGINS: If I just may briefly --

11 DISCOVERY COMMISSIONER: I do.

12 MS. DWIGGINS: -- I don't agree with what he decided down
13 constitutes his mental impression. If that's the case, there would be no
14 concept of ordinary work product. Work product is everything somebody
15 wrote down and it's -- you accept that as a mental impression. It doesn't
16 matter who you are then if you wrote down. And when would ordinary
17 work product ever come into play then?

18 MR. WILLIAMS: Interviewing a witness and the witness telling
19 you these are the facts that happened and the lawyer takes down,
20 These are the facts that happened. That's ordinary work product, Your
21 Honor.

22 MS. DWIGGINS: I -- you could argue --

23 MR. WILLIAMS: That's the quintessentialist handbook.

24 MS. DWIGGINS: -- it's mental impression as well as that
25 that's what you consider it important to write down of what the witness

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

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

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

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

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

22 MS. DWIGGINS: And I have not argued that.

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

25 So with respect to the production --

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

3 MR. WILLIAMS: Oh, I --

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

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

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

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

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

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

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

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

11 MR. WILLIAMS: No.

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

15 MR. WILLIAMS: So --

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

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

19 DISCOVERY COMMISSIONER: I know you negotiated it.

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

23 DISCOVERY COMMISSIONER: All you have to do is notify.

24 MR. WILLIAMS: Right.

25 DISCOVERY COMMISSIONER: You don't have a clawback

1 provision.

2 MR. WILLIAMS: Correct. There was never a notification
3 here, Your Honor. I'm not talking about clawback, I'm talking about --

4 DISCOVERY COMMISSIONER: Well, how would they know?

5 MR. WILLIAMS: When --

6 DISCOVERY COMMISSIONER: Because you've not put a --
7 you've produced them.

8 MR. WILLIAMS: I -- I get that, Your Honor. But when I -- if I'm
9 a lawyer and I review this document, especially a lawyer as experienced
10 as Ms. Dwiggins, and I see some of the things in this document, Your
11 Honor, talking about what he perceives to be strengths and weaknesses
12 of his case?

13 DISCOVERY COMMISSIONER: Okay. I -- I am not --

14 MR. WILLIAMS: That's not --

15 DISCOVERY COMMISSIONER: I am not on the group yet.

16 I'm going to deal with this one --

17 MR. WILLIAMS: Okay. Oh, we're still --

18 DISCOVERY COMMISSIONER: -- first.

19 MR. WILLIAMS: -- talking about Exhibit 2?

20 DISCOVERY COMMISSIONER: Yes.

21 MR. WILLIAMS: Oh, Your Honor, again, I --

22 DISCOVERY COMMISSIONER: Okay. I'm going to require --

23 MR. WILLIAMS: -- I don't know how much --

24 DISCOVERY COMMISSIONER: -- that to retain its
25 nonprivileged but confidential designation, I don't see any alleged

1 opinions in that document that would concern me. Otherwise, also it -- it
2 appears to be more factual in nature. And although there are other
3 options to interview other witnesses, you could never take the deposition
4 of Mr. Lubbers and therefore there's no other way to get to his notes of
5 what he thought or what he documented from that meeting. So I'm
6 going to let it retain its nonprivileged designation.

7 MR. WILLIAMS: Okay, Your Honor.

8 DISCOVERY COMMISSIONER: And then we'll move on to
9 where you are concerned about.

10 MR. WILLIAMS: All right. And so I understand --

11 DISCOVERY COMMISSIONER: Which is third --

12 MR. WILLIAMS: -- the scope of the Court's ruling, you're
13 finding that there's substantial need to obtain -- that -- that it's work
14 product protected --

15 DISCOVERY COMMISSIONER: Right.

16 MR. WILLIAMS: -- but that there's a substantial need to
17 obtain it.

18 DISCOVERY COMMISSIONER: Because --

19 MR. WILLIAMS: Because Mr. Lubbers is not longer with us.

20 DISCOVERY COMMISSIONER: Right.

21 MR. WILLIAMS: Okay. And that it -- it maintains the -- I don't
22 know that that one was marked confidential, because that one was the
23 one that produced as a NATA file.

24 DISCOVERY COMMISSIONER: That's right.

25 MR. WILLIAMS: So, but --

1 DISCOVERY COMMISSIONER: What is it --
2 MS. DWIGGINS: It wasn't NATA.
3 DISCOVERY COMMISSIONER: -- is it -- should it be marked
4 confidential?
5 MS. DWIGGINS: It was a PDF.
6 DISCOVERY COMMISSIONER: Should it be parked
7 confidential, Mr. Schwarz? Mr. --
8 MR. WILLIAMS: I -- I think it should be, Your Honor.
9 DISCOVERY COMMISSIONER: Is that what the intent would
10 have been to mark it confidential?
11 MS. DWIGGINS: The -- the confidentiality agreement was
12 designed to protect financial information. Not every single document
13 disclosed in this case.
14 DISCOVERY COMMISSIONER: But -- but you've used that
15 designation on these documents.
16 MR. WILLIAMS: Right.
17 MS. DWIGGINS: They used it on everything. But --
18 MR. WILLIAMS: Your Honor, the -- the confidentiality
19 agreement it's Exhibit 11 to our opposition, is not limited only to financial
20 information.
21 DISCOVERY COMMISSIONER: Okay. All right. Well, we'll
22 extend the confidentiality label to those documents.
23 MR. WILLIAMS: Okay.
24 DISCOVERY COMMISSIONER: Moving right along. The
25 next set is 13284 through 13288. And these I think are the issue, I

1 mean, I think the -- the clear issue here is not so much with page 284,
2 which I think falls in line with the other group of documents, 286, I think
3 those are clearly similar to what I just allowed to remain unprivileged or
4 produced, but maintained as confidential. Do you have any dispute on --
5 on those two pages? It's 13284 and 13286 is what I'm looking anything.

6 MS. DWIGGINS: I think 7 and 8 are also part of the same
7 thing. Because you have keep in mind there were three different
8 petitions filed relating to three different trusts.

9 MR. WILLIAMS: All right. So why would -- why would they
10 even be getting his notes related to trusts other than what's at issue in
11 this action?

12 DISCOVERY COMMISSIONER: I would agree
13 that 13284, 13286, and 13287 appears to be factual information related
14 to the trust. Would someone on the respondent's side please tell me if
15 I'm incorrect on that.

16 MR. WILLIAMS: Well, so a couple of points, Your Honor. On
17 those three that you just mentioned, I -- I think on the first one --

18 DISCOVERY COMMISSIONER: Yes.

19 MR. WILLIAMS: -- I think that that reflects Mr. Lubbers' notes
20 that he took during the call with the lawyers. It's got the same date and
21 there are some notations that suggest that. That's the document that to
22 me reflects a discussion about the petition.

23 DISCOVERY COMMISSIONER: Right.

24 MR. WILLIAMS: Okay. So I would -- my position on this
25 document, and I'll -- I'll address all of them just to go in order.

1 DISCOVERY COMMISSIONER: Okay.

2 MR. WILLIAMS: I'll address all of them. I think this one is
3 both attorney/client privileged and work product would be my position.
4 We're -- we're skipping 85 for right now.

5 DISCOVERY COMMISSIONER: Correct.

6 MR. WILLIAMS: The typed notes.

7 The next two documents, Your Honor, 13286 at the top is
8 titled Secondary Trust. Ms. Dwiggins is correct. Three petitions were
9 filed at the same time regarding three different trusts. This is related to a
10 trust that is not at issue in this proceeding, the secondary trust.

11 Same with the next page, that's dealing with an asset
12 protection trust. So these two pages aren't even related to this case. I
13 don't think that they should be produced for that reason first, I guess
14 would be the easiest. But next is I think that they would also be work
15 product protected and/or attorney/client privileged to the extent that
16 Mr. Lubbers was talking with his lawyers about these and making the
17 notes after the initial petitions have been filed.

18 DISCOVERY COMMISSIONER: We don't know. That's the
19 problem, we don't know.

20 MR. WILLIAMS: That's -- it -- it is -- and, Your Honor --

21 DISCOVERY COMMISSIONER: The first page I would say is
22 more likely, but page 286 and 287 we don't know.

23 MR. WILLIAMS: Right. And -- but I will --

24 MS. DWIGGINS: I believe and I would say there's probably
25 no dispute that these four handwritten pages were taken at the same

1 time during the call.

2 DISCOVERY COMMISSIONER: Okay.

3 MS. DWIGGINS: But -- but I don't see how you could
4 separate them out. When you look at the context of the call was at
5 most 24 minutes, I think it's important for this Court to look at the scope
6 of what was discussed as reflected in his handwritten notes.

7 DISCOVERY COMMISSIONER: We have to have objective
8 parameters in place on this. I cannot start second-guessing what was
9 discussed, who was present, what was said. I can honestly barely read
10 Mr. Lubbers' notes. So I can tell what they relate to somewhat, but to
11 me the notes on the pages that I just talked to you about --

12 MR. WILLIAMS: Uh-huh.

13 DISCOVERY COMMISSIONER: -- deal with maybe if you
14 want to say kind of a summary of the petition and some client contact
15 information or attorney contact information. And the trust. Now, if the
16 secondary trust and the protection trust are not at issue, I don't know
17 why we can't claw back those two pages of notes. Which are 286
18 and 287.

19 MS. DWIGGINS: Again, Your Honor, my only concern is that
20 in light of the fact that this was all discussed presumably during this call
21 that again was 24 minutes at the most, I think it's important as to a
22 reasonable inference or whether or not this other stuff was discussed.

23 Your Honor understands how complicated --

24 DISCOVERY COMMISSIONER: How is that even going to
25 get into evidence?

1 MR. WILLIAMS: Well --

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

5 DISCOVERY COMMISSIONER: Right. He's not.

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

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

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

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

17 MR. WILLIAMS: It is true, Your Honor.

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

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

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

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

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

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

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

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

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

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

2 MR. WILLIAMS: Okay.

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

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

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

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

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

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

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

25 MR. WILLIAMS: Uh-huh.

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

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

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

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

1 they could generally describing the subject matter of the items discussed
2 with Mr. Lubbers. And it -- this is an important point. Not just on
3 October 14th, 2013. If you look at their dealing records that they
4 provided, they continued to have discussions with Mr. Lubbers about
5 these types of topics.

6 So, Your Honor, the threshold argument is that there -- they
7 would be privileged. If Mr. Lubbers was taking notes during those calls
8 or even if he record -- even if he hung up the phone and said, Let me
9 write down what the lawyers told me, that would still be privileged, is my
10 position.

11 And then with respect to work product, you've analyzed it and
12 found that they only reflect facts. I understand that. But I would
13 respectfully submit that they haven't shown a substantial need to get
14 these notes if they're just ordinary work product.

15 DISCOVERY COMMISSIONER: Well, the substantial --

16 MR. WILLIAMS: Because I --

17 DISCOVERY COMMISSIONER: -- need is Mr. Lubbers isn't
18 here.

19 MR. WILLIAMS: I understand.

20 DISCOVERY COMMISSIONER: And he's the only one that
21 could have documented what he did document.

22 MR. WILLIAMS: But -- but substantial need never justifies the
23 disclosure of attorney/client privilege communications is all I'm saying.

24 DISCOVERY COMMISSIONER: But it can be waived.

25 MR. WILLIAMS: Well --

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

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

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

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

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

1 against Mr. Lubbers individually was filed.

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

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

12 So --

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

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

24 13284 I think it probably is attorney/client. I'm going to go
25 ahead and apply the trustee exception here utilizing Subsection 5

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

6 MS. DWIGGINS: And your --

7 DISCOVERY COMMISSIONER: On this particular document.

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

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

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

17 DISCOVERY COMMISSIONER: And I disagree with you.

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

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

1 the family trustees who are the Canarellis, not Ed, became hostile and
2 stopped making distributions. Scott had hired our firm in 2012 of June in
3 connection with the Canarellis' decision to stop withhold -- or withholding
4 distributions.

5 In November 2012, Scott did authorize us to file a petition and
6 we communicated that by way of letter. But it was as a result of the
7 Canarellis' decision as family trustee, because Ed was not family trustee
8 at this time, remember.

9 MR. WILLIAMS: But didn't -- didn't he work with the
10 Canarellis? I mean --

11 MS. DWIGGINS: Okay. Well, what hat is he wearing?

12 DISCOVERY COMMISSIONER: Well --

13 MS. DWIGGINS: There's no threat in litigation against him.
14 He's not even a trustee that could potentially be liable.

15 DISCOVERY COMMISSIONER: We have been going for
16 almost an hour and a half. I need to give my staff and myself a break. I
17 think we all need a break. And --

18 MS. DWIGGINS: I'm fine. But I would like the opportunity to
19 go through this really quickly, because I think it's very important,
20 especially in the context --

21 DISCOVERY COMMISSIONER: Okay. Ms. Dwiggins --

22 MS. DWIGGINS: -- of the --

23 DISCOVERY COMMISSIONER: -- I will give you that
24 opportunity. Just let my staff have a break, please. And myself. Okay?
25 And we'll be back. We promise. We'll be back.

1 Thank you.

2 MR. WILLIAMS: Thank you, Your Honor.

3 [Court recessed at 3:21 p.m., until 3:32 p.m.]

4 DISCOVERY COMMISSIONER: All right. So we're back on
5 the record.

6 Ms. Dwiggins.

7 MS. DWIGGINS: Thank you, Your Honor.

8 I guess just going back to the chart. In November 2012, when
9 correspondence was sent and it's attached to the opposition Exhibit 2, it
10 was disclosed in the correspondence that Scott was authorizing a
11 petition to redress the Canarellis withholding of distribution based upon
12 their interpretation of HEMS. I know they reference an agenda in 2012
13 November of Scott lawsuit threaten. I think it's clear based upon the one
14 right above it, it was against the Canarellis, they were the only family
15 trustees at the time.

16 Obviously, I have the date they resigned, the date the
17 purchase agreement was. You've already addressed what the petition
18 sought as it related to the trust, namely an accounting and the appraisal
19 pursuant to the terms of the agreement. And on the -- the left here, and
20 they reference this in their opposition repeatedly, everything they
21 reference is where it either says Larry or the family trustees that -- it --
22 specifically, it says Larry will not authorize an accounting, Larry will not
23 authorize an inventory, Larry is in a conflict, he was on both sides of the
24 transaction, he violated his fiduciary duties, he entered the sale to
25 punish Scott and harm the interest.

1 Every single one of those allegations are against Larry only on
2 the --

3 DISCOVERY COMMISSIONER: What was the relationship
4 between Mr. Lubbers and the Canarellis?

5 MS. DWIGGINS: Well, it depends. He was wearing multiple
6 hats.

7 DISCOVERY COMMISSIONER: Right.

8 MS. DWIGGINS: He was our trustee at the time, he was the
9 attorney for them, he was -- I don't know if he was a manager, but he
10 can't serve two masters at one time. He is our trustee. And the only
11 statements made against him is Lubbers admitted having no knowledge
12 of the assets of the trust. He admitted having no knowledge of the
13 management of the trust. There was not one allegation of wrongdoing
14 against him and Lubbers was only named because he was the acting
15 trustee at the time and that's who has to be named.

16 And then if you just go down, Your Honor, obviously, we talk
17 about the call and -- and the notes and whatnot. But Scott reserved his
18 right to unwind the sale in December '13, because he didn't have
19 sufficient information. We didn't have the appraisal. In fact, we hadn't
20 met with Nicolatus at that point in time, which is the next one.

21 In 2015 in November, Lubbers signs the consent with Gary
22 authorizing him to speak with us and then I think probably most
23 importantly, Your Honor, is even in December 2015, on the 30th, we had
24 prepared a draft petition and sent it to them to try and facilitate
25 settlement and have a discussion. And we specifically stated in writing

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

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

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

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

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

21 MR. WILLIAMS: Right.

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

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

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

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

18 DISCOVERY COMMISSIONER: Okay.

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

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

25 DISCOVERY COMMISSIONER: Want me to see if we have

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

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

3 DISCOVERY COMMISSIONER: Okay.

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

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

14 MR. WILLIAMS: Okay.

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

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

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

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

5 I'm skipping a sentence.

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

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

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

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

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

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

17 MS. DWIGGINS: He was the liaison between us.

18 MR. WILLIAMS: What would Mr. Lubbers expect?

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

1 Is that vague enough, Mr. Williams?

2 But having said that, we get back to the same analysis.

3 Attorney/client? Yeah, I think this one probably is. Asking for opinions,
4 asking for consideration of certain issues? Yes.

5 Now we get to the trustee exception. In this case, it appears
6 to go far beyond just dealing with the trust accounting.

7 MS. DWIGGINS: Your Honor, may I interject just one
8 second?

9 DISCOVERY COMMISSIONER: Yes.

10 MS. DWIGGINS: Because according to Mr. Williams'
11 declaration, this memo was prepared by Mr. Lubbers before he retained
12 or before he participated in the call. So --

13 DISCOVERY COMMISSIONER: Okay. So --

14 MS. DWIGGINS: So in order for it to be attorney/client
15 privilege, there has to be a communication of that with the lawyer.

16 DISCOVERY COMMISSIONER: And we don't know, because
17 we don't know what took place during the call.

18 MR. WILLIAMS: Your Honor, the -- the declarations from
19 Mr. Lee and Ms. Renwick to the extent that they can get into this, have
20 generally described the subject matters that were discussed with
21 Mr. Lubbers on October 14th, 2013, and thereafter. And they are
22 entirely consistent with the content of what you see in these notes,
23 particularly the first three lines pose questions, okay. I'm not getting into
24 the content. But they are consistent with what the lawyers say was
25 discussed.

1 DISCOVERY COMMISSIONER: And then they talked about
2 future legal proceedings.

3 MR. WILLIAMS: Well, it -- it's the epitome of work product
4 and attorney/client, Your Honor. It's basically assessing here's where
5 we're strong, here's where we're weak. Here's what we should probably
6 do from a strategy standpoint. It doesn't get any more quintessential
7 work product, opinion work product, and the fact that it's being shared
8 with lawyers, attorney/client privilege.

9 MS. DWIGGINS: There is absolutely no indication that that
10 was shared with lawyers. And --

11 DISCOVERY COMMISSIONER: Yeah. I can't -- I -- it looks
12 like something that would -- let me say it that way. Whether it actually
13 was paragraph per paragraph, question per question, we don't know,
14 because we don't know what happened during the discussion. And the
15 real problem we have, and this is the reality and we've said it again and
16 again, you don't have and we don't have Mr. Lubbers here to tell us.

17 MS. DWIGGINS: Well -- well --

18 DISCOVERY COMMISSIONER: Not that he could. He would
19 have to assert a privilege and -- and maintain it.

20 MS. DWIGGINS: Well, I'm not sure. Because I think part of it
21 is factual, which I'm sure we're going to go through. But I just want to
22 point out the fact that -- that when the billing statements in part talk
23 about legal defenses, if you noticed, there's also redactions there. We
24 don't know if perhaps Ed was being advised by the attorneys that he has
25 a potential claim against the Canarellis.

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

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

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

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

8 MR. WILLIAMS: Right.

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

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

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

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

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

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

7 MR. WILLIAMS: Asset Protection Trust.

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

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

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

15 The last paragraph, not relevant, protect it.

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

21 MR. WILLIAMS: Your -- Your Honor --

22 DISCOVERY COMMISSIONER: It is not opinion.

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

24 DISCOVERY COMMISSIONER: Well, belief is not an opinion.

25 MR. WILLIAMS: Your Honor, but starting --

1 DISCOVERY COMMISSIONER: I wish we all could
2 understand that, a belief is not a -- a fact.
3 MR. WILLIAMS: It's not a fact, right.
4 DISCOVERY COMMISSIONER: Right.
5 MR. WILLIAMS: I understand that.
6 DISCOVERY COMMISSIONER: It's not a fact.
7 MR. WILLIAMS: So when you start the second sentence, and
8 I'm not going to read it into the record, Your Honor, but I'm now on third
9 paragraph from the bottom --
10 DISCOVERY COMMISSIONER: Yes.
11 MR. WILLIAMS: -- okay, the second sentence starts, and if
12 you just read from there, I don't think there's any way in the world that
13 someone could find that those are facts. Those are clearly his opinions.
14 Those are his assessments of this case.
15 DISCOVERY COMMISSIONER: As it relates to the
16 administration of the trust.
17 MR. WILLIAMS: No. Most respectfully, we're talking --
18 DISCOVERY COMMISSIONER: What does it relate to then?
19 Because I'm confused.
20 MR. WILLIAMS: The -- the transaction. The sales
21 transaction.
22 DISCOVERY COMMISSIONER: Right. Which is part of the
23 administration of Scott's trust.
24 MR. WILLIAMS: That's -- that's what this entire litigation is
25 about.

1 DISCOVERY COMMISSIONER: That's why -- that's correct.
2 That is correct. And that goes to the administration of the trust. And --
3 and the key issue on this -- on -- that -- the reason why we're here. And
4 there is no other way to know that information that Mr. Lubbers had or
5 his thought about the trust at that time than this note -- than these notes.

6 MR. WILLIAMS: But, Your Honor, so we talked about the
7 initial petition, that it only sought an account.

8 DISCOVERY COMMISSIONER: Uh-huh.

9 MR. WILLIAMS: Okay. And that's where you made some
10 decisions based on the fact that the fiduciary exception would apply.

11 DISCOVERY COMMISSIONER: Right.

12 MR. WILLIAMS: There's then --

13 DISCOVERY COMMISSIONER: Don't you think the
14 accounting deals with the assets and the trust?

15 MR. WILLIAMS: Of course they -- of course an accounting
16 has to do with the assets of the trust, Your Honor.

17 DISCOVERY COMMISSIONER: That's right.

18 MR. WILLIAMS: But they were reserving their rights at this
19 time to unwind the sales transaction and then filed a subsequent petition
20 where we're litigating, as you well know, about the valuation that was
21 employed and the purchase price employed as part of that sales
22 transaction. That's not administration. That's not trust administration,
23 Your Honor.

24 DISCOVERY COMMISSIONER: Really?

25 MR. WILLIAMS: No. Most respectfully, it's not.

1 DISCOVERY COMMISSIONER: Well, what do you -- what do
2 you call it then? It doesn't deal with anything else but Scott's trust.

3 MR. WILLIAMS: It -- Your Honor, everything in this case --

4 DISCOVERY COMMISSIONER: And the assets in the sale.

5 MR. WILLIAMS: -- has to do with Scott's trust.

6 DISCOVERY COMMISSIONER: Not everything.

7 MR. WILLIAMS: Your Honor, everything does.

8 DISCOVERY COMMISSIONER: Not everything.

9 MR. WILLIAMS: Well, Your Honor, the entire -- the entire
10 case is about Mr. Canarelli's trust. I mean, seriously, the purchase
11 transaction --

12 DISCOVERY COMMISSIONER: It talks about the -- the
13 actual trust itself and managing the trust and what they were going to --
14 what they did as it relates to the value of the trust. What -- what their
15 thoughts were on that.

16 MR. WILLIAMS: Right.

17 DISCOVERY COMMISSIONER: Right.

18 MR. WILLIAMS: Their opinions --

19 MS. DWIGGINS: Your Honor, if --

20 MR. WILLIAMS: -- their assessments of where -- you know,
21 I -- I don't want to --

22 DISCOVERY COMMISSIONER: But he's playing the trustee
23 role. He's got his trustee hat on. He's doing this for the benefit of the
24 beneficiary. He's not doing this for his own well being, although I
25 suppose one could argue he is, because he's acting as trustee. But this

1 isn't about litigation against him.

2 MR. WILLIAMS: Sure -- Your Honor --

3 DISCOVERY COMMISSIONER: No. It's about how to
4 manage the trust and the assets of it.

5 MR. WILLIAMS: Your Honor, he's been threatened, he's been
6 alleged to have breached his fiduciary duty in the initial petition. The
7 family trustee. Paragraph C6.

8 DISCOVERY COMMISSIONER: I didn't think there was a
9 breach of fiduciary duty against him in the initial petition.

10 MR. WILLIAMS: Your Honor, I read it.

11 DISCOVERY COMMISSIONER: Did I miss something? I
12 thought it was in 2015.

13 MR. WILLIAMS: Your Honor --

14 MS. DWIGGINS: It was for --

15 MR. WILLIAMS: Your Honor.

16 MS. DWIGGINS: What he just read, singular, was the failure
17 to account.

18 MR. WILLIAMS: Your Honor.

19 MS. DWIGGINS: Only.

20 MR. WILLIAMS: The family trustee, singular, Mr. Lubbers,
21 has violated the fiduciary obligations due and owing to the petitioner.
22 That is in the initial petition.

23 MS. DWIGGINS: Keep reading.

24 By failing to provide Petitioner with an inventory of the trust
25 assets or render an accounting.

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

2 MS. DWIGGINS: That's different than the sale.

3 MR. WILLIAMS: Right. That's exactly right, Your Honor. I
4 couldn't have said it any better than Ms. Dwiggins. You have been
5 focused on the fact that an accounting was demanded and that that's
6 administrative, and in his role as trustee, that there may be a fiduciary
7 exception that applies to that. The sale is different. That's the exact
8 point. The sale is different.

9 MS. DWIGGINS: And I think it --

10 MR. WILLIAMS: That's not accounting.

11 MS. DWIGGINS: Sorry.

12 MR. WILLIAMS: That's why they have, at this period of time
13 in 2013, they're specifically reserving their rights to challenge the sale.
14 They then come in and they -- they don't challenge the sale to set it
15 aside, but they challenge the sale to say you didn't sell it for enough.
16 And that's what we're litigating now, Your Honor. That's not trust
17 administration.

18 So when Mr. Lubbers is talking about risks and what he thinks
19 are strong points --

20 DISCOVERY COMMISSIONER: If you -- you don't think
21 managing the assets of Scott's trust is trust administration?

22 MR. WILLIAMS: Of -- yes, Your Honor. That's -- I'm not
23 saying that managing the trusts aren't. But the issue is this transaction.
24 The transaction where his --

25 DISCOVERY COMMISSIONER: And that was part of

1 administering the trust.

2 MS. DWIGGINS: And it was in a sense that he had to make --
3 when he made the decision to sell, it was guided by whether or not it
4 was in the best interests.

5 DISCOVERY COMMISSIONER: It had to be, because he is
6 trustee.

7 MS. DWIGGINS: And that is an administrative function. And
8 when he's talking about potentially defending any claim to unwind, which
9 never even has occurred, it's -- it would -- he would have to be arguing
10 what his decision was, why it was made, and that it was in the best
11 interests. Which --

12 MR. WILLIAMS: Because --

13 MS. DWIGGINS: -- which I guess goes to the other part,
14 which -- which I think is the most critical, is -- is where it says:

15 First there was resistance --

16 DISCOVERY COMMISSIONER: Don't read it into the record.

17 MS. DWIGGINS: Oh, sorry. That -- the part right above it that
18 starts, and then the first line of that paragraph we were just looking at it.
19 I don't see how that's anything but factual in nature. And I think the
20 ultimate question is if I asked him those questions during a deposition,
21 ultimately, why decisions were certain -- why certain decisions were
22 made, who they were discussed with, what was discussed, I would
23 ultimately get those answers if he was telling the truth under oath. There
24 is no way that those would be protected as to the reason why certain
25 decisions were made to allow distributions, not allow distributions, and

1 ultimately sell.

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

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

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

12 MR. WILLIAMS: Uh-huh.

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

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

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

21 MR. WILLIAMS: The one with the four lines?

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

24 MR. WILLIAMS: Right.

25 DISCOVERY COMMISSIONER: And everything underneath

1 it.

2 MR. WILLIAMS: Ask Larry Canarelli.

3 DISCOVERY COMMISSIONER: Where do we get --

4 MR. WILLIAMS: Ask Larry Canarelli. He was the family
5 trustee through the majority of this period of time, Your Honor. Take his
6 deposition. They're going to.

7 DISCOVERY COMMISSIONER: But what if it's different than
8 what's in this document?

9 MR. WILLIAMS: Well, Your Honor, but that's not -- whether a
10 person testifies consistent with what's in a document or not --

11 DISCOVERY COMMISSIONER: But the -- but -- but this is
12 not his document he's testifying to.

13 MR. WILLIAMS: Right.

14 DISCOVERY COMMISSIONER: The person who could --

15 MR. WILLIAMS: I'm -- this document --

16 DISCOVERY COMMISSIONER: -- testify to it is no longer
17 with us.

18 MR. WILLIAMS: Your Honor, this document theoretically
19 should never be in evidence. It shouldn't be the subject of examination.

20 DISCOVERY COMMISSIONER: Well, then, maybe it should
21 have --

22 MR. WILLIAMS: If Mr. Lubbers --

23 DISCOVERY COMMISSIONER: -- been more carefully
24 culled --

25 MR. WILLIAMS: Your Honor.

1 DISCOVERY COMMISSIONER: -- before being produced.

2 MR. WILLIAMS: If Mr. Lubbers was here today and
3 Ms. Dwiggins went to ask him, Can you tell me in this period of time
4 were certain distributions being made, and if -- you know, he could -- of
5 course, she can ask that. And he could say no, that period of time they
6 weren't. I'm -- I'm making this up, I'm not agreeing with this set of facts.
7 But, you know, or, you know, did they resume at some point? Of course,
8 you can ask those types of things.

9 MS. DWIGGINS: And I could ask the follow-up that says
10 why? And he -- and that's not protected.

11 DISCOVERY COMMISSIONER: Yeah. I think --

12 MS. DWIGGINS: His --

13 DISCOVERY COMMISSIONER: -- we have to have
14 resolution on the trustee exception. I think we have to have some
15 resolution on that.

16 MS. DWIGGINS: I don't even think --

17 DISCOVERY COMMISSIONER: I'm giving you my --

18 MS. DWIGGINS: -- we even get there because of this.

19 DISCOVERY COMMISSIONER: -- recommendation.

20 MS. DWIGGINS: I think these are facts, they're admissions of
21 a party opponent.

22 DISCOVERY COMMISSIONER: Right.

23 MS. DWIGGINS: And they go to the credibility of Larry.

24 DISCOVERY COMMISSIONER: But facts in a contained in
25 an attorney/client privileged communication, to make that

1 communication remain privileged.

2 MS. DWIGGINS: And the Court has the ability under the law
3 to redact the document so as to protect anything other than facts. And I
4 think the --

5 DISCOVERY COMMISSIONER: How would you recommend
6 I redact this document?

7 MS. DWIGGINS: From the part that says the word, First,
8 down to where it says, Happened, in the next paragraph, I -- I think is all
9 factual in nature, because I believe if I ask the questions during the
10 deposition, he would answer accordingly as to the -- what was done,
11 when it was done, why distribution stopped, why they were resumed,
12 when discussions were first being talked about the sale, who they were
13 talked about. I mean, I could go into probably 100 questions just about
14 this alone.

15 And if he was being truthful, I would ultimately get those
16 answers and they wouldn't be protected.

17 DISCOVERY COMMISSIONER: Mr. Williams --

18 MS. DWIGGINS: What would be a basis of privilege to say
19 that we acquiesced and the --

20 DISCOVERY COMMISSIONER: Don't read anymore into the
21 record.

22 MS. DWIGGINS: -- what the purpose was. I'm not --

23 DISCOVERY COMMISSIONER: And if you --

24 MS. DWIGGINS: -- just saying --

25 DISCOVERY COMMISSIONER: I'm serious.

1 MS. DWIGGINS: -- what the purpose was.

2 DISCOVERY COMMISSIONER: Mr. Williams, how would you
3 redact the document?

4 MR. WILLIAMS: I wouldn't. I mean, Your Honor, and I'm not
5 saying that to be flip.

6 DISCOVERY COMMISSIONER: Yeah, all right.

7 MR. WILLIAMS: But -- no, no, no. No. Let me tell you what
8 my position is and I understand the court will rule.

9 DISCOVERY COMMISSIONER: I think you need to put your
10 lawyer hat on right now. Okay?

11 MR. WILLIAMS: Right.

12 DISCOVERY COMMISSIONER: And help me out here.

13 MR. WILLIAMS: Okay. So --

14 DISCOVERY COMMISSIONER: Because some of this is
15 factual.

16 MR. WILLIAMS: Here's -- here's what I would say. Okay.
17 This is my position and then let me -- Your Honor, my position is the
18 entire document is protected as attorney/client privilege. My position is
19 the entire document is protected because of work product. My -- I'll --
20 third position would be that even to the extent that there are facts
21 contained within this document, they are inextricably intertwined with
22 mental impressions and attorney/client privilege communications such
23 that there can't be an effective redaction.

24 So what I don't -- I'm not trying to be disrespectful, Your
25 Honor, all I'm saying --

1 DISCOVERY COMMISSIONER: No, I know that.

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

7 DISCOVERY COMMISSIONER: All right.

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

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

14 MR. WILLIAMS: Right.

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

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

1 MS. DWIGGINS: I understand --

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

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

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

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

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

15 Mr. Williams, who went through the documents?

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

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

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

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

3 DISCOVERY COMMISSIONER: Well, that cuts against you
4 too.

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

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

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

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

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

25 MR. WILLIAMS: No, you're --

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

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

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

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

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

1 back as opinion work product.

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

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

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

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

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

1 right on that?

2 MR. WILLIAMS: Only to you, Your Honor.

3 DISCOVERY COMMISSIONER: Only to me. What
4 happened -- so it's --

5 MS. DWIGGINS: It's referenced in our surcharge petition.

6 DISCOVERY COMMISSIONER: So you'll have to,
7 Mr. Williams, bring your Motion to Seal. I can't seal. I'm -- I don't have
8 that ability. I can strike a document. I can't strike Judge Sturman's
9 documents. I can strike my own.

10 MR. WILLIAMS: Uh-huh.

11 DISCOVERY COMMISSIONER: I would ask you to make
12 your Motion to Seal.

13 MS. DWIGGINS: I would be willing to stipulate to just extract
14 that exhibit or redact that portion. We've done it with other documents in
15 the case.

16 DISCOVERY COMMISSIONER: All right. The document
17 itself would have to be redacted and the exhibits would have to be
18 removed. If you want to make that agreement on the record pending
19 further resolution by the Court, you're welcome to do that.

20 MS. DWIGGINS: I think it would be a --

21 DISCOVERY COMMISSIONER: And that would save you a
22 motion, Mr. Williams.

23 MS. DWIGGINS: I think it would be agreeing to redact that
24 portion of the brief where it's referenced, and I otherwise think it's --

25 DISCOVERY COMMISSIONER: I would request you do a stip

1 and order and have Judge Sturman sign it, and then you can take her
2 order to the district court and have them redact and -- and pull the
3 document.

4 MR. WILLIAMS: Understood, Your Honor. I'll work with
5 Ms. Dwiggins on this. And -- because I'm sensitive to this document
6 being reviewed by the district court as part of the motion that we filed to
7 dismiss the petition, because -- and I'm not going to reargue anything,
8 but I will deal with it. I understand what the Court is saying and we will
9 deal with it appropriately. And I appreciate what both the Court's order
10 is -- or recommendation.

11 DISCOVERY COMMISSIONER: If I have something further I
12 could offer you, I would. I just don't. But I will give you the time under
13 EDCR 2.34 to make your proper objection. And that would include until
14 final resolution by a higher court.

15 MR. WILLIAMS: Thank you, Your Honor. And -- and for
16 clarity, that applies only to 13285?

17 DISCOVERY COMMISSIONER: Correct.

18 MR. WILLIAMS: Understood. Okay.

19 DISCOVERY COMMISSIONER: And then everything else I
20 think I -- did I deal with everything else? I hope.

21 MS. DWIGGINS: I believe so. And just so Your Honor is
22 aware, there has been -- I guess the order hasn't been entered yet. But
23 there has been a modification to the confidentiality agreement. So
24 there's really only limited things that are now considered confidential and
25 they really relate to just the personal finances of the siblings trust, Scott,

1 and the Canarellis. But understanding that you want these to mean
2 confidential, we'll just make sure they're within the scope of that modified
3 order.

4 DISCOVERY COMMISSIONER: I did put confidentiality on
5 the others. I didn't ask you if you wanted 2.43(e) relief on the other set
6 of documents.

7 MR. WILLIAMS: Your Honor, my position, for the record,
8 would be that I do. And if the Court's willing to give me 2.34(e) relief for
9 the other documents --

10 DISCOVERY COMMISSIONER: I'll give you the relief on
11 those sets.

12 MR. WILLIAMS: Thank you.

13 DISCOVERY COMMISSIONER: Sure. All right.

14 One thing I've learned the hard way is it's very difficult to the
15 put the cat back in the bag. And I think this case and this motion work is
16 case in point on that. So before it gets any worse, I'll give you 2.34
17 relief. But I will -- but I will say that I did spend a considerable amount of
18 time thinking about this. I don't want you to think that I didn't. I did. And
19 I made the best decisions I could. But you are welcome to object. I
20 have no problem with that. We'll maintain these as privileged until such
21 time as the objection is ruled on by the district court judge. And in which
22 case I would just say within five business days after the Court rules on
23 the objection, that the documents will be treated as -- as I've indicated.

24 MR. WILLIAMS: Setting aside, I mean, any attempt to seek
25 further relief from the supreme court or whatever.

1 DISCOVERY COMMISSIONER: Right. An order --
2 MR. WILLIAMS: If the -- if the district court, for example, were
3 to give us a stay, it would -- it would still maintain that protection.
4 DISCOVERY COMMISSIONER: Exactly.
5 MR. WILLIAMS: Understood.
6 DISCOVERY COMMISSIONER: Until the resolution of the
7 confidentiality or the privileged nature of the documents has been -- has
8 been fully resolved, including any appeals.
9 MS. DWIGGINS: I understand, Your Honor.
10 MR. WILLIAMS: Very good. Thank you, Your Honor.
11 DISCOVERY COMMISSIONER: All right.
12 And, Ms. Dwiggins, can you prepare the report and
13 recommendation on this one.
14 MS. DWIGGINS: Of course.
15 DISCOVERY COMMISSIONER: Sorry.
16 MS. DWIGGINS: No, that's fine.
17 DISCOVERY COMMISSIONER: You do such a good job
18 though. It's why I keep asking you.
19 MS. DWIGGINS: She's taking good notes back here. I hear
20 her typing.
21 DISCOVERY COMMISSIONER: I know. She does a great
22 job.
23 MS. DWIGGINS: She told me her fingers hurt.
24 MR. WILLIAMS: And, Your Honor, was this -- did this get
25 marked?

1 you've had to review, more importantly.

2 MR. SCHWARZ: Thank you to your staff.

3 DISCOVERY COMMISSIONER: Thank you.

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

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

20 

21 _____
22 Shawna Ortega, CET*562
23
24
25

EXHIBIT 2

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DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of

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

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

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

Hearing Date: August 29, 2018

Hearing Time: ^{1:30}
2:00 p.m.

Attorneys for Petitioner: Dana A Dwiggin
Jeffrey P. Luszeck
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Attorneys for Respondents: J. Colby Williams
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1 Alyssa Lawren Graves Canarelli Irrevocable Trust; and (4) American West Development, Inc.:

2 Jennifer L. Braster
3 Andrew J. Sharples

4 Attorney for the Special Administrator for the Estate of Edward C. Lubbers: Liane K. Wakayama¹

5 **I.**
6 **FINDINGS**

7 **A. *Motion for Determination of Privilege Designation***

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

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

15 **1. Attorney/Client Privilege**

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

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

23 THE COMMISSIONER FURTHER HEREBY FINDS that although the “fiduciary
24 exception” has not yet been determined by the Nevada Supreme Court, *id.* at 30:4-5, 30:22-23, NRS
25 49.115(5) creates an exception to the attorney/client privilege as to communications relevant to

26
27 ¹ Because Ms. Wakayama departed the hearing prior to the Discovery Commissioner addressing the
28 matters that are the subject of this Report and Recommendation, her signature is not included below
as a reviewing attorney.

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

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

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

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

15 **2. Attorney Work Product**

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

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

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

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

26 THE COMMISSIONER FURTHER HEREBY FINDS that as a result of Lubbers’ passing
27 on April 2, 2018, he is unavailable to be deposed regarding any factual matter related to the creation
28

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

3 **3. Documents Bates Numbers RESP0013284-13288**

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

7 THE COMMISSIONER FURTHER HEREBY FINDS that Respondents clawed back the
8 documents Bates Numbered RESP0013284-13288 on June 5, 2018, less than three weeks after
9 Petitioner attached them as an exhibit to his supplemental Petition filed May 18, 2018. *Id.* at 55:23-
10 25; 57:18-58:25.

11 i. *RESP0013284*

12 THE COMMISSIONER FURTHER HEREBY FINDS that RESP0013284 appears to be
13 handwritten notes that the Commissioner assumes Lubbers made contemporaneous with a
14 teleconference he had with his lawyers on or about October 14, 2013. *Id.* at 76:20-22, 78:3-5,
15 81:21-22.

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

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

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

26 ii. *RESP0013285*

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

1 consulted with his lawyers, and the notes reflect the types of things one would discuss with his/her
2 attorney. The typed notes, therefore, appear to be an attorney-client communication. *Id.* at 93:9-
3 14.

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

7 THE COMMISSIONER FURTHER HEREBY FINDS that from the beginning of
8 RESP0013285, including the handwritten notes, to the indented paragraph starting with the word
9 "1st" is both work product and protected under the attorney-client privilege without an applicable
10 exception. *Id.* at 109:21-110:4.

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

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

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

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

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

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

8 iii. *RESP0013286 and RESP0013287*

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

12 iv. *RESP0013288*

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

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

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

25 **4. No Waiver**

26 THE COMMISSIONER FURTHER HEREBY FINDS that under *Cotter v. Eighth Judicial*
27 *District Court in and for County of Clark*, 134 Nev. Adv. Op. 32, 416 P.3d 228 (2018), even if a
28

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

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

7 **5. Documents Bates Numbered RESP0078899-78900**

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

12 THE COMMISSIONER FURTHER HEREBY FINDS that Respondents do not contend the
13 documents Bates Numbered RESP0078899-78900 are protected by the attorney/client privilege.
14 They instead contend the notes are protected by the attorney work product doctrine. *Id.* at 62:20-
15 24, 64:2-18.

16 THE COMMISSIONER FURTHER HEREBY FINDS that RESP0078899-78900 do not
17 contain Lubbers' opinions but rather information that is primarily factual in nature. *Id.* at 51:23-
18 52:2, 64:6-11, 71:1-2.

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

23 ***B. Supplemental Briefing on Appreciation Damages.***

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

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

5 THE COMMISSIONER FURTHER HEREBY FINDS that if the Court finds that there was
6 a breach of fiduciary duty, then the amount of any distribution from the Purchased Entities² post
7 March 31, 2013 to the Siblings' Trust is relevant and discoverable. *Id.* at 117:17-19, 138:5-12,
8 141:24-25, 142:3-5.

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

13
14 **II.**
RECOMMENDATIONS

15 **A. *Motion for Determination of Privilege Designation***

16 IT IS HEREBY RECOMMENDED that RESP0013284 is subject to production. *Id.* at 73:1-
17 4, 82:24-83:5.

18 IT IS FURTHER RECOMMENDED that with respect to RESP0013285:
19
20

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

- 1 (1) from the beginning of RESP0013285, including the handwritten notes, to the
2 indented paragraph starting with the word “1st” shall be redacted, *id.* at 109:21-
3 110:1;
- 4 (2) the indented paragraph starting with the word “1st” through and including the first
5 sentence of the following paragraph that starts with “[w]hether” and ends with
6 “happened” is subject to production, *id.* at 101:19-24, 103:20-22, 104:5-16, 110:5-
7 16;
- 8 (3) the second sentence of the paragraph starting with “[w]hether” up through and
9 including the paragraph starting with the word “annual” is subject to production, *id.*
10 at 110:5-16;
- 11 (4) the final paragraph on RESP0013285 shall be redacted. *Id.* at 94:15.

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

14 IT IS FURTHER RECOMMENDED that RESP0013288 is subject to production. *Id.* at
15 77:2-3, 78:1.

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

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

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

23 ***B. Supplemental Briefing on Appreciation Damages.***

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

26 IT IS FURTHER RECOMMENDED that the Siblings’ Trusts shall provide records of all
27 distributions made to the Siblings’ Trusts from the Purchased Entities during the period of January
28 1, 2014 to August 29, 2018, including the name of the entity making the distribution, the date the

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

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

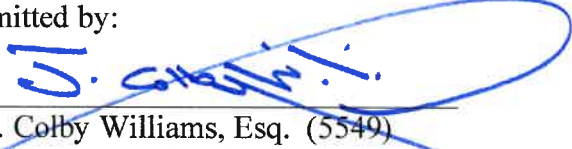
7 IT IS FURTHER RECOMMENDED that the Distribution Records be given a confidential
8 designation under NRCP 26(c), thereby protecting the same from being used or attached in filings
9 or other documents submitted to this Court without redactions or an *in camera* designation. *Id.* at
10 138:13-18.

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

14 DATED this 5 day of December, 2018.

15
16 
17 DISCOVERY COMMISSIONER

18 Submitted by:

19 By: 
20 J. Colby Williams, Esq. (5549)
21 Philip R. Erwin, Esq. (11563)
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*Counsel for Respondents Lawrence
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Lubbers*

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

Approved as to form and content by:

Approved as to form and content by:

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Attorneys for Petitioner

NOTICE

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

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

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

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

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

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

Rule 9.

By Natilie Gh
Commissioner Designee

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

ORDER

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

_____ The parties having waived the right to object thereto,

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

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

* * *

AND

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

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

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

Dated this _____ day of _____, 20_____.

DISTRICT COURT JUDGE