IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

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

Petitioner,

v.

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

Respondents,

And

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

Real Party in Interest.

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Clerk of Supreme Court

Case No.

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

PETITIONER'S APPENDIX TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

(VOLUME 4 OF 7)

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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: April 11, 2019** **Hearing Time: 1:30 p.m.**

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

Petitioner Scott Canarelli ("Petitioner"), beneficiary of The Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998 (the "SCIT"), by and through his Counsel of Record, the law firm of Solomon Dwiggins & Freer, Ltd., hereby submits this Reply in support of the Objection to the Discovery Commissioner's Report and Recommendations on (1) the Motion for Determination of Privilege Designation, (2) the Supplemental Briefing on Appreciation Damages ("Petitioner's Objection") following Respondents Lawrence ("Larry") and Heidi Canarelli (collectively the "Canarellis"), and Frank Martin, Special Administrator of the Estate of Edward C. Lubbers ("Lubbers") (collectively the "Respondents")' Opposition to Petitioner's Objection filed on January 14, 2019 ("Respondents' Opposition").

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

DATED this 21 day of March, 2019.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Respondents have produced documents that are damning to their case and are now reeling to find any way to recover them. They have gone so far as to label the Discovery Commissioner's mere musings as "substantive evidence," blurred Lubbers' multiple capacities in this matter's procedural history and have even changed their arguments while the "Report and Recommendation"[1] is pending. The "Disputed Documents"[2] are not and had never been treated as attorney-client privilege or work product until it was advantageous for Respondents to claim them as so. This is especially apparent given Respondents' storage and production of Lubbers' file to third parties without the implementation of adequate screening or security protocols, if any. The purpose of these privileges was never to withhold documents that are relevant and material simply because they harm one's case. It should certainly not be used in such a way now.

There are many issues pending and extensive briefing is already before this Court for not only Petitioner's Objection and Respondents' Opposition thereto, but also Respondents' own objection that is to be heard at the same hearing. Thus, to simplify the arguments set forth in this Reply, Petitioner asserts as follows:

- The attorney-client privilege must be construed narrowly and Respondents have the burden of proving that a privilege even applies and that they have not otherwise waived the same; Respondents are improperly trying to shift the burden, thereby attempting to force Petitioner to prove a negative;

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[1] "Report and Recommendation" refers to the Discovery Commissioner's Report and Recommendations on (1) the Motion for Determination of Privilege Designation, (2) the Supplemental Briefing on Appreciation Damages attached as Exhibit 1 to the Petitioner's Objection.

[2] Like prior briefing, the term "Disputed Documents" refers collectively to documents identified by Bates Nos. RESP013284 – RESP013288 (the "Group 1 Documents") and RESP078899 – RESP078900 (the "Group 2 Documents"). The Group 1 Documents consist of one (1) typed document (the "Typed Notes") as well as handwritten pages (the "Handwritten Notes").

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- Respondents have failed to demonstrate an essential predicate to proving privilege; namely, that the documents were "actually communicated" to counsel;
- Any purported representations by Respondents' present Counsel regarding the Typed Notes implicitly waived any privilege because the attorney-client privilege cannot be used as both a sword and a shield; Respondents must be compelled to provide a basis for their claim that the document was prepared in anticipation of a call with former counsel;
- Respondents are foreclosed from now claiming the Typed Notes memorialized the October 14, 2013 teleconference because they have not previously argued this before and it contravenes prior sworn representations by Counsel to this Court;
- The Initial Petition did not commence an adversarial proceeding;
- The Respondents have conceded that the Discovery Commissioner did not rely upon opinion work product in her findings; notwithstanding, Petitioner properly objected to the Discovery Commissioner's finding that the Typed Notes *may* constitute opinion work product and has demonstrated substantial and compelling need for the Disputed Documents;
- Respondents have the burden of proving that they did not waive any applicable privilege and are in the best position to demonstrate what records were stored in American West Development, Inc.'s ("AWDI") offices; Petitioner should not have to prove that the Disputed Documents were in Lubbers' hard file stored at AWDI;
- The Discovery Commissioner erred when she extended the common interest doctrine to AWDI; Respondents' own caselaw provides that there must be a common ***legal*** interest as opposed to a commercial or financial one and AWDI must anticipate litigation on the same issue or issues;
- This Court has the authority to consider Petitioner's argument of waiver by reckless disclosure because: (1) he could not have previously raised it; and (2) judicial economy favors a decision simultaneous with other issues raised in related briefing;
- The ESI Protocol was not intended as a blanket protection from any waiver, regardless of the care taken;

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- Respondents have not met their burden of proving that the disclosure of the Disputed Documents was inadvertent; they have further failed to enunciate any precautions taken to adequately prevent the disclosure of protected materials; and

- Respondents have simply ignored the fact that they disclosed the Group 1 Documents a second time, even ***after*** they "clawed" it back after it was relied upon by Petitioner in filing a supplemental petition.

As stated in Petitioner's Objection and this Reply herein, Petitioner requests that this Court grant Petitioner's Objection and to further amend the provisions of the Report and Recommendation so they are consistent with those provided in Petitioner's Objection, at p. 5:15-6:4, and incorporated herein by reference.

II. LEGAL ARGUMENT

A. RESPONDENTS HAVE THE BURDEN OF PROVING A PRIVILEGE APPLIES; THEY ARE IMPROPERLY TRYING TO SHIFT THE BURDEN AND FORCE PETITIONER TO PROVE A NEGATIVE.

Respondents misstate Petitioner's Objection in claiming that "Petitioner does not dispute any of this circumstantial evidence or present any contradictory evidence." *See* Respondents' Opposition, at p. 12:19-20. ***To the contrary***, Petitioner heavily disputes these claims, having demonstrated Respondents both: (1) failed to show the content of the Typed Notes was communicated to counsel; and (2) failed to demonstrate that Lubbers subjectively anticipated litigation. In making such claims, Respondents erroneously imply it is the Petitioner's burden to establish whether the Disputed Documents are privileged.

Forcing Petitioner to demonstrate that there is no privilege would improperly shift the burden and require him to prove a negative. While there is case law stating that a party asserting a negative must prove the same,[3] that indisputably does not apply where the burden of proof is well established by law. It is incontrovertible that ***Respondents have the burden to prove that the***

[3] *See e.g. Acuity Mut. Ins. Co. v. Olivas*, 298 Wis. 2d 640, 658 (2007) (Citations omitted).

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Disputed Documents are privileged[4] and several jurisdictions require a preponderance of the evidence standard.[5] For this reason, this Court should not allow Respondents to shift the burden away from themselves.

B. THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE MUST BE CONSTRUED NARROWLY.

Respondents misinterpret Nevada's policy "recognizing the importance of attorney-client confidentiality"[6] to mean that the privilege should apply regardless of legitimate uncertainties raised by Petitioner and even the Discovery Commissioner.[7] Indeed, Respondents seek to apply the privilege to prove speculatory circumstances. However, the Nevada Supreme Court "has consistently held that statutory privileges ***should be construed narrowly***" to their plain meaning.[8] The work product doctrine is no different. *See Whitehead*, 110 Nev. at 414-15, 873 P.2d at 968.

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[4] *See* Petitioner's Objection, p. 12 n. 18; *see also In re Cnty. of Erie,* 473 F.3d 413, 418 (2d. Cir. 2007) (Citations omitted); *Guidiville Rancheria of Cal. v. United States*, 2013 WL 6571945, at *5 (N.D. Cal. Dec. 13, 2013) ("It is a well-established principle that the party asserting the attorney-client privilege bears the ultimate burden to establish the privilege.").

[5] *See e.g. United States v. Wilson,* 798 F.2d 509 (1st Cir. 1986); *TP Orthodontics, Inc. v. Kesling*, 15 N.E.3d 985 (Ind. 2014); and *CH Props., Inc. v. First Am. Title Ins. Co.,* 48 F.Supp.3d 143 (D.P.R. 2014).

[6] *See* Respondents' Opposition, at p. 9:1-3 (citing *Tahoe Reg'l Planning Agency v. McKay*, 769 F.2d 534, 540 (9th Cir. 1985); *Mitchell v. Bromberger*, 2 Nev. 345, 348 (1866)).

[7] For examples of the Discovery Commissioner's speculative statements, *see* Petitioner's Objection, at p. 17:10-18:7 which is incorporated herein by reference. Indeed, even Respondents acknowledge these suppositions, stating that "***[t]he Discovery Commissioner's uncertainty about when the notes were created does not matter.***" *See* Respondents' Opposition, at p. 16:3-4 (Emphasis added).

[8] *Rogers v. State*, 127 Nev. 323, 328, 255 P.3d 1264, 1267 (2011) (Emphasis added) (citing *Ashokan v. State, Dep't of Ins.,* 109 Nev. 662, 670, 668, 856 P.2d 244, 249 (1993) (hospital peer review privilege construed narrowly); *McNair v. Dist. Ct.,* 110 Nev. 1285, 1288, 885 P.2d 576, 578 (1994) (accountant-client privilege construed narrowly); *Whitehead v. Nevada Comm'n on Judicial Discipline*, 110 Nev. 380, 414-15, 873 P.2d 946, 968 (1994) ("Because both the work product and the attorney-client privileges: obstruct[ ] the search for truth and because [their] benefits are, at best, 'indirect and speculative,' [they] must be 'strictly confined within the narrowest possible limits consistent with the logic of [their] principles.'") (Emphasis added) (Citation omitted); *State v. Fouquette,* 67 Nev. 505, 536–37, 221 P.2d 404, 420–21 (1950) (construing a predecessor version

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In this case, Respondents merely discuss the policies behind the privilege in an effort to distract away from their obligation to prove *each* element of the attorney-client privilege as set forth under NRS 49.095 and the work product doctrine as set forth under NRCP 26(b)(3). *See* Respondents' Opposition, at p. 9:1-8. Regardless of Nevada's interests in protecting such material, this Court should not be diverted from the fact that these privileges derogate "the search for truth," and otherwise "'contraven[e] ... the fundamental principle that 'the public ... has the right to every man's evidence.'"[9] Therefore, this Court must construe such protections narrowly and find no privilege applies as Respondents have not satisfied each and every element, irrespective of the underlying policies behind such privileges.

C. THE ATTORNEY-CLIENT PRIVILEGE.

1. Respondents Have Failed to Prove the Typed Notes Were Actually Communicated to Counsel.

Petitioner has already outlined the facts and has previously argued that Respondents' assertions do not adequately satisfy Respondents' heavy burden of proving a privilege applies. Thus, he does not see a need to discuss them yet again and merely incorporates the briefing herein by reference. *See* Petitioner's Objection at Sections III(B). That being said, Petitioner must address Respondents' counterfactual claims that "the Discovery Commissioner's findings and conclusions are supported by substantial evidence." *See* Respondents' Opposition, at p. 13:8-9.

As even Respondents concede: "Lubbers' typed notes are privileged ***so long as*** the notes were prepared in order to obtain legal advice ***and*** the information was ***actually communicated*** to

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of NRS 49.225 narrowly; holding that the physician-patient privilege provided in Nevada Compiled Laws § 8974 (1949) was limited to physicians or surgeons actually licensed to practice medicine in Nevada).

[9] *Rogers*, 127 Nev. at 327, 255 P.3d at 1266 (Citations omitted). *See also Residential Constructors, LLC v. Ace Prop. & Cas. Ins. Co.*, 2006 WL 3149362, at *11 (D. Nev. Nov. 1, 2006) (citing *Whitehead*, 110 Nev. 380, 873 P.2d 946.) ("The attorney-client privilege is narrowly construed because it impedes the search for truth.").

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counsel."[10] Indeed, the statute specifically provides there is only a privilege from disclosing "confidential ***communications***." *See* NRS 49.095.

A Second Circuit case cited by Respondents notes that the fact that the notes ***were communicated*** by the client to the attorney is "***[c]entral to the finding of privilege***" in many cases.[11] The *DeFonte* court further found the communication requirement comported with the policy of the privilege, noting as follows:

> A rule that recognizes ***a privilege for any writing made with an eye toward legal representation would be too broad***. A rule that allows no privilege at all for such records would discourage clients from taking the reasonable step of preparing an outline to assist in a conversation with their attorney.[12]

Despite Respondents' efforts to package the Typed Notes as a privileged communication, there is nothing but circumstantial evidence (if even that) indicating the information was "actually communicated" to counsel.

The fact patterns of Respondents' caselaw are distinguishable from the instant matter. For example, in *Bernbach*, an attorney directed his client to "to write notes regarding matters that she needed to discuss with him in order to help him prepare her case." 174 F.R.D. at 9. The client prepared and compiled these notes which she kept in notebooks labeled "For My Attorneys." *Id.* The Court ultimately determined that the notes "were made for the purpose of informing" her counsel about those events and conditions the client "felt her attorneys needed to know in order to represent her." *Id.* at 10.

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[10] *See* Respondents' Opposition, at p. 13:5-7 (citing *United States v. DeFonte*, 441 F.3d 92, 96 (2d Cir. 2006); *Graves v. Deutsche Bank Sec.*, 2011 WL 721558 at*1 (S.D. NY 2011); *Bernbach v. Timex Corp.*, 174 F.R.D. 9, 10 (D. Conn. 1997) (Emphasis added).

[11] *DeFonte*, 441 F.3d at 95 (referring to *Bernbach*, 174 F.R.D. 9 and *Clark v. Buffalo Wire Works Co.*, 190 F.R.D. 93 (W.D.N.Y.1999) (Emphasis added). *See also* Respondents' Opposition, at p. 10:24-25 (citing *DeFonte*, 441 F.3d at 95-96) ("[T]he underlying policy of the attorney-client privilege is furthered ***so long as such information is actually communicated*** to the attorney.") (Emphasis added).

[12] *DeFonte*, 441 F.3d at 95-96 (Emphasis added).

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Contrary to *Bernbach*, there is no indication that Lubbers' then counsel, David Lee and Charlene Renwick of the law firm of Lee Hernandez, Landrum & Garofalo ("Lee Hernandez"), instructed him to prepare notes to aid in their preparation of the case. Indeed, ***Mr. Williams represented the complete opposite in a declaration***. While Respondents assert that the Typed Notes seek legal advice, such contention completely disregards the fact that Lubbers was a practicing attorney himself. He had the ability to both ask and answer the questions set forth in the Typed Notes. Indeed, ***there is further no evidence that Lubbers segregated these notes from his other non-privileged records, electing instead to clump them in a file that was broadly titled "Corresp, Notes & Memos."***[13] Given Lubbers' legal qualifications as well as his own conduct in this matter, there is no indication that he prepared the Typed Notes to discuss these documents with his counsel, that he prepared the document "in confidence," *see Bernbach*, 174 F.R.D. at 10, or intended to maintain the alleged confidential nature of this record.

Further, in *DeFonte*, a former inmate kept a journal during her incarceration wherein she memorialized incidents involving a guard in addition to conversations with both her attorneys and prosecutors. 441 F.3d at 95. The court ultimately determined that "memorializations of private conversations the inmate had with her attorney are protected from disclosure by the attorney-client privilege." *Clark*, 190 F.R.D. at 95. As indicated *infra*, Respondents have already committed to the position that the Typed Notes were prepared in anticipation of Lubbers' call with his then counsel. Case law on the privileged status of a memorialization is, therefore, distinguishable from the instant action.

It is undisputed that for information to be privileged, the information must be transmitted to counsel and the party claiming the privilege must ***prove the same***. *See* Petitioner's Objection, at p. 13 n. 22. In this case, Respondents simply have failed to meet such burden. Instead, they make the ***unsupported assumption*** that Lubbers communicated the Typed Notes with his then counsel

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[13] *See* Cover sheet entitled "Corresp, Notes & Memos" labeled with Bates No. RESP0013262 attached as Exhibit 9 to Petitioner's Objection. Petitioner presumably assumes that "Corresp, Notes & Memos" does not contain other privileged records as Respondents have not sought to clawback any other records from that folder.

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because the Typed Notes: (1) have questions "seeking legal advice;" (2) list his "beliefs" as to the "risks;" and (3) "the notes reflect the types of things one would discuss with his/her attorney." *See* Respondents' Opposition, at p. 13:10-14:14:2, 14:15-21. While Petitioner disputes all of these contentions, not one of their assertions demonstrate any type of communication to counsel actually occurred.

In another case upon which Respondents rely, *Graves*, the federal court indicated that physical delivery was not a requirement for the attorney-client privilege to apply. 2011 WL 721558 at *2 (citing *De Fonte*, 441 F.3d at 96). However, this statement should not be interpreted broadly, as the *Graves* court subsequently held the notes would be privileged "so long as the notes served as an outline for a communication with counsel." *Id.* In that case, the court ultimately found that the notes were *not* protected by the privilege, citing the lack of evidence of a communication, specifically noting that "[n]othing in the record indicates that the content of the plaintiff's handwritten notes served as a basis for any conversation that the plaintiff might have had with counsel" or even "that the content of his notes was orally communicated or discussed with his then counsel." *Graves*, 2011 WL 721558 at *2.

Similar to *Graves*, there is no indication that the Typed Notes served as any type of outline or that he communicated its content orally with his then counsel. First, there is no evidence that the Typed Notes were discussed with Lee Hernandez prior to, during or after the October 14, 2013 telephone conference. Petitioner has already expressed his disputes as to Respondents' use of the Lee and Renwick's declarations (the "Declarations") in prior briefing and incorporates them herein by reference. *See* Petitioner's Objection, at Section III(B)(2). Contrary to Respondents' contentions, Petitioner does not question either Lee or Renwick's credibility. He questions Respondents' ***assumption*** that Lubbers ***must have communicated*** the Typed Notes to them because the Declarations merely stated that they discussed various petitions with Lubbers on October 14, 2013.

In reality, Lee and Renwick's representations do not substantiate this assumption. Rather, their Declarations and corresponding billing statements (the "Lee Hernandez Documents") merely

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show a short call (24 minutes or less) with Lubbers on October 14, 2013 wherein they purportedly discussed multiple petitions.[14] None of the Lee Hernandez Documents discuss receipt of the Typed Notes, either before or after the call, or even indicate that the attorneys reviewed any records in their file to assess whether the document or its content was ever communicated to them. The vague and broad statements by individuals who actually have personal knowledge of their communications with Lubbers should not be enough to overcome the narrow confines of the attorney-client privilege.

In addition, the Typed Notes do not even correspond with the remainder of the Group 1 Documents, which presumably were prepared during the October 14, 2013 teleconference with Lee Hernandez. Indeed, the Handwritten Notes only contain three (3) pages. Each page of the Handwritten Notes relates to each of the three (3) trusts and pending petitions in relation to such trusts. The Handwritten Notes relating to the SCIT are completely devoid of those portions of the Typed Notes that the Discovery Commissioner ultimately found to contain facts and not subject to protection. Additionally, a simple review of the Handwritten Notes demonstrates that it is ***unfathomable*** that Lubbers and Lee Hernandez discussed each of the statements contained therein ***plus*** the Typed Notes in less than 24 minutes.

Moreover, this Court should not be persuaded by Respondents' assertion that the Typed Notes contain topics that "one would discuss" with his attorney. Lubbers was a practicing attorney

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[14] *See* Declaration of David S. Lee attached to the Opposition to the Motion for Determination of Privilege Designation of RESP013284-013288 and RESP078899-078900 and Countermotion for Remediation of Improperly Disclosed Attorney-Client Privileged and Work-Product Protected Materials ("Opposition to the Privilege Motion"), filed August 10, 2018, ¶¶ 6-7 ("I have reviewed my firms billings records from October 2013 for the Canarelli trust matters, which were created at or about the time of the events recorded therein in the normal course of business…The subject billings records reflect that Charlene Renwick, another attorney at the firm, and I conducted a conference call with Mr. Lubbers on October 14, 2013 that lasted approximately half an hour."); *see also* Declaration of Charlene N. Renwick attached the Opposition to the Privilege Motion, ¶¶ 5-6; billing records attached as Exhibit 5 to the Opposition to the Privilege Motion (showing an entry on 10/14/13 by Renwick for 0.4 hours, stating as follows: "Lengthy t/c/ w/ E. Lubbers (client) re: retention for hearing on petitions filed by S. Canarelli, issues requiring clarification by court and [redacted]."). For further reference on the three (3) petitions, *see* Reply to the Privilege Motion, filed August 24, 2018, at p. 7:23-8:18.

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at around the time of his death and he even acted as the Canarellis' attorney on multiple occasions. His notes regarding legal "topics" are not indicative of his seeking legal advice, but merely of an individual with a legal background drafting notes. If Lubbers served as Petitioner's trustee at the time the Typed Notes were created, by definition he could not also act as legal counsel for himself or the SCIT. Consequently, the Discovery Commissioner committed clear error in finding that the Typed Notes were protected by the attorney-client privilege without adequate evidence.

2. Respondents' New Claim that the Typed Notes are a Memorialization of Lubbers' Teleconference with Counsel Should Not Be Considered.

Due to the Discovery Commissioner's speculation over the circumstances under which Lubbers prepared the Typed Notes, Respondents are trying to hedge their bets ***by now claiming*** that the Typed Notes *may* be Lubbers' *memorialization* of the teleconference with Lee and Renwick as opposed to merely preparatory notes. Specifically, Respondents accuse Petitioner of assuming "without evidence" that the Typed Notes were prepared in anticipation of a meeting with counsel "as opposed to a memorialization of such a meeting."[15] To the contrary, Petitioner made no assumption but based his argument ***on the representations made by Respondents' own Counsel*** that Lubbers prepared the Typed Notes "***[i]n anticipation of the call with attorneys Lee and Renwick.***"[16] Indeed, Respondents should not be allowed to change course so easily when it benefits them, especially when said statement was made under penalty of perjury. *See* NRS 53.045.

It is apparent that Respondents are using the Discovery Commissioner's uncertainty to integrate a new legal argument that the Typed Notes *could be* a memorialization of a privileged conversation.[17] However, in light of Respondents' ***clear position*** taken before the August 29, 2018

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[15] *See* Respondents' Opposition, at p. 10:9-10. *See also Id.* at p. 13 n. 6 ("In this case, there is no evidence whatsoever that Lubbers' notes were a pre-existing, non-privileged document.").

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

[17] *See* Respondents' Opposition, at p. 16:3-5 ("The Discovery Commissioner's uncertainty about when the notes were created does not matter because the decision would have been the same regardless of when the notes were created.").

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hearing, they should not be allowed to wait "until the outcome is determined" by the Discovery Commissioner and then add or switch to alternative arguments, hoping something sticks in the process.[18] For these reasons, this Court should disregard any legal argument by Respondents that the Typed Notes are a *memorialization* of a communication with counsel.

3. Respondents Further Cannot Demonstrate That the Typed Notes Are a Memorialization of His Conference with Counsel.

Regardless of whether this Court elects to entertain Respondents' claim that the Typed Notes "memorialize Lubbers' discussion with counsel," *see* Respondents' Opposition, at p. 10:14, Respondents still should not prevail because they have failed to meet their burden of proving the same. As acknowledged by the Discovery Commissioner, we do not know if the Typed Notes were prepared during or in anticipation of the call.[19] As stated *supra,* although the Handwritten Notes are dated October 14, 2013 and refer to Lee and Renwick, the substance of the Handwritten Notes does not correlate with the substance of the Typed Notes. Thus, other than Respondents making the contention that the Typed Notes are a memorialization of such call, no evidence was presented of the same.

4. This Court Should Not Preclude Petitioner's Access to Facts.

Throughout this briefing, it is important to recognize that Respondents are not only trying to preclude Petitioner's access to the Disputed Documents but also his access to **facts material to**

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[18] In *Valley Health Sys., LLC v. Eighth Judicial Dist. Ct.*, 127 Nev. 167, 252 P.3d 676 (2011), the Nevada Supreme Court held that "neither this court nor the district court will consider new arguments raised in objection to a discovery commissioner's report and recommendation that could have been raised before the discovery commissioner but were not." 127 Nev. at 173, 252 P.3d at 680. One of the purposes of this rule "is to allow the lower tribunal the first opportunity to decide the issue" because an untimely raised argument "would lead to the inefficient use of judicial resources" thereby allowing "parties to make an end run around the discovery commissioner." *Id.* at 172-73, 252 P.3d at 679-80 (Citation omitted.). *See also Greenhow v. Sec'y of Health & Human Servs.,* 863 F.2d 633, 638 (9th Cir. 1988).

[19] *See* Petitioner's Objection, at p. 17:19-21 incorporated herein by reference (citing the Excerpt of the August 29, 2018 hearing transcript attached hereto as **Exhibit 1**, at p. 33:1-4.

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this case. The facts set forth in the Typed Notes are admissions by a material witness in which Petitioner is now precluded from deposing.

The law is clear that "**[m]ere facts are not privileged, but communications about facts in order to obtain legal advice are.**"[20] Even in Respondents' case, *Bernbach*, Timex argued that the attorney-client privilege did not protect the client's notes because they do not contain confidential facts. *Bernbach*, 174 F.R.D. at 10. The court agreed with Timex, stating that although the communication of facts is protected, "***the facts contained in the notebooks are not***." *Id.* (Emphasis added).

Here, Respondents should not be allowed to withhold facts relevant to this case which, based on the face of the Typed Notes, include: (1) distribution requests; (2) the responses to these requests; and (3) the reasons for the same. Respondents cannot dispute that if Petitioner had been allowed an opportunity to depose Lubbers on these issues, the foregoing facts would not be subject to protection based upon either the attorney-client privilege or work product doctrine. Lubbers would have been compelled to testify as to the fact that distributions requests were made by Petitioner, Respondents' responses thereto, and their reasons for agreeing to or denying said requests.

5. Respondents Have Further Implicitly Waived the Attorney-Client Privilege as It Relates to the Circumstances Under Which Lubbers Prepared the Typed Notes.

In support of the claim that the Disputed Documents are privileged, Mr. Williams represented that Lubbers prepared the Typed Notes "[i]n anticipation of the call with attorneys Lee and Renwick." *See* Williams Decl. *supra* note 16. Respondents claim this is not a waiver because they only "revealed the ***circumstances*** under which an attorney-client communication was made, as opposed to the ***contents of that communication***." *See* Respondents' Opposition, at p. 17:5-6 (Emphasis in original). However, Mr. Williams cannot have personal knowledge of the circumstances under which Lubbers prepared these notes because he was not Respondents' counsel

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[20] *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct. in & for Cnty. of Clark*, 399 P.3d 334, 341 (Nev. 2017); *see also Wardleigh v. Second Judicial Dist. Ct. In & For Cnty. of Washoe*, 111 Nev. 345, 352, 891 P.2d 1180, 1184 (1995).

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at that time and he has failed to illuminate how he purportedly came by this information.[21] Given even Lee Hernandez's failure to provide the circumstances for the Typed Notes, Petitioner can only assume Lubbers spoke to his current Counsel regarding the same.

Respondents claim that they "did not reveal any attorney-client privileged communication that could result in any waiver," because it is Petitioner, not Respondents, who seeks to make use of the privileged communication. *See* Respondents' Opposition, at p. 16:10. Quite simply, that is not true. Respondents are using the privilege to both gain an advantage against Petitioner while simultaneously trying to protect themselves from any additional disclosure of information. If Respondents are going to use privileged communications to meet their burden of proof as to the Disputed Documents, they should not be able to selectively lift the veil of protection and then close it again to preclude any further inquiry by Petitioner.

Respondents cite to *Wardleigh* where homeowners brought a construction defect action and asserted their lack of knowledge of the defects tolled the statute of limitations. 111 Nev. at 348, 891 P.2d at 1182. Given that there were three (3) prior actions regarding the condominium's poor quality, the adverse party sought relevant minutes, legal files and a deposition by counsel to dispute the tolling claim. *Id.* at 354, 891 P.2d at 1186. While the Supreme Court stated at-issue waiver occurs when the holder "pleads a claim or defense in such a way that eventually he or she will be forced to draw upon the privileged communication" to prevail at trial, *id.* at 355, 891 P.2d at 1186., it also describes waiver by implication as instances "***where a party seeks an advantage in litigation by revealing part of a privileged communication.***" *Id.* at 354, 891 P.2d at 1186.

Another Nevada case that discusses the conflicting use of the attorney-client privilege is *Molina v. State*, 120 Nev. 185, 87 P.3d 533 (2004). There, Edward Molina argued that his guilty pleas were due to inadequate assistance of counsel and therefore were not knowing, voluntary and intelligent waivers of his trial rights. *Id.* at 187, 87 P.3d at 535. Molina later filed an appeal arguing, in part, that the district court erred when it allowed Molina's former counsel to testify at an

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[21] *See* Substitution of Attorney, filed December 11, 2013; *see also Black's Law Dictionary*, 877 (7th ed. 1999) (defining "personal knowledge" as "[k]nowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said.").

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evidentiary hearing regarding communications he had with Molina. *Id.* at 192, 87 P.3d at 538. The Nevada Supreme Court stated that Molina's claims "implicate a waiver of the privilege against disclosure of the communications between attorney and client." *Id.* at 193-94, 87 P.3d at 539. Thus, the Court held that it would "not permit a defendant to use insufficient communication with his attorney as a sword to assert a claim of ineffective assistance of counsel, but then use a claim of attorney-client privilege as a shield to protect the content of his conversations with his attorney." *Id.* at 194, 87 P.3d at 539 (citing *Wardleigh,* 111 Nev. at 354, 891 P.2d at 1186.). The main theme of these and other cases is to preclude the attorney-client privilege's dual use as both a sword and a shield.[22]

In this case, Petitioner filed a supplement on May 18, 2018 to the Surcharge Petition previously filed on June 27, 2017 (the "Supplemental Petition"), alleging Respondents committed fraud relating to the valuation of the "Purchase Price" as well as representations related to the timing of the sale.[23] As this Court is already aware, Petitioner contends that Respondents' responses to distribution requests were intended to stall so they could finalize the sale without any notice to Petitioner or his counsel and Petitioner cited to the Typed Notes in support of this claim. In response, Respondents filed a motion to dismiss asserting that Petitioner did not plead with

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[22] *See Chevron Corp. v. Pennzoil Co.*, 90-16833, 1992 WL 214012 (9th Cir. 1992) (citing *United States v. Bilzerian,* 926 F.2d 1285, 1292 (2d Cir.1991) ("The privilege which protects attorney-client communications may not be used both as a sword and a shield."); *Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1196 (9th Cir. 2001); *Mitre Sports Int'l Ltd. v. Home Box Office, Inc.*, 304 F.R.D. 369, 372 (S.D.N.Y. 2015) (Citations omitted) ("Subject matter waiver is reserved for the rare case where a party either places privileged information affirmatively at issue, or attempts to use privileged information as both a sword and a shield in litigation.").

[23] As this Court is already aware, Respondents claim to have sold the Purchased Entities to protect both the SCIT and Petitioner because Petitioner needed money and the SCIT could not rely on distributions from the Purchased Entities due to the Credit Agreement. *See* Objection to Petition to Surcharge Trustee and for Additional Relief, filed August 9, 2017, p. 3:1-3. *See also* Purchase Agreement attached as Exhibit 4 to the Exhibits to Surcharge Petition, filed June 29, 2017, Sections D and I.

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particularity under NRCP 9(b) and further noted that Petitioner "improperly relie[d] upon" the Typed Notes, claiming they are privileged.[24]

Respondents cannot selectively disclose privileged information when it is most advantageous to them. Selective or implicit waiver is intended to prevent "prejudice to the adversary party and 'distortion of the judicial process' that may result from selective disclosure." *Mitre Sports Int'l Ltd.*, 304 F.R.D. at 372 (Citations omitted). Therefore, if Respondents are going to continue with their claim that the Typed Notes were prepared in anticipation of litigation, this Court must either compel Counsel to set forth their basis for this "position" or alternatively cannot give Mr. Williams' declaration the same weight as it would generally give representations by officers of the Court.

D. THE WORK PRODUCT DOCTRINE

Like his arguments on the attorney-client privilege, Petitioner does not want to belabor the issues previously raised and briefed on several occasions and will incorporate prior filings herein by reference. *See* Petitioner's Objection, at Sections II(A), III(C). Instead, Petitioner will directly address some of the arguments set forth in the Respondents' Opposition.

1. The Initial Petition Was Not an Adversarial Proceeding.

For the work product to apply, it is not sufficient for there to be merely "some remote prospect of litigation."[25] Rather, "the party claiming the doctrine's protection must 'have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable.'" *See* Petitioner's Objection, at p. 20 n. 39.

In attempting to establish that the work product applies to the Disputed Documents, Respondents assert that that "the dispute between the parties was adversarial from its very inception." *See* Respondents' Opposition, at p. 21:10-11. Respondents have essentially taken

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[24] *See* Motion to Dismiss Petitioner's Supplement to Petition to Surcharge Trustee and Former Trustees for Breach of Fiduciary Duties, Conspiracy and Aiding and Abetting; Petition for Breach of Fiduciary Duty for Failure to Property Account; and Petition for an Award of Attorney Fees, Accountant Fees and Costs, filed June 29, 2018, at p. 20:27-21:6.

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

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advantage of the fact that Lubbers wore many hats during this conflict, namely using his position as go-between for the Canarellis and Petitioner, to contend that Petitioner "made several demands" and threatened Lubbers in or around November, 2012. *Id.* at p. 21:25-22:1. As Petitioner stated in prior briefing,[26] in or about November 14, 2012 Petitioner sent a letter to Lubbers in his limited capacity as: (1) the Canarellis' legal counsel in their capacities as the Family Trustees; and (2) a liaison between the Canarellis and Petitioner. With this letter, Petitioner was not threatening Lubbers but merely using him as a contact point to relay distribution requests to the Canarellis who were the Family Trustees at that time. Indeed, Petitioner could not have threatened Lubbers with a breach of fiduciary duty because of his limited powers as the SCIT's Independent Trustee at that time.[27]

Further, Respondents try to persuade this Court that the Initial Petition was an adversarial proceeding. *See* Respondents' Opposition, at p. 21:4-22. The work product doctrine applies in administrative proceedings only when they are "adversarial in nature." *S. Union Co. v. Sw. Gas Corp.,* 205 F.R.D. 542, 549 (D.Ariz.2002). Courts have found that a proceeding is "adversarial" "only if the proceeding has adversaries, i.e., opposing parties ... if it is a proceeding in which one party has a claim against another party" *Adair v. EQT Prod. Co.*, 294 F.R.D. 1, 5 (W.D. Va. 2013). As an example, the *Adair* court determined that an administrative proceeding held by a regulatory board is not "adversarial" for purposes of applying the work-product doctrine unless the proceeding involves a claim prosecuted by one party against another or a decision between multiple parties with opposing claims.[28] In addition, a case cited by Respondents states "[t]he determining factor of whether "the proceedings are adversarial in nature" is "whether the parties have a right to cross-examine witnesses and therefore introduce evidence." *Frou-Con Const. Corp. v. Sacramento Mun.*

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[26] *See* Petitioner's Objection at Sections II(A)(2) and III(C)(1) and Opposition to Respondents' Objection, filed January 14, 2019, at Section II(A) incorporated herein by reference.

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

[28] *Adair*, 294 F.R.D. 1 (citing *Frou-Con Const. Corp. v. Sacramento Mun. Utility Dist.*, 2006 WL 2050999, *14-15 (E.D. Cal. 2006).

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Utility Dist., 2006 WL 2050999 at *4 (E.D. Cal. 2006). In *Frou-Con Const. Corp.*, the court noted that the subject proceedings were adjudicatory in nature because "they involved intervenors who are opposed to the permit and/or licensing process; there are hearings before hearing officers and/or commissioners which involve cross-examination of witnesses, evidentiary rulings, findings of fact, and other procedures in the nature of litigation." *Id.* at *5.

In contrast, when Petitioner filed the Initial Petition in September, 2013, Petitioner did not assert any claims against the Respondents and any allegations that were made in the Initial Petition, if any, were lodged *only* at the Canarellis. The non-adversarial relationship between Petitioner and Lubbers is further evidenced by the fact that Lubbers did not object to the relief sought in the Initial Petition, stating instead that he was "generally amenable to Petitioner's Prayer."[29] Moreover, Lubbers later stipulated to clarify certain provisions of a prior court order and agreed to the retention of a valuator to determine a Purchase Price for the Purchased Entities.[30] This Court further did not set an evidentiary hearing or a scheduling order and the parties further did not engage in discovery, take depositions, introduce evidence or cross-examine any witnesses. The proceedings were for all practical matters closed once the court issued an order and the parties stipulated to a valuator for the Purchased Entities.

As such, these proceedings were not "adversarial in nature" in or around 2013. Respondents are merely trying to fabricate a conflict between Lubbers and Petitioner where one did not exist. Thus, the Discovery Commissioner's finding that Lubbers anticipated litigation at the time any portion of the Disputed Documents were prepared is clearly erroneous.

2. Petitioner Properly Objected to the Discovery Commissioner's Finding that the Disputed Documents May Constitute Opinion Work Product.

In Respondents' Opposition, Respondents contend that Petitioner's arguments regarding opinion work product are misplaced and unfounded because the Discovery Commissioner applied

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[29] *See* Trustee Edward C. Lubbers' Response to the Initial Petition, filed October 16, 2013, p. 2:12-13.

[30] *See* Stipulation and Order Appointing Valuation Expert and Clarifying Order, filed December 2, 2013.

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only the substantial need doctrine as opposed to a heightened standard.[31] It is true that the Discovery Commissioner applied the substantial need standard, *see* Report and Recommendation, at p. 5:17-19, and noted during the August 29, 2018 hearing that the Disputed Documents do not constitute opinion work product. *See* **Exhibit 1**, at p. 37:23-24, 54:11-18. Nevertheless, the Commissioner executed Respondents' proposed draft of the Report and Recommendation which provides that "certain portions of [the Typed Notes] may constitute opinion work product." *See* Report and Recommendation, at p. 5:15-16. Given that the failure to timely object to a report and recommendation "shall result in an automatic affirmance," Petitioner had to object to this portion of the finding to preserve his arguments regarding the opinion work product issue. *See* EDCR 2.34(f).

3. There is Compelling Need for the Disputed Documents.

Petitioner has previously demonstrated the compelling need for the Disputed Documents in Section III(D)(2) of Petitioner's Objection and Section III(D) of Petitioner's Opposition and incorporates it herein by reference. In short, Petitioner cannot recover the information contained in the Disputed Documents from other sources as suggested by Respondents, i.e. financial records and/or the Canarellis' testimony. *See* Respondents' Opposition, at p. 28:6-21. While financial records may be able to demonstrate the timing and amounts of distributions made, these records cannot satisfy the "why" component of Petitioner's inquiries, i.e. why the distributions were denied or why the requests were later acquiesced to. In equal measure, the Purchase Agreement does not provide information on the contemplation of the sale or Petitioner's lack of notice. These records cannot replace the motive behind Respondents' actions that is reflected in the Typed Notes.

With respect to Respondents' suggestion of alternative testimony, the contention that Larry can provide testimony in lieu of Lubbers is disingenuous. As a Family Trustee of the SCIT, Lubbers was undoubtedly a material witness to his action. Nevertheless (and despite Lubbers' illness), Respondents used unnecessary delay and innumerable excuses to block Lubbers' deposition from

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[31] *See* Respondents' Opposition, at p. 24:24-25:2 ("[T]he Discovery Commissioner's statement that the typed notes *may* constitute opinion work product had no bearing on her conclusions") (Emphasis in original).

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going forward. Now that Lubbers is tragically unavailable, Respondents seek to preclude disclosure of Lubbers' rendition of the facts and admissions either made by him or to him by Larry and/or his agent(s). No matter how Respondents attempt to rephrase the issue, Petitioner has been exceedingly prejudiced by Respondents' failure to produce Lubbers for deposition prior to his death, thereby creating not only a substantial need, but also a compelling need, for his notes and records.

E. WAIVER BY DISCLOSURE TO AMERICAN WEST DEVELOPMENT, INC.

1. AWDI's Possession of the Disputed Documents Waived the Attorney-Client Privilege and the Work Product Doctrine.

Like Respondents' implication that Petitioner should prove there is no privilege (i.e. proving a negative), they also seek to convince this Court that it is Petitioner's burden to prove that the Disputed Documents "were actually provided to AWDI." *Id.* at p. 29:21. While some courts have held the party challenging a privilege has the initial burden of showing that there was a waiver,[32] Petitioner must merely "present sufficient evidence upon which a reasonable person may find that the privilege has been waived."[33] Once he has done so, it is the Respondents ultimate burden of demonstrating that privilege has not been waived. *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 25 (9th Cir. 1981). Petitioner has more than adequately demonstrated that there is a credible issue of waiver given Respondents' handling of the Disputed Documents.[34]

Through discovery, Petitioner learned that AWDI had been storing Lubbers' hard file for the SCIT and that Tina Goode, the Director of Corporate Administration with AWDI, went through

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[32] *Shumaker, Loop & Kendrick, LLP v. Zaremba*, 403 B.R. 480, 484 (N.D. Ohio 2009) (citing *Mass. Eye & Ear Infirmary v. QLT Phototherapeutics, Inc.*, 412 F.3d 215, 225 (1st Cir.2005); *Sampson v. Sch. Dist. of Lancaster*, 2008 WL 4822023, at *8 (E.D.Pa. Nov. 5, 2008); *Martin Marietta Materials, Inc. v. Bedford Reinforced Plastics, Inc.*, 227 F.R.D. 382, 390 (W.D.Pa.2005); *Perkins v. Gregg Cnty.*, 891 F.Supp. 361, 363 (E.D.Tex.1995); *Texaco, Inc. v. La. Land & Exploration Co.*, 805 F.Supp. 385, 387 (M.D.La.1992)).

[33] *Shumaker, Loop & Kendrick, LLP*, 403 B.R. at 484; *see also Burkhead & Scott, Inc. v. City of Hopkinsville*, 2014 WL 7335173, at *1 (W.D. Ky. Dec. 19, 2014) ([O]nce grounds for waiver have been demonstrated, proponents bear the burden to counter those grounds.").

[34] *See* Petitioner's Objection, at Sections II(C)-(D) and III(E), incorporated herein by reference.

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the boxes to recover missing records.[35] Based on the Bates labels of Respondents' own productions, Ms. Goode was specifically looking for an email that was within 600 pages of the Group 1 Documents. *See* Petitioner's Objection, at Section II(C) and p. 27 n. 51. Demanding that Petitioner prove the Disputed Documents were actually in the boxes held by AWDI imposes an impossible requirement on Petitioner, especially when the Respondents are in the best position of determining whether any portion of the Disputed Documents were or were not provided to AWDI. Petitioner has demonstrated grounds for waiver and it is now Respondents' burden to refute it.

Respondents contend there is a difference between storing the boxes as Larry's "office location…as opposed to being provided to a third party unrelated to this action." *See* Respondents' Opposition, at p. 7-9. In truth, it is not Petitioner who has emphatically insisted on treating AWDI as a wholly separate third party; Respondents have. *See* Petitioner's Objection, at Section III(E)(2), incorporated herein by reference. Respondents cannot claim their individual capacity is separate from their corporate one to avert discovery (thereby driving up litigation costs) while at the same time assert that there is enough of a relationship between them and the American West Group or AWDI to overcome waiver.

Moreover, Respondents have failed to enunciate, either through an affidavit or other sworn statement, any screening protocols to protect the records while they were stored at AWDI. During the August 29, 2018 hearing, Respondents' Counsel was unable to enunciate who else had access to the boxes and/or actually went through them, merely stating that "[i]t doesn't matter if I gave work product protected materials to everyone at AWDI, as long as they didn't turn it over to my adversary."[36] Again, Respondents are the parties who must prove there is no waiver. Even now, after multiple briefs, they have failed to offer any information regarding the storage of Lubbers'

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[35] *See* November 18, 2017 email from Ms. Goode attached as Exhibit 12 to the Motion for Determination of Privilege Designation of RESP013284-RESP78899-RESP78900 ("Privilege Motion"), filed July 13, 2018.

[36] *See* **Exhibit 1**, at p. 107:20-22. It should be noted that American West Homes claims the company's size is 51-200 employees on its LinkedIn website. *See American West Homes,* LinkedIn, https://www.linkedin.com/company/american-west-homes/about/ (last visited March 20, 2019).

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hard file and merely offer to present evidence if there are "lingering concerns." *See* Respondents' Opposition, at p. 33:6-7. Respectfully, Respondents have had more than enough opportunities to meet their burden and have failed to do so. They should not be allowed to further delay this case by having yet another chance to further brief this issue.

2. The Common Interest Doctrine Should Not Apply Between the Respondents and a Subpoenaed Party.

The Discovery Commissioner further erred when she overextended the common interest doctrine to AWDI. The Nevada Supreme Court has adopted "the common interest rule" which "allows attorneys to share work product with third parties that have common interest in litigation without waiving the work-product privilege."[37] As Petitioner previously noted,[38] the common interest is not limited to co-parties and does not require a written agreement, *Cotter*, 416 P.3d at 232 (Citations omitted); however, it is still "***a narrow exception to the rule of waiver.***"[39] "For the common interest rule to apply, the "***transferor and transferee [must] anticipate litigation against a common adversary on the same issue or issues.***" *See* Petitioner's Objection, p. 29 n. 60.

Respondents contend that the common interest doctrine should encompass third parties who have been subpoenaed in this action. However, even their own case law is distinguishable from this matter. In *O'Boyle v. Borough of Longport*, 42 A.3d 910 (N.J. Super. Ct. App. Div. 2012), *aff'd,* 218 N.J. 168 (2014), a public records requester filed a complaint against the Borough of Longport, its clerk and custodian of records seeking to compel production of certain correspondence and compact discs pursuant to the Open Public Records Act and the common law right of access to public records. 42 A.3d at 913. The plaintiff appealed the matter on multiple issues, including the

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

[38] *See* Petitioner's Objection, at p. 29:6-8. Respondents erroneously imply Petitioner limited the common interest doctrine to only co-parties. *See* Respondents' Objection, at p. 31:15-17.

[39] *Resilient Floor Covering Pension Fund v. Michael's Floor Covering, Inc.*, 2012 WL 3062294, at *6 (N.D. Cal. Jul. 26, 2012) (quoting *Pecover v. Elec. Arts Inc.,* No. 08–2820, 2011 WL 6020412, at *2 (N.D.Cal. Dec.2, 2011)) (Emphasis added).

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lower courts finding that materials and correspondence exchanged between the borough's outside counsel and counsel for a former Planning and Zoning Board member and other persons who had been or were being sued by plaintiff, were not subject to production. *Id.*

Similar to *Cotter*, the *O'Boyle* court held that the common interest rule only applied if the parties had a "common purpose." *Id.* at 916. It ultimately determined there was a common interest ***because the third parties had been sued by plaintiff as a result of their connection to the borough***, borough governance, and its elected officials.[40] Thus, the borough reasonably anticipated future litigation. As Petitioner has previously stated, he has not and cannot pursue litigation against AWDI in this matter.

Given AWDI ***cannot reasonably anticipate litigation***, Respondents try to portray their commercial and financial interests with AWDI as legal ones. However, caselaw rejects this. In *FSP Stallion 1, LLC v. Luce*, 2010 WL 3895914 (D. Nev. Sept. 30, 2010), the plaintiff alleged that the various defendants conspired to fraudulently induce investors to purchase Stallion Mountain golf course. 2010 WL 3895914 at*1. During litigation, the co-defendants sought to withhold documents under a "common interest" privilege. *Id.* at*3. The documents in question involved commercial communications about the sale of Stallion Mountain golf course in a private placement offering of tenant in common interests. The federal court ultimately held that the common interest doctrine ***only applies if the parties share a common legal interest; a commercial or financial interest is not enough***. *Id.* at *18.

> The common interest doctrine does not extend to communications about a joint business or financial transaction, merely because the parties share an interest in seeing the transaction is legally appropriate. Additionally, the common interest doctrine does not apply simply because the parties are interested in developing a business deal that complies with the law, and a common goal to avoid litigation. ***A desire to comply with applicable laws and to avoid litigation does not transform their common interest and enterprise into a legal, as opposed to a commercial, matter.***[41]

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[40] *O'Boyle*, 42 A.3d at 916–17 ("These materials advanced a common interest, i.e., the defense of litigation spanning several years initiated by plaintiff related to his ongoing conflicts with Longport and individuals associated with the municipality.").

[41] *Id.* at at*21 (Emphasis added).

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Respondents contend that "at a minimum AWDI has a common interest with Respondents in supporting the accuracy of the financial information and defending against Petitioner's scorched-earth litigation." *See* Respondents' Opposition, at p. 32:20-21. However, per the *FSP Stallion 1, LLC* decision, AWDI's interest in upholding the accuracy of their records or disputing the production of records to Petitioner does not create a common legal interest with Respondents.

For these reasons, this Court should overturn the Discovery Commissioner's finding that the common interest doctrine applies to AWDI as it is clearly erroneous.

F. RESPONDENTS' RECKLESS DISCLOSURE OF PURPORTEDLY PROTECTED DOCUMENTS.

1. This Court Should Make a Determination as to Respondents' Waiver by Reckless Disclosure.

Respondents' attempt to avoid having to address their reckless disclosure of documents by claiming that this Court cannot "consider a new argument that was not first decided by the Discovery Commissioner."[42] However, this argument should fail because Respondents misstate Nevada law and because the holding in *Valley Health Sys., LLC* is distinguishable from the instant matter. In that case, Valley Health System initially only argued before the Discovery Commissioner that requested documents were irrelevant. 127 Nev at 170, 252 P.3d at 678. It was only when the parties went before the District Court that it finally asserted the documents were also privileged. *Id.* Contrary to Respondents' contention that the issue of waiver by reckless disclosure must first be decided by the Discovery Commissioner, the Supreme Court actually stated that "neither this court nor the district court will consider new arguments raised in objection to a discovery commissioner's report and recommendation ***that could have been raised before the discovery commissioner but were not.***" *Id.* at 173, 252 P.3d at 680. This case is unlike *Valley Health* because Valley Health System was aware of the privilege argument (or at least should have been) when it first appeared before the Discovery Commissioner and failed to raise it.

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[42] *See* Respondents' Opposition (citing *Valley Health Sys., LLC*, 127 Nev at 172, 252 P.3d at 679).

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Here, Petitioner could not have raised the reckless disclosure issue because he was not alerted to Respondents' deficiencies until the August 29, 2018 hearing at the earliest. As stated in greater detail in Sections II(D) and III(E)(4) of Petitioner's Objection and incorporated herein by reference, Petitioner only learned at the August 29, 2018 hearing that Respondents had implemented *de minimus*, if any, protocols to screen their productions for privilege. Instead, Respondents' Counsel merely referred to their execution of the ESI Protocol when specifically asked about production safeguards by the Discovery Commissioner. *See* **Exhibit 1**, at p. 67:3-9, 68:8-14. Moreover, on November 2, 2018, over two (2) months after the August 29, 2018 hearing, Petitioner discovered that Respondents had produced the Group 1 Documents ***a second time***.[43]

Given Petitioner did not have reason to question the adequacy of Respondents' screening efforts prior to filing the Privilege Motion, he did not have sufficient notice to raise these issues at that time. Indeed, had Petitioner argued waiver by reckless disclosure in Petitioner's Objection, both Petitioner and his Counsel would have been susceptible to Rule 11 sanctions. *See* NRCP 11(b)(3) and NRCP 11(c). Thus, this Court has the authority to consider this argument.

Irrespective of this Court's authority to consider whether Respondents waived the privilege by reckless disclosure, judicial economy favors having this Court hear arguments on this issue simultaneous with the several other pending issues concerning the Disputed Documents. At this point in the litigation, forcing Petitioner to first bring this matter before a Discover Commissioner who is not familiar with this case[44] after this Court rules on other issues concerning the Disputed Documents would cause further delay and would create unnecessary confusion in an already

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[43] *See* Excerpt of Respondents Second Supplement to Initial Disclosures of Witness and Documents Pursuant to NRCP 16.1 attached as Exhibit 4 to Petitioner's Objection, p. 270 (showing production of RESP0088918-RESP0088917 identified as "corr.note.memo.pdf"); *see also* RESP0088954-RESP0088958 attached as Exhibit 5 to Petitioner's Objection.

[44] During the pendency of the Report and Recommendation, Discovery Commissioner Bonnie Bulla was appointed to the Nevada Court of Appeals.

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complex docket. For this reason, it is appropriate for the Court to consider this issue simultaneous with the other arguments raised as to the Report and Recommendation.

2. The Clawback Provisions of the ESI Protocol Were Not Intended to Absolve Respondents of Their Obligations to Maintain Any Applicable Privileges.

Respondents argue that, under the ESI Protocol, "the parties intended to foreclose any argument that the unintended disclosure of privileged information constitutes waiver." *See* Respondents' Opposition, at p. 34:22-23. Quite simply, there is no evidence of such a broad intent. In support of the contention that Petitioner "expressly agreed not to argue that any waiver occurred through the inadvertent production of privileged or protected materials," *id.* at p. 34:7-8, Respondents quote a selective portion of the ESI Protocol that has no relation to the production of documents but rather a *pre-production* examination of records. That entire provision of the ESI Protocol (with Respondents' quoted portion underlined) provides as follows:

> **Initial Examination of Records.** ... The Producing Party may withhold from that production any privileged document and identify the privileged document ***on a privilege log*** as outlined in paragraph 17 herein. The parties agree that the Producing Party is not waiving, and the Requesting Party will not argue that the Producing Party has waived, any claims of attorney-client privilege, attorney work product protection, or any other privilege or protection, including protections enumerated in the Stipulated Confidentiality Agreement and Protective Order, by making documents available for examination.[45]

When reviewed in its entirety, this provision is inapplicable because the Parties did not engage in any pre-production review and the Disputed Documents are part of Respondents' formal productions. Moreover, ***Respondents have failed to produce a privilege log.***

Case law further does not support such a broad protection from waiver. For instance, in *Koch Materials Co. v. Shore Slurry Seal, Inc.*, 208 F.R.D. 109 (D.N.J. 2002), one party agreed to only produce certain records if the other party "agree[d] not to argue waiver of attorney-client privilege, attorney work product, or any other applicable protection." 208 F.R.D. at 118 Koch Materials later argued that any inadvertently produced documents were protected as a result of this

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[45] *See* ESI Protocol attached as Exhibit 3 to the Privilege Motion, Section 3 (Emphasis added).

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agreement. *Id.* at 116. The court was unpersuaded and elected not to apply such a broad interpretation noting that:

> Courts generally frown upon "blanket" disclosure provisions as contrary to relevant jurisprudence. In particular, the court observes that ***such blanket provisions, essentially immunizing attorneys from negligent handling of documents, could lead to sloppy attorney review and improper disclosure which could jeopardize clients' cases***. Moreover, where the interpretation of the provision remains hotly disputed, as it is in this case, broad construction is ill advised.[46]

Other federal courts, which have a test for determining waiver by inadvertent disclosure, *see* Fed. R. Evid. 502(b), have further found that a general court order or agreement concerning inadvertent disclosure does not supplant said test if the agreement "does not provide adequate detail regarding what constitutes inadvertence, what precautionary measures are required, and what the producing party's post-production responsibilities are to escape waiver."[47]

The purpose of the clawback agreement was to act as additional insulation should a protected document fall through the cracks despite a party's efforts. However, Respondents seek to manipulate this failsafe to avoid any inquiry into why or how the Disputed Documents were produced. The reason for this is simple: Respondents implemented no screening protocols and instead used the better part of a year to both delay relevant productions and do a document dump rather than engage in good faith discovery. Respondents should not be shielded from their poor handling of productions merely because the ESI Protocol provides a general non-waiver for the inadvertent production of documents.

3. Respondents Have Not Met the Burden That the Disclosure of the Disputed Documents Was Inadvertent

Regardless of whether this Court interprets the ESI Protocol as protecting *any* inadvertent disclosure (regardless of that care taken), Respondents have still failed to demonstrate that the

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[46] *Id.* at 118 (citing *Ciba-Geigy Corp. v. Sandoz Ltd.*, 916 F.Supp. 404, 412 (D.N.J. 1995) (Emphasis added).

[47] *United States Home Corp. v. Settlers Crossing, LLC*, 2012 WL 3025111, at *5 (D. Md. July 23, 2012); *see also Maxtena, Inc. v. Marks*, 289 F.R.D. 427, 445 (D. Md. 2012).

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disclosure was indeed "inadvertent."[48] It is undisputed that "[t]he burden of proving inadvertent disclosure is on the party asserting the privilege."[49] Since the ESI Protocol is silent on what "inadvertence" means, this Court should construe this term according to its plain language[50] which Black's Law defines as "[a]n accidental oversight; a result of carelessness."[51]

Despite Respondents' repeated assertions, they have not demonstrated how the disclosure of the Disputed Documents could have been an oversight or careless. Rather, Respondents merely assert that "[m]ultiple professionals, with differing knowledge of the matters and issues, were involved in the review and production of documents." *See* Respondents' Opposition, at p. 38:9-10. However, Respondents' Opposition does not indicate who looked at these records, these individuals' capacities or relation to the case,[52] or even provide a single declaration explaining the circumstances under which the Disputed Documents were "inadvertently produced." As seen from

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[48] *See N.M. Oncology & Hematology Consultants, Ltd. v. MV/GBW Presbyterian Healthcare Servs.*, 2017 WL 5644390, at *5 (D.N.M. Feb. 27, 2017), *report and recommendation adopted in part sub nom. N.M. Oncology & Hematology Consultants, Ltd. v. MV/GBW Presbyterian Healthcare Servs.*, 2017 WL 4271330 (D.N.M. Sept. 25, 2017) ("In effect Presbyterian seems to be saying 'take my word for it.' But no matter how many times you repeat it, saying the Hinton Email was produced by 'inadvertence, mistake or other error' doesn't make it so.").

[49] *FSP Stallion 1, LLC*, 2010 WL 3895914, at *11. *See also e.g., Clark Cnty. v. Jacobs Facilities, Inc.*, 2012 WL 4609427, at *10 (D. Nev. Oct. 1, 2012) ("As a general rule, the burden of proving inadvertent disclosure is on the party asserting the privilege."); *Pac. Coast Steel v. Leany*, 2011 WL 4704217, at *4 (D. Nev. Oct. 4, 2011).

[50] *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 488, 117 P.3d 219, 224 (2005) (citing *White Cap Indus., Inc. v. Ruppert,* 119 Nev. 126, 128, 67 P.3d 318, 319 (2003); *Sandy Valley Assocs. v. Sky Ranch Estates,* 117 Nev. 948, 953–54, 35 P.3d 964, 967 (2001); *Kaldi v. Farmers Ins. Exch.,* 117 Nev. 273, 278, 21 P.3d 16, 20 (2001)).

[51] *Black's Law Dictionary* 762 (7th ed. 1999). Petitioner disputes Respondents' claim that recklessness is included in this definition, *see* Respondents' Opposition, at p. 35:19-21, because "recklessness" is defined as "[c]onduct whereby the actor does not desire harmful consequences but nonetheless foresees the possibility and consciously takes the risk." *Black's Law Dictionary* 1277 (7th ed. 1999).

[52] *See Mfrs. & Traders Trust Co. v. Servotronics, Inc.*, 132 A.D.2d 392, 399 (N.Y. App. Div. 1987) ("[I]f a screener could not reasonably be expected to differentiate between privileged and non-privileged documents, the reasonable precaution test would not be met.").

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Respondents' failure to implement reasonable precautions as well as the second disclosure of the Group 1 Documents, *see infra*, this is not a situation where a handful of documents slipped through but rather where there were systemic deficiencies that Respondents failed to address. Now that damning documents were disclosed on multiple occasions because of these deficiencies, they are trying to use inadvertence as a life line.[53] Without more, Respondents should not be able to obstruct good faith discovery.

4. Respondents Did Not Take Reasonable Precautions to Prevent Disclosure of Privileged Material.

Despite claiming that recklessness is included within the scope of an "inadvertent disclosure" under the ESI Protocol, Respondents further claim that they "never argued that they had no duty of care" and that they "took reasonable precautions to protect their privileged information." *See* Respondents' Opposition, at p. 37:3-5. However, aside from merely executing the ESI Protocol, there is no evidence that Respondents implemented any protective measures to avoid disclosures like the one currently before this Court.

To support their claim that they indeed took reasonable precautions, Respondents tout the hundreds of thousands of pages that they have produced[54] and further cite cases that are distinguishable from the instant action. For example, in *Transamerica Computer Co., Inc. v. Int'l Bus. Machs. Corp.*, 573 F.2d 646 (9th Cir. 1978), the disclosing party, IBM, had "extraordinary logistical difficulties" in reviewing 17 million pages within a short timetable ordered by the Court. 573 F.2d at 652. The Ninth Circuit also noted that, even within such a short period of time, "IBM

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[53] *New Mexico Oncology & Hematology Consultants, Ltd.*, 2017 WL 5644390, at *6 ("What Presbyterian really seems to be saying is that "inadvertence, mistake or other error" means that I gave you something I shouldn't have or wish I had not and now I want it back. In effect, Presbyterian is arguing that it can clawback the Hinton Email 'for any reason or no reason at all,' but that is not what the Protective Order says and the Special Master is not willing to go that far.").

[54] Petitioner maintains that the number of pages Respondents produced is heavily inflated as Respondents have extensively padded their productions with thousands of pages of duplicates as well as filed pleadings and numerous subpoenas issued to certain American West entities. *See* Motion for Rule 37 Sanctions Regarding Edward Lubbers' Responses to Scott Canarelli's Request for Production Nos. 28-33, filed July 16, 2018, Section III(A)(2).

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attempted...to develop effective screening procedures." *Id.* at 649. Moreover, in *Kan.-Neb. Nat. Gas Co. v. Marathon Oil, Co.*, 109 F.R.D. 12 (D.Neb. 1983), the Court was persuaded by the number of documents produced ***and*** "the procedural screening employed." 109 F.R.D. at 21.

In this case, Respondents describe their production of records as "an extraordinary effort to locate, review and produce hundreds of thousands of pages of documents." *See* Respondents' Opposition, at p. 37:18-20. As an example, Respondents incorporate the Canarellis' Status Report Regarding the July [sic] 18, 2018 Hearing ("Status Report"). *Id.* at p. 37 n. 19. Aside from the fact that this Status Report does not relate to the Disputed Documents because it concerned the production of electronically stored information and the Disputed Documents are indisputably part of Lubbers' hard file, the Status Report provides no substantive discussion of Respondents' screening efforts and merely states any hits from search terms were "reviewed for responsiveness and privilege."[55]

Even Respondents' Opposition is noticeably devoid of anything but broad claims about their review of documents. Indeed, the only evidence presented that Respondents "were proactive about protecting their privilege" was entering the ESI Protocol itself and using an electronic database for their documents. *See* Respondents' Opposition, at p. 38:18-19. As noted *supra*, the purpose of the ESI Protocol was not a broad protection of privilege. With respect to the use of the Relativity database, there is no apparent evidence that Respondents used the program "to review and analyze documents, code documents, remove duplicate documents, identify near duplicate documents, and protect attorney-client and work product documents." Although Respondents had produced over 101,000 pages of records as of July 2018, Petitioner asserts that Respondents essentially did a "document dump" as opposed to good faith production. It is especially apparent that Respondents failed to adequately review their productions because the over a hundred thousand pages of documents includes but is not limited to pleadings filed in this action, subpoenas, and even

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[55] *See* Status Report, filed July 13, 2018, p. 3:1-2, 4:12-14. It is further important to note that these efforts by Respondents to produce this information was only after months of contentious litigation and appearances before both the Discovery Commissioner and this Court.

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financials for other trusts.[56] Petitioner estimates that of the over 100,000 pages of documents Respondents have produced, about 55,000 pages are either duplicates or irrelevant records. *See supra* note 54. Respondents simply cannot meet their burden of showing inadvertence merely by saying it was so.

5. Respondents Fail to Address the Second Disclosure of the Group 1 Documents.

What is noticeably missing from Respondents' Opposition is even ***the mere acknowledgement that Respondents disclosed the Group 1 Documents a second time on June 5, 2018***. While the Respondents claim to have produced "nearly two hundred thousand pages of documents," *see* Respondents' Opposition, at p. 38:1, and stated that when evaluating reasonableness "the Court should consider 'the number of documents to be reviewed and the time constraints for production,'"[57] the second disclosure of the Group 1 Documents was within a production of only about 3,200 pages and was produced approximately six (6) months *after* the initial production. While it is true that the Advisory Committee Notes for Fed. R. Evid. 502 provide that the rule does not require post-production review to uncover any mistaken productions, it "***does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently***."[58] As early as February 16, 2018, Respondents became aware that there was a problem with their prior productions because they started to claw back documents.[59] Yet, even after Petitioner attached the Typed Notes as an exhibit, Respondents still did so not undergo any obvious effort to screen their productions because

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[56] *See* Excerpt of Edward Lubbers, Lawrence Canarelli, and Heidi Canarelli's Tenth Supplement to Initial Disclosures of Witnesses and Documents Pursuant to NRCP 16.1 attached hereto as **Exhibit 2**, p. 27, 32, 167, 235, 245, 255, 264, 270 (disclosing records for The Cankids Investments, LLC, an unrelated LLC); p. 34, 41, 145, 223-224, 228, 236, 243-244, 246-249, 253-254, 256-258, 265, 270, 272 (disclosing records for Scott LGC, LLC, an unrelated LLC); p. 225-226, 228-231 (disclosing subpoenas issued by Petitioner in this action); p. 226-232, 234, 238 (disclosing hearing transcripts and legal documents filed in this action).

[57] *Id.* at p. 37:20-22 (citing Fed. R. Evid. 502 advisory committee notes (Revised 11/28/2007).

[58] *See* Fed. R. Evid. 502 advisory committee notes (revised Nov. 28, 2007) (Emphasis added).

[59] *See* February 16, 2018 letter from Mr. Schwarz attached hereto as **Exhibit 3.**

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they not only disclosed the Group 1 Documents a second time, but did on the same day that they asserted the Typed Notes were "clearly an attorney-client privileged and attorney work product-protected document."[60] Moreover, when Petitioner learned of the second disclosure and advised Respondents of the same, Respondents' Counsel requested to specifically clawback the Typed Notes (disclosed as RESP0088955, *see* Exhibit 5 attached to Petitioner's Objection) and advised that they would "***undertake a further review*** of Respondents' production to determine whether any other documents (including those that are the subject of the pending privilege dispute) were included as part of this or other productions."[61] Despite this representation, Respondents have still ***failed to clawback the second production of the Handwritten Notes that was produced alongside the second production of the Typed Notes.*** *See* RESP0088954 and RESP0088956-58 attached as Exhibit 5 to Petitioner's Objection. Respondents cannot demand that this Court protect their records when Respondents themselves refuse to undertake even reasonable efforts to do so.

III. CONCLUSION

For the above reasons as well as those stated in Petitioner's Objection, Petitioner respectfully requests that this Court grant the Petitioner's Objection and further requests that this Court strike or amend portions of the Report and Recommendation so they are consistent with those provided in Petitioner's Objection, at p. 5:15-6:4, and incorporated herein by reference.

DATED this 21st day of March, 2019.

SOLOMON DWIGGINS & FREER, LTD.

By: _____
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60 *See* June 5, 2018 letter from Ms. Brickfield attached as Exhibit 4 to the Privilege Motion.

61 *See* November 2, 2018 email from Mr. Williams attached as Exhibit 8 to Petitioner's Objection (Emphasis added).

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CERTIFICATE OF SERVICE

PURSUANT to NRCP 5(b), I HEREBY CERTIFY that on March 21, 2019, I served a true and correct copy of the **REPLY IN SUPPORT OF PETITIONER'S OBJECTION TO THE DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS ON (1) THE MOTION FOR DETERMINATION OF PRIVILEGE DESIGNATION, (2) THE SUPPLEMENTAL BRIEFING ON APPRECIATION DAMAGES** to the following in the manner set forth below:

Via:

[____] Hand Delivery

[____] U.S. Mail, Postage Prepaid

[____] Certified Mail, Receipt No.: _____

[____] Return Receipt Request

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

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EXHIBIT 1

EXHIBIT 1

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

IN THE MATTER OF THE TRUST OF: THE SCOTT LYLE GRAVES CANARELLI IRREVOCABLE TRUST, DATED FEBRUARY 24, 1998	Case No. P-13-078912-T DEPT. XXVI/Probate

BEFORE THE HONORABLE BONNIE BULLA,
DISCOVERY COMMISSIONER

WEDNESDAY, AUGUST 29, 2018

TRANSCRIPT OF PROCEEDINGS RE:
ALL PENDING MOTIONS AND ADDITIONAL BRIEFING

APPEARANCES:

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

RECORDED BY: FRANCESCA HAAK, COURT RECORDER

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

MR. WILLIAMS: Correct.

DISCOVERY COMMISSIONER: Okay.

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

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

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

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

DISCOVERY COMMISSIONER: I -- I agree with you.

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

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

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

DISCOVERY COMMISSIONER: Right.

MR. WILLIAMS: Wait a second --

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

MR. WILLIAMS: I didn't --

DISCOVERY COMMISSIONER: And the opinion work product --

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

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

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

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

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

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

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

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

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

MR. WILLIAMS: Correct.

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

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

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

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

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

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

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

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

MS. DWIGGINS: And I have not argued that.

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

So with respect to the production --

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

MR. WILLIAMS: Oh, I --

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

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

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

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

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

MS. DWIGGINS: I understand --

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

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

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

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

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

Mr. Williams, who went through the documents?

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

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

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

you've had to review, more importantly.

MR. SCHWARZ: Thank you to your staff.

DISCOVERY COMMISSIONER: Thank you.

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

/ / /

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

Shawna Ortega, CET*562

EXHIBIT 2

EXHIBIT 2

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

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

Frank Martin, the Special Administrator of The Estate of Edward Lubbers, successor-in-interest to Edward Lubbers ("Lubbers"), named in this matter individually and as former Family Trustee and former Independent Trustee of the Scott Lyle Graves Canarelli Irrevocable Trust dated February 24, 1998, and Lawrence Canarelli ("Larry") and Heidi Canarelli ("Heidi," and together with Larry, the "Canarellis") former Family Trustees of the Scott Lyle Graves Canarelli Irrevocable Trust Dated February 24, 1998 (the "Trust"), (collectively, "Respondents"), by and

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480.	The Cankids Investments, LLC Balance Sheet 2016	RESP0013335-13343
481.	The Cankids Investments, LLC Balance Sheet 2017	RESP0013344-13352
482.	Corporate Structure sheet	RESP0013353-13354
483.	Scott Canarelli Irr Trust Settlement Payments	RESP0013355-13357
484.	Scott Canarelli Settlement	RESP0013358-13359
485.	Letter	RESP0013360-13408
486.	Letter	RESP0013409-13411
487.	Bullet Points/Memo	RESP0013412-13414
488.	cover sheet	RESP0013415-13415
489.	The Cankids Investments LLC Balance Sheet 2016	RESP0013416-13424
490.	The Cankids Investments LLC Balance Sheet 2017	RESP0013425-13433
491.	cover sheet	RESP0013434-13434
492.	AWH Ventures, Inc. Notes Rec/Pay Internal Scott Irrev Trust	RESP0013435-13437
493.	cover sheet	RESP0013438-13438
494.	Receipt of Deposit	RESP0013439-13440
495.	cover sheet	RESP0013441-13441
496.	Letter	RESP0013442-13442
497.	Letter	RESP0013443-13454
498.	NRS Chapter 165	RESP0013455-13463
499.	Coversheet	RESP0013464-13464
500.	Letter	RESP0013465-13466
501.	Handwritten Notes	RESP0013467-13468
502.	Memo	RESP0013469-13470

595.	Nevada Department of Taxation form	RESP0015580-15581
596.	Nevada Department of Taxation form	RESP0015582-15582
597.	Nevada Department of Taxation form	RESP0015583-15583
598.	cover sheet	RESP0015584-15584
599.	Grantor Letter	RESP0015585-15586
600.	Nevada Department of Taxation form	RESP0015587-15589
601.	Letter	RESP0015590-15590
602.	IRS Efile Signature Authorization for Form 1041 2015	RESP0015591-15591
603.	Efile notice to IRS	RESP0015592-15592
604.	Letter	RESP0015593-15593
605.	Grantor Letter	RESP0015594-15595
606.	Page 2 of tax return for Scott Canarelli Protection Trust	RESP0015596-15596
607.	Letter	RESP0015597-15609
608.	cover sheet	RESP0015610-15610
609.	Letter	RESP0015611-15611
610.	IRS Efile Signature Authorization for Form 1041 2015	RESP0015612-15616
611.	Letter	RESP0015617-15617
612.	Schedule K-1 2015 The Cankids Investments	RESP0015618-15634
613.	cover sheet	RESP0015635-15635
614.	Letter	RESP0015636-15636
615.	2015 Tax Return Filing Instructions	RESP0015637-15637
616.	IRS form 7004 for the Scott Lyle Graves Canarelli IRR Tru.	RESP0015638-15638
617.	Form 8879-F Ire Efile Signature Authorization for Form 1041	RESP0015639-15639

641.	cover sheet	RESP0015680-15680
642.	2014 Tax Return Filing Instructions	RESP0015681-15681
643.	IRS payment voucher	RESP0015682-15682
644.	US Federal Income Tax return 2014 Kylie Canarelli	RESP0015683-15699
645.	Scott Canarelli for year ended 12/31/2014 for McGladrey	RESP0015700-15700
646.	Letter	RESP0015701-15782
647.	cover sheet	RESP0015783-15783
648.	2014 two year comparison report	RESP0015784-15786
649.	U.S. Return of Partnership Income 2014 Scott LGC, LLC	RESP0015787-15818
650.	cover sheet	RESP0015819-15819
651.	Letter	RESP0015820-15820
652.	Schedule K-1 2014	RESP0015821-15833
653.	cover sheet	RESP0015834-15834
654.	2014 Tax Return Filing Instructions	RESP0015835-15835
655.	Form 8879-F Ire Efile Signature Authorization for Form 1041	RESP0015836-15840
656.	Letter	RESP0015841-15842
657.	2014 Tax Return Filing Instructions	RESP0015843-15864
658.	cover sheet	RESP0015865-15865
659.	Grantor Letter	RESP0015866-15866
660.	Letter	RESP0015867-15867
661.	Grantor Letter	RESP0015868-15869
662.	cover sheet	RESP0015870-15870
663.	Letter	RESP0015871-15871

802.	McGladrey 2011 income tax return for Scott Canarelli	RESP0016998-16998
803.	Letter	RESP0016999-16999
804.	Cover sheet	RESP0017000-17000
805.	2013 Tax Records	RESP0017001-17104
806.	2011 Tax Records	RESP0017105-17164
807.	2011 Tax Records	RESP0017165-17226
808.	Cover sheet	RESP0017227-17227
809.	General Ledger 2015	RESP0017228-17246
810.	Cover sheet	RESP0017247-17247
811.	General Ledger	RESP0017248-17248
812.	Profit and Loss 2015	RESP0017249-17257
813.	Cover sheet	RESP0017258-17258
814.	Balance Sheet 2015	RESP0017259-17266
815.	Cover sheet	RESP0017267-17267
816.	Buyer's Final Settlement Statement	RESP0017268-17268
817.	Cover sheet	RESP0017269-17269
818.	Reconciliation Summary 2015	RESP0017270-17283
819.	2016 General Ledger	RESP0017284-17307
820.	2016 Trial Balance	RESP0017308-17310
821.	Bank statements with reconciliations (December)	RESP0017311-17324
822.	2016 Arizona Partnership Income Tax Return for Scott LGC, LLC	RESP0017325-17339
823.	2016 Arizona Partnership Income Tax Return for Scott LGC, LLC	RESP0017340-17351
824.	2016 Arizona Partnership Income Tax Return for Scott LGC, LLC	RESP0017352-17365

3194.	WF IRRV TRST-may-2016.pdf	RESP0020015-20020
3195.	WF IRRV TRST-may-2017.pdf	RESP0020021-20026
3196.	WF IRRV TRST-nov-2015.pdf	RESP0020027-20032
3197.	WF IRRV TRST-nov-2016.pdf	RESP0020033-20038
3198.	WF IRRV TRST-nov-2017.pdf	RESP0020039-20045
3199.	WF IRRV TRST-oct-2015.pdf	RESP0020046-20051
3200.	WF IRRV TRST-oct-2016.pdf	RESP0020052-20057
3201.	WF IRRV TRST-oct-2017.pdf	RESP0020058-20063
3202.	WF IRRV TRST-sep-2015.pdf	RESP0020064-20069
3203.	WF IRRV TRST-sept-2016.pdf	RESP0020070-20075
3204.	WF IRRV TRST-sept-2017.pdf	RESP0020076-20082
3205.	Scott Canarelli bank account balance as of 3/31/2017	RESP0020083-20084
3206.	Slip Sheet	
3207.	Various documents from the Nevada Secretary of State for Scott LGC, LLC	RESP0020086-20107
3208.	Minutes of the Organizational meeting of member of SCOTT LGC, LLC dated November 30, 2007	RESP0020108-110
3209.	Operation Agreement for SCOTT LGC, LLC	RESP0020111-20142
3210.	Slip sheet	RESP0020143
3211.	Multiple Listing Service Change Order for the Robar Street Home and Black and Lobello engagement letter,	RESP0020143-20150
3212.	Exclusive Authorization and Right to Sell, Exchange or Lease Brokerage Listing Agreement	RESP0020151-20171
3213.	Incoming Domestic Wire Instructions, Buyer's Estimated Settlement Statement, Escrow Instructions, Property Taxes, Republic Services coversheet, Title Insurance, closing documentation	RESP0020172-20200
3214.	Assignee instructions and Seller's Real Property Disclosure Form	RESP0020201-20205
3215.	Purchase and Sale Agreement dated April 8, 2015	RESP0020206-20220
3216.	Purchase and Sale Agreement dated March 2015	RESP0020221-20237

3703.	SCIT General Ledger 1/2/2014	RESP0030934-30939
3704.	SCIT General Ledger 3/13/2014	RESP0030940-30952
3705.	SCIT General Ledger 4/1/2014	RESP0030953-30956
3706.	SCIT General Ledger 4/3/2014	RESP0030957-30963
3707.	Notice from Lender dated 3/31/2013	RESP0030964-30969
3708.	Payment Guaranty dated 5/31/2013	RESP0030970-30973
3709.	Agreement dated 5/31/2013	RESP0030974-30998
3710.	Demand for Payment dated 7/28/2017	RESP0030999-31000
3711.	Notice from Lender dated 3/31/2013	RESP0031001-31006
3712.	Cash flow to CanKids for SCI	RESP0031007-31008
3713.	SCIT financial statement dated 12/31/2009 (first page)	RESP0031009
3714.	Checks with invoices payable to McGladrey & Pullen for financial work	RESP0031010-31043
3715.	McGladrey documents for SCIT ending December 31, 2012	RESP0031044-31154
3716.	Secondary Trust – Supplemental to Irr. Trust 2006-2010	RESP0031155-31156
3717.	Settlement Statement from First American Title Ins. Co.	RESP0031157-31161
3718.	Letter from California Bank and Trust re property lien release dated 11/20/2013	RESP0031162-31163
3719.	Settlement Statement from First American Title Ins. Co.	RESP0031164-31168
3720.	First page of letter from California Bank and Trust re property lien release dated 11/20/2013	RESP0031169
3721.	Settlement Statement from First American Title Ins. Co.	RESP0031170-31174
3722.	Letter from California Bank and Trust re property lien release dated 11/26/2013	RESP0031175-31176
3723.	Settlement Statement from First American Title Ins. Co.	RESP0031177-31181
3724.	Letter from California Bank and Trust re property lien release dated 11/5/2013	RESP0031182-31183
3725.	Settlement Statement from First American Title Ins. Co.	RESP0031184-31188
3726.	Letter from California Bank and Trust re property lien release dated 12/9/2013	RESP0031189-31190

5057.	2009.pdf	RESP0073733-73850
5058.	SCIT 2010 tax returns	RESP0073851-73942
5059.	SCIT 2011 tax returns	RESP0073943-74036
5060.	SCIT 2012 tax returns	RESP0074037-74147
5061.	Houlihan Answer to #14-A & WVA Answer to Schedule 13-A 14-0710.pdf	RESP0074148
5062.	Houlihan Answer to #5-B 14-0710.pdf	RESP0074149-74155
5063.	HoulihanCapital Answers.pdf	RESP0074156-74158
5064.	WesternValuation-Answers.pdf	RESP0074159-74163
5065.	WVA Answer #11-C 14-0710.pdf	RESP0074164-74202
5066.	2005-2009, 2012, W-2's – Scott Canarelli	RESP0074203-74208
5067.	Letter from the Lung Center of Nevada dated 3/19/2018	RESP0074209

Respondents are producing the following documents concurrently herewith:

5068.	Trustee Statement re: Residence purchase	RESP0074210
5069.	E-mail dated 1/24/2014 from Teresa O'Malley re: Scott Canarelli bill payment	RESP0074211
5070.	Accepted: Hearing - SCIT Motion to Compel Disclosure of Gerety Records.msg	RESP0074213
5071.	2014 General Ledger.pdf	RESP0074214-74237
5072.	2015 Beginning Balance Scott Checking #8800.pdf	RESP0074238
5073.	CAN003050-CAN003118.pdf	RESP0074263-74331
5074.	NBA American West A&R Subordination and Intercreditor Agreement 4820-3020-9612 2.docx	RESP0074332-74348
5075.	NBAZ American West Omnibus Certificate of Nevada Borrower LLCs 4846-0138-3500 2.doc	RESP0074349-74355
5076.	NBAZ American West 2017 Certificate of Secretary (Model Renting Company, Inc.) 4813-8985-7612 2.doc	RESP0074356-74362
5077.	NBAZ American West 2017 Trust Certificate (SLGC Irrevocable Trust) 4827-2541-5756 2.doc	RESP0074363-74365
5078.	Re: Taxes.msg	RESP0074436
5079.	Re: Scott LGC, LLC.msg	RESP0074437
5080.	Tax prep questions for Scott LGC and Scott's Irrev. Trust.msg	RESP0074438-74439
5081.	RE: Scott LGC payable to Scott's Irr. Trust.msg	RESP0074440-74442

5082.	RE: Scott LGC payable to Scott's Irr. Trust.msg	RESP0074443-74446
5083.	taxes.msg	RESP0074447
5084.	SCOTT LGC LLC - CA FRANCHISE TAX PAYMENT VOUCHER.pdf.msg	RESP0074448
5085.	SCOTT LGC LLC - CA FRANCHISE TAX PAYMENT VOUCHER.pdf	RESP0074449
5086.	RE: Extension Voucher for 2016 Tax Return.msg	RESP0074450-74455
5087.	RE: Extension Voucher for 2016 Tax Return.msg	RESP0074456-74460
5088.	RE: Extension Voucher for 2016 Tax Return.msg	RESP0074461-74465
5089.	RE: Extension Voucher for 2016 Tax Return.msg	RESP0074466-74468
5090.	Scott.msg	RESP0074469
5091.	2016 Extension Payment Voucher -- Canarelli (1).pdf	RESP0074470-74471
5092.	RE: Extension Voucher for 2016 Tax Return.msg	RESP0074472-74473
5093.	Commerce tax.msg	RESP0074474
5094.	Taxes.msg	RESP0074475
5095.	RE: Taxes.msg	RESP0074476-74477
5096.	RE: Tax prep questions for Scott LGC and Scott's Irrev. Trust.msg	RESP0074478-74479
5097.	RE: Scott LGC payable to Scott's Irr. Trust.msg	RESP0074480-74481
5098.	RE: Scott LGC payable to Scott's Irr. Trust.msg	RESP0074482-74484
5099.	RE: Scott LGC, LLC.msg	RESP0074485-74486
5100.	Scott LGC, LLC.msg	RESP0074487
5101.	Scott Canarelli.msg	RESP0074488
5102.	RE: Extension Voucher for 2016 Tax Return.msg	RESP0074489-74491
5103.	Extension Voucher for 2016 Tax Return.msg	RESP0074492-74493
5104.	RE: Taxes.msg	RESP0074494-74495
5105.	RE: Scott LGC, LLC.msg	RESP0074496-74498
5106.	Scott Canarelli NV Commerce Tax Return.msg	RESP0074499
5107.	RE: Scott Canarelli NV Commerce Tax Return.msg	RESP0074500-74501
5108.	Re: Account(s) Info.msg	RESP0074502

5109.	AcctsInformation.xlsx	RESP0074503-74504
5110.	Re: Grants landing transfer.msg	RESP0074505
5111.	RE: Grants landing transfer.msg	RESP0074506-74507
5112.	Scan.pdf	RESP0074508-74510
5113.	Scott Canarelli Overview.docx	RESP0074511
5114.	Scott Canarelli Overview.docx	RESP0074512
5115.	Scott Canarelli.msg	RESP0074513
5116.	RE: Scott Canarelli.msg	RESP0074514-75415
5117.	RE: Scott Canarelli.msg	RESP0074516-74519
5118.	RE: Scott Canarelli.msg	RESP0074520-74524
5119.	Loss Carry forward chart.pdf	RESP0074525
5120.	Settlement Payment Calculation.pdf	RESP0074526-74528
5121.	RE: Scott Canarelli.msg	RESP0074529-74531
5122.	Carryforward Scott Canarelli.pdf	RESP0074532-74609
5123.	P-13-078912-T.pdf	RESP0074610-74612
5124.	Subpoena-AWDI.pdf	RESP0074613-74625
5125.	Subpoena-AWH Ventures.pdf	RESP0074626-74640
5126.	Subpoena-Canfam Holdings.pdf	RESP0074641-74650
5127.	Subpoena-Colorado Housing Inv.pdf	RESP0074651-74660
5128.	Subpoena-Colorado Land Inv.pdf	RESP0074661-74670
5129.	Subpoena-Heritage 2.pdf	RESP0074671-74679
5130.	Subpoena-Indiana Inv.pdf	RESP0074680-74689
5131.	Subpoena-Inverness 2010.pdf	RESP0074690-74698
5132.	Subpoena-Model Renting Co.pdf	RESP0074699-74708
5133.	P-13-078912-T.pdf	RESP0074709-74715
5134.	Scotts Irrevocable Trust Agr (SCIT).pdf	RESP0074716-74749

5135.	12-2-13 Stip and Order.pdf	RESP0074750-74753
5136.	2017.04.28 - Letter to Dana Dwiggins.pdf	RESP0074754
5137.	2017-09-15 Petitioner's Reply Memorandum in Support of Petition to Surch....pdf	RESP0074755-75109
5138.	Letter to SDF re Robar Street.PDF	RESP0075110-75113
5139.	Letter to Gerety 7 25 2017.PDF	RESP0075114-75115
5140.	Objection to Petition to Surcharge Trustee and for Add....pdf	RESP0075116-75207
5141.	Notice of Issuance of Subpoena Duces Tecum to Model Re....pdf	RESP0075208-75221
5142.	Notice of Issuance of Subpoena Duces Tecum - American ....pdf	RESP0075222-75238
5143.	Notice of Issuance of Subpoena Duces Tecum - American ....pdf	RESP0075239-75254
5144.	Notice of Issuance of Subpoena Duces Tecum - AWH Vent....pdf	RESP0075255-75272
5145.	Notice of Issuance of Subpoena Duces Tecum Brentwood 1....pdf	RESP0075273-75287
5146.	Notice of Issuance of Subpoena Duces Tecum - Bridgewate....pdf	RESP0075288-75301
5147.	Notice of Issuance of Subpoena Duces Tecum - Colorado ....pdf	RESP0075302-75315
5148.	Notice of Issuance of Subpoena Duces Tecum Heritage 2....pdf	RESP0075316-75328
5149.	Notice of Issuance of Subpoena Duces Tecum Lexington 1....pdf	RESP0075329-75341
5150.	Notice of Issuance of Subpoena Duces Tecum Colorado La....pdf	RESP0075342-75355
5151.	Notice of Issuance of Subpoena Duces Tecum Stonebridge....pdf	RESP0075356-75368
5152.	Notice of Issuance of Subpoena Duces Tecum Highlands C....pdf	RESP0075369-75382
5153.	Notice of Issuance of Subpoena Duces Tecum Indiana Inv....pdf	RESP0075383-75396
5154.	Notice of Issuance of Subpoena Duces Tecum Inverness 2....pdf	RESP0075397-75409
5155.	Notice of Issuance of Subpoena Duces Tecum - Silverado....pdf	RESP0075410-75423
5156.	Notice of Issuance of Subpoena Duces Tecum - CanFam Ho....pdf	RESP0075424-75437
5157.	Scott Canarelli s First Request for Production of Documents to Lawrence and Heidi Canarelli.PDF	RESP0075438-75487

5158.	Petition to Surcharge Trustee and Former Trustees for Breach of Fiduciary Duties Conspiracy and Aiding and Abetting; Petition f.PDF	RESP0075488-75527
5159.	Notice of Hearing.PDF	RESP0075528-75530
5160.	Administrative Order 16-10	RESP0075531-75532
5161.	2017-09-15 Petitioner's Reply Memorandum in Support of Petition to Surcharge Trustee and for Additional Relief 4848-1349-9727 v.1.pdf	RESP0075533-75887
5162.	tbf Object to Edward Lubbers, Lawrence Canarelli and Heidi Canarelli.pdf	RESP0075888-75894
5163.	P-078912 CANARELLI TRUST 9-28-17.doc	RESP0075895-75962
5164.	4.20.17 - Letter to Dana Dwiggins.pdf	RESP0075963
5165.	Order Scheduling Status Check.PDF	RESP0075964-75965
5166.	Letter to Counsel (7.25.17).pdf	RESP0075966-75967
5167.	Stipulation to Hold Further Proceedings in the District Court.PDF	RESP0075968-75971
5168.	Notice of Entry filed by Campbell & Williams.PDF	RESP0075972-75978
5169.	Notice of Entry of Stipulation and Order.PDF	RESP0075979-75984
5170.	RE: Scott Canarelli.msg	RESP0075985-75988
5171.	Attorney Fees.msg	RESP0075989
5172.	FW: Attorney Fees.msg	RESP0075990-75991
5173.	2017-09-11 Correspondence to J. Colby Williams 4837-2419-4639 v.1.pdf	RESP0075992
5174.	2017-09-11 Correspondence to J. Colby Williams 4837-2419-4639 v.1.pdf	RESP0075993
5175.	2017-09-15 Petitioner's Reply Memorandum in Support of Petition to Surcharge Trustee and for Additional Relief 4848-1349-9727 v.1.pdf	RESP0075994-76348
5176.	Letter to Counsel (7.25.17).pdf	RESP0076349-76350
5177.	Letter to Counsel (7.25.17).pdf	RESP0076351-76352
5178.	Notice of Exercise of Right to Have Hearing Before Probate Court Judge.PDF	RESP0076353-76355
5179.	Order Scheduling Status Check.PDF	RESP0076356-76357
5180.	Notice of Entry of Stipulation and Order.PDF	RESP0076358-76363

5181.	Notice of Entry filed by Campbell & Williams.PDF	RESP0076364-76370
5182.	Objection to Petition to Surcharge Trustee and for Additional Relief.PDF	RESP0076371-76462
5183.	Petitioner's Reply Memorandum in Support of Petition to Surcharge Trustee....pdf	RESP0076463-76817
5184.	Petition to Require Trust to Pay Former Family Trustees' and Current Tru....pdf	RESP0076818-76831
5185.	Notice of Hearing.pdf	RESP0076832
5186.	SC month-by-month-REVISION.xlsx	RESP0076833-76853
5187.	Letter to SDF - 8-16-2017.PDF	RESP0076854-76855
5188.	SO Notice of Issuance of SDT - SJSA Investments.pdf	RESP0076856-76869
5189.	SO Notice of Issuance of SDT - Model Renting 2012.pdf	RESP0076870-76883
5190.	Notice of Issuance of Subpoena Duces Tecum.pdf	RESP0076884-76897
5191.	Notice of Subpoena Duces Tecum - Jeffrey Lawrence Graves Canarelli Irr Trust.PDF	RESP0076898-76984
5192.	Notice of Subpoena Duces Tecum - Alyssa Lawren Graves Canarelli Irr Trust.PDF	RESP0076985-77071
5193.	Notice of Subpoena Duces Tecum - Stacia Leigh Lemke Irr Trust.PDF	RESP0077072-77158
5194.	ROC - subpoenas - Stacia Alyssa Jeff Irrevocable Trust.PDF	RESP0077159
5195.	Draft Release Agr for Ed from Solomon.pdf	RESP0077160-77168
5196.	P-13-078912-T Stip and Order 1 9 18.pdf	RESP0077169-77176
5197.	Resignation - Kincan LLC.PDF	RESP0077177
5198.	Resignation - Scott LGC LLC.PDF	RESP0077178
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6448.	2016 IRREV TRT AJE.pdf	RESP0090059-RESP0090062
6449.	2014 Scott LGC WPs.pdf	RESP0090063-RESP0090065
6450.	2015 Scott LGC WPs.pdf	RESP0090066-RESP0090069
6451.	2016 Scott Protection Trust AJE.pdf	RESP0090070-RESP0090072
6452.	Scott trusts 02.17.2015.docx	RESP0090073
6453.	2014-12-31 Report Reference Documents (Part 1).pdf	RESP0090074-RESP0090122
6454.	2014-12-31 Report Reference Documents (Part 2).pdf	RESP0090123-RESP0090165
6455.	Letter to Nicolatus.07.23.2015.red.ecl.docx	RESP0090166-RESP0090167
6456.	Letter to Nicolatus.docx	RESP0090168-RESP0090170
6457.	SCOTT LGC LLC 2016 Taxes WP.pdf	RESP0090171-RESP0090172
6458.	00_12_SCIT Investment literature.pdf	RESP0090173
6459.	10-11+13_SCIT Investment literature.pdf	RESP0090174-RESP0090176
6460.	14_SCIT Investment literature.pdf	RESP0090177-RESP0090178

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

III. INSURANCE AGREEMENTS

Not applicable.

DATED this 24th day of October 2018.

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EXHIBIT 3

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February 16, 2018

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

Hearing Date: April 11, 2019
Hearing Time: 1:30 p.m.

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POINTS AND AUTHORITIES

I. INTRODUCTION

Petitioner's Opposition to Respondents' Objections to the underlying DCRR rehashes many of the same arguments previously presented in Petitioner's own 40-page set of objections to the same findings and recommendations.[1] Respondents dispensed with these arguments in their extensive opposition to Petitioner's objections, and will not burden the Court by repeating them here except where necessary to address any pertinent points.

Though his underlying motion was devoid of any legal argument contending that Lubbers' notes were subject to production under the fiduciary exception to the attorney-client privilege, the crux of Petitioner's Opposition is a full-throated defense of the Discovery Commissioner's *sua sponte* findings and recommendations on this legal issue. To demonstrate a factual predicate for the application of the fiduciary exception, Petitioner now presents new "facts" in support of the retroactive notion that the Initial Petition was a benign pleading that would not have caused Lubbers to anticipate litigation. There are just two problems with Petitioner's continuing attempt to revise history. First, Petitioner's so-called "facts" are not facts at all as they are comprised exclusively of improper attorney argument. Second, even if Petitioner's new facts could surmount the first hurdle, they are not inconsistent with the Discovery Commissioner's finding that Lubbers reasonably anticipated litigation by October 2013.

Petitioner's legal basis for application of the fiduciary exception is equally flawed. Predictably relying on *Riggs Nat'l Bank v. Zimmer*, 335 A.2d 709 (Del. Ch. 1976), Petitioner first contends that the Nevada Supreme Court would likely recognize a fiduciary exception to the attorney-client privilege. That the Nevada Supreme Court has not recognized the common-law

[1] Capitalized terms used herein shall have the same meaning as those identified in Respondents' Objections dated Dec. 17, 2018 (on file) ("Resp. Objections").

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fiduciary exception to Nevada's statutory attorney-client privilege in the three-plus decades since *Riggs* was decided undermines Petitioner's conclusory position. Indeed, the Nevada Supreme Court has consistently rejected entreaties like those being made by Petitioner to enlarge or narrow statutory privileges through judicial legislation.

Petitioner next represents that this Court has recognized the existence of the fiduciary exception on "repeated occasions." Even if true, this Court's prior recognition of the fiduciary exception in past cases—presumably based on the facts unique to those cases—does not constitute precedent or law of the case in this action. Finally, Petitioner claims that most of the jurisdictions to consider this question have adopted the fiduciary exception. This is either wishful thinking or a purposeful mischaracterization of reality as the vast majority of state courts and legislatures to consider the issue have outright rejected the fiduciary exception to the attorney-client privilege based on a variety of grounds. Other states upon which Petitioner relies, including Delaware post-*Riggs*, have at least partially rejected the exception. Setting aside all of the foregoing issues, the fiduciary exception does not apply to Lubbers' notes even if it were recognized in Nevada. That is because Lubbers unequivocally prepared his notes and sought legal advice from LHLGB for his own protection.

Petitioner's remaining arguments fare no better. The statutory exception embodied in NRS 49.115(5) cannot apply for the simple reason that LHLGB lawyers were not "retained or consulted in common" by Lubbers ***and*** Scott. Nor can Scott obtain production of Lubbers' Group 1 Notes based on "substantial need" as this principle is irrelevant where, as here, the subject documents are protected by the attorney-client privilege. While a demonstration of "substantial need" can justify the production of "ordinary" work product (unless the attorney-client privilege also applies to the subject materials), Scott has failed to satisfy this showing for the reasons set forth below.

Petitioner ends his Opposition by knocking down a strawman. Respondents never argued

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this Court lacks authority to review potentially privileged documents *in camera* or that it is incapable of rendering an "unbiased ruling." To the contrary, as officers of the Court, Respondents' counsel simply alerted Her Honor in advance that the notes at issue reflect, in part, Lubbers' opinions as to how the Court may view this case. Because the Court is the trier of fact in this action, Respondents believe it should be permitted the opportunity to make an informed choice either to resolve the privilege dispute on its own or—in the event the Court is concerned about becoming inadvertently tainted—to refer the matter to another judicial officer who will not be rendering the ultimate decision herein.

II. ARGUMENT

A. The Court Should Disregard Petitioner's New Factual Contentions.

Petitioner responds to the factual summary contained in Respondents' Objections by once more attempting to downplay the adversarial nature of the Initial Petition and the events leading up to its filing. The parties addressed this issue in great detail below and in related filings pending before this Court. *See, e.g.*, Pet. Objections dated Dec. 17, 2018 (on file) at 6-7; Resp. Opp'n to Pet. Objections dated Jan. 14, 2019 (on file) at 3-5. Despite the silence of his 31-page Reply in support of his underlying Motion for Determination of Privilege Designation ("Priv. Mot.") and his 40 pages of objections to the DCRR, Petitioner now argues in his Opposition to Respondents' Objections that the alleged manner in which Lubbers interacted with Scott between the filing of the Initial Petition in September 2013 and the Petition to Surcharge in June 2017 (*i.e.* having weekly meetings) demonstrates that Lubbers did not anticipate litigation in 2013. *See* Opp'n at 5:4-11. The Court should disregard these "factual" contentions.

First, assuming *arguendo* that Petitioner can assert these factual contentions at this stage of the proceedings, he has nonetheless failed to support his alleged "facts" with any competent evidence. There is no declaration, no affidavit nor any other form of evidence attesting to this

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newly-presented information. Petitioner instead relies solely on improper attorney argument to make these points. Of course, "[a]rguments of counsel are not evidence and do not establish the facts of the case." *Nevada Ass'n Servs., Inc. v. Eighth Judicial Dist. Ct.*, 130 Nev. 949, 957, 338 P.3d 1250, 1255-56 (2014) (quoting *Jain v. McFarland*, 109 Nev. 465, 475-76, 851 P.2d 450, 457 (1993)).[2]

Second, even if Scott had presented competent evidence to support his argument, that Lubbers may have had breakfast meetings with Scott after the filing of the Initial Petition in no way detracts from the abundance of evidence that Lubbers reasonably anticipated litigation at the time he prepared his notes in October 2013 and thereafter. Again, Scott's counsel accused Lubbers of acting in bad faith in November 2012, Lubbers memorialized this as a threat of litigation, Scott filed the Initial Petition in September 2013 accusing Lubbers of violating his fiduciary duties as Family Trustee and questioning whether Lubbers entered the Purchase Agreement in May 2013 as a means to punish Scott, and Lubbers promptly retained counsel in October 2013 to represent him in responding to the Initial Petition. *See* Resp. Objections at 4-5; 15-16 (incorporating Resp. Opp'n to Priv. Mot. dated Aug. 10, 2018). Additionally, the Initial Petition, orders entered shortly after the Initial Petition was filed, and Scott's counsel all confirmed that Scott was retaining his right to challenge the propriety of the Purchase Agreement, *see id.*, which he has now done through his Surcharge and Supplemental Petitions.

Scott further challenges the factual basis for the Discovery's Commissioner's findings on

[2] Scott never raised the issue of his breakfast meetings with Lubbers in his underlying papers. Instead, his counsel briefly argued this point during the August 29 hearing. *See* Resp. Objections, Ex. 1 at 87:7-14. While oral attorney argument is just as ineffective at establishing the facts of the case as written attorney argument, the Discovery Commissioner nonetheless had an opportunity to consider Petitioner's point and still found that Lubbers prepared the subject notes because of the prospect of litigation. This Court should do the same.

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grounds that the declarations submitted by the LHLGB attorneys were "vague" and "not credible." *See* Opp'n at 5:17-8:3. But Respondents are not required to reveal the contents of the communications they seek to protect as privileged. *See* NRCP 26(b)(5) (party claiming privilege shall identify withheld materials "***without revealing information itself privileged or protected***") (emphasis added); *cf. Robbins v. Gillock,* 109 Nev. 1015, 1018, 862 P.2d 1195, 1197 (1993) ("the moving party is not required to divulge the confidences actually communicated, nor should a court inquire into whether an attorney actually acquired confidential information in the prior representation.").[3] Nor do the declarations of the LHLGB attorneys lack credibility simply because Scott does not like what they say. In any event, Respondents have already addressed these arguments elsewhere and would simply direct the Court to their Opp'n to Pet. Objections at 12:23-15:11. Lastly, Respondents have also addressed previously Petitioner's final factual argument regarding the interplay between the inadvertent production of documents and the terms of the parties' ESI Protocol Agreement. *See id.* at 33:9-40:2.

B. Respondents Have Satisfied Their Burden of Establishing that Lubbers' Notes Are Protected by the Attorney-Client Privilege and the Work Product Doctrine.

Petitioner argues that Respondents must first establish the attorney-client privilege and/or work product doctrine apply to Lubbers' notes before reaching the issue of whether any exceptions apply that would allow for production of the notes, or portions thereof. *See* Opp'n at 9:14-11:22. Respondents agree. That said, they made this showing below. The Discovery Commissioner properly determined that Bates Nos. RESP0013284 and RESP0013285

[3] Respondents purposefully refrained from showing Lubbers' notes to the LHLGB attorneys prior to the preparation of their declarations as Respondents did not want to face a claim that the use of privileged documents to refresh a witness's recollection prior to testifying resulted in a waiver of the privilege. *See L.V. Dev. Assocs. v. Eighth Judicial Dist. Ct.*, 130 Nev. 334, 340, 325 P.3d 1259, 1263 (2014) ("Nevada courts lack discretion to halt the disclosure of privileged documents when a witness uses privileged documents to refresh his or her recollection prior to testifying.").

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(sometimes referred to as the Group 1 Notes along with Bates Nos. RESP0013286-88) were protected by the attorney-client privilege, and that both the Group 1 Notes and Bates Nos. RESP78899-78900 (sometimes referred to as the Group 2 Notes) were protected by the work product doctrine. Respondents have previously explained why the Discovery Commissioner's findings on these points should be affirmed, s*ee* Resp. Opp'n to Pet. Objections at 8:20-24:19, and incorporate those arguments as if fully set forth herein.

C. Neither the Nevada Legislature Nor the Nevada Supreme Court Has Recognized the Fiduciary Exception to the Attorney-Client Privilege.

Petitioner begins his analysis of the fiduciary exception by chastising Respondents for citing to the unpublished opinion of *Marshall v. Eighth Judicial Dist. Ct.*, 128 Nev. 915, 381 P.3d 637, 2012 WL 2366435 (2012) in purported violation of NRAP 36(c)(3). *See* Opp'n at 11:24-12:12:9. Because NRAP 36 is a rule of appellate procedure, not civil procedure, its application here is questionable. That said, Respondents acknowledged that *Marshall* is unpublished and not precedential. *See* Resp. Objections at 12:19-13:2. Respondents addressed *Marshall* because the Discovery Commissioner raised it *sua sponte* during the August 29 hearing. *See id.*, Ex. 1 at 31:9-18. They did so, moreover, only to make the point that the opinion did not resolve the application of the fiduciary exception one way or the other. *See id.* at 13:2-10. Despite Petitioner's attempt to cherry-pick language from the opinion to suggest that the Nevada Supreme Court "impl[ied] a fiduciary exception applies to a trustee," *see* Opp'n at 12:6-9, the plain language of *Marshall* makes clear this issue remains unresolved in Nevada.[4]

[4] Equally off-base is Petitioner's nonsensical proposition that the parties' briefing of the fiduciary exception in connection with accountant Dan Gerety in February 2018 somehow means that Respondents had notice this was a contested issue six months later when briefing the altogether different issue of Lubbers' notes. *See* Opp'n at 12:11-16. Petitioner filed his Motion for Determination of Privilege Designation on July 13, 2018 (on file), ***which is devoid of any legal argument about the fiduciary exception applying to Lubbers' notes***. Though Petitioner made a passing reference to the fiduciary exception in his reply, *see id.* at 16:5-15, it was for a general

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1. This Court's prior rulings addressing the fiduciary exception are not precedential or law of the case in this action.

Petitioner argues that this Court has "recognized" the fiduciary exception to the attorney-client privilege on "repeated occasions" and has applied *Riggs Nat'l Bank v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976) "in multiple cases." *See* Opp'n 11:23; 13:4-5; 13:8-9; and 15:13-16. The undersigned was not involved in those cases and, thus, cannot comment one way or the other as to the accuracy of Petitioner's representations on these points.

Assuming, for present purposes, that the Court has applied the fiduciary exception in other actions, Respondents presume the Court reached those rulings based on the facts unique to the respective cases at issue. For example, a finding in a particular case that a trust beneficiary is permitted to obtain ***certain*** legal opinions a trustee commissioned in connection with trust administration matters, would not automatically justify the disclosure of ***all*** attorney-trustee communications on trust administration issues. Nor would such a ruling justify the disclosure of notes a trustee prepared to aid communications with counsel for his own protection. In other words, facts matter. Petitioner cannot import the fiduciary exception into this action simply because the Court has purportedly applied it in different district court cases involving different parties in different factual situations.

Besides the innumerable factual distinctions between the many cases on this Court's docket (both past and present), the sweep of this Court's rulings in other cases is also limited by the law

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point and still lacked any analysis of the exception in the context of Lubbers' notes. Of course, raising a matter for the first time in reply does not constitute proper notice. *See Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 671 n.7, 262 P.3d 705, 715 n.7 (2011) (issue raised for first time in reply would not be considered as opposing party did not have fair opportunity to respond). In short, there is nothing "misleading" about Respondents' contention that their Objections provided the first substantive opportunity to address the Discovery Commissioner's *sua sponte* invocation of the fiduciary exception to justify the production of Lubbers' protected notes.

of the case doctrine, which "provides that when an appellate court decides a principle or rule of law, that decision governs the same issues in subsequent proceedings in that case." *Dictor v. Creative Mgmt. Servs., LLC*, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010). With all due respect to this Court's prior decisions, "only appellate court decisions may constitute law of the case." *McKague v. Whitley*, 112 Nev. 159, 166, 912 P.2d 255, 259 (1996). If a district court's prior decisions in the ***same*** action do not constitute law of the case, then Petitioner's attempt to use this Court's earlier decisions in ***different*** actions to justify application of the fiduciary exception here is even further afield.

2. The Court cannot create judicial exceptions to Nevada's statutory attorney-client privilege.

Respondents explained in their Objections that any determination to adopt the fiduciary exception to Nevada's attorney-client privilege must be made by the legislature, not the courts, *see* Resp. Objections at 10:17-13:10, as the privilege and its exceptions are creatures of statute, not common law. *See id.*; *see also* NRS 49.095; NRS 49.115. The Nevada Supreme Court has expressly recognized that it cannot enlarge or narrow statutory privileges by judicial fiat. *See id.* (analyzing *State ex rel. Tidvall v. Eighth Judicial Dist. Ct.*, 91 Nev. 520, 539 P.2d 456 (1975)); *see also Mitchell v. Eighth Judicial Dist. Ct.*, 131 Nev. Adv. Op. 21, 359 P.3d 1096, 1100-01 (2015) ("[W]e cannot enlarge the doctor-patient privilege by judicially narrowing one of its principal exceptions without running afoul of NRS 49.015, which constrains nonconstitutional privileges to those the Legislature has authorized."); *cf. Rogers v. State*, 127 Nev. 323, 326-27, 255 P.3d 1264, 1266 (2011) (because doctor-patient privilege did not exist at common law, "[i]ts existence and scope depend on statute.").

Claiming that Respondents have a "fundamental misunderstanding" of the fiduciary exception, *see* Opp'n at 15:2-3, Petitioner hopes to evade the above authorities by arguing that

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the term "fiduciary exception" is a "misnomer" as it is not really an exception to the attorney-client privilege at all. *See id.* at 15:4-16:10. According to Petitioner, "the fiduciary exception is better described ***as a definition of who falls within the class that is protected by the privilege*** than an actual exception to the same." *Id.* at 15:11-12 (emphasis added). Respectfully, it is Petitioner who has a fundamental misunderstanding of how privileges work in Nevada.

To begin, the reasoning upon which Petitioner bases his "misnomer" theory—*i.e.*, that the beneficiary, not the trustee, is the "real client"—comes from three cases decided outside the context of a statutory attorney-client privilege. *Riggs, supra* was decided in 1976 before Delaware codified the attorney-client privilege and its exceptions. 355 A.2d at 713 ("Attorney client privilege is established in Delaware, not by statute but by application of common law principles[.]") (quotation omitted); *but see* D.R.E. 502 (subsequently codifying attorney-client privilege and its exceptions).[5] The other two cases Petitioner cites for this proposition are premised on federal law which, like *Riggs*, draws its privilege jurisprudence from the common law unless the Constitution or a federal statute provides otherwise. *See* Opp'n at 15:19-24 and nn. 28-29 (citing *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 131 S.Ct. 2313 (2011) and *United States v. Mett*, 178 F.3d 1058 (9th Cir. 1999)); *see also* FRE 501 ("The common law

[5] The Delaware legislature has enacted additional legislation that significantly undercuts the remaining scope of *Riggs*. *See* 12 Del.C § 3333 ("[a] fiduciary may retain counsel in connection with any matter that is ***or might reasonably be believed to be one*** that will become the subject of or related to a claim against the fiduciary, and the payment of counsel fees and related expenses from the fund with respect to which the fiduciary acts as such ***shall not cause the fiduciary to waive or to be deemed to have waived any right or privilege including, without limitation, the attorney-client privilege even if the communications with counsel had the effect of guiding the fiduciary in the performance of fiduciary duties***.") (emphases added). Thus, the *Riggs* court's emphasis on the use of trust assets to pay counsel as being a "significant factor" for identifying the "real client," *see* 355 A.2d at 712, no longer appears to be good law in Delaware.

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. . . governs a claim of privilege[.]").[6]

The "real client" justification for the fiduciary exception is, moreover, directly at odds with Nevada law. The Nevada legislature has already defined who qualifies as a "client" in the context of the attorney-client privilege. *See* NRS 49.045 ("'Client" means a person, including a public officer, corporation, association or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer."). Scott plainly does not meet this definition in the context of Lubbers' notes as LHLGB never provided any services to him, and Scott never consulted with the firm. Scott was instead represented by SDF, and it was that firm that filed the Initial Petition on his behalf in September 2013. Only then did Lubbers retain his own counsel, LHLGB, to assist him in responding to the Initial Petition.

Simply put, none of the relevant statutes make any mention of trust beneficiaries being the "real client" when a trustee consults counsel. Just the opposite is true. NRS 162.310(1) expressly provides that attorneys for trustees do not, solely because of that attorney-client relationship, owe fiduciary duties to beneficiaries. *See In re Laprade Family Trust*, 2016 WL 1204540, at *1, n.1 (Mar. 25, 2016) (explaining that NRS 162.310 was enacted in direct response to *Charleson v. Hardesty*, 108 Nev. 878, 839 P.2d 1303 (1992)). Under Nevada law, then, Petitioner's rationale that a trustee is not the "real client" and nothing but a proxy for the beneficiary is wholly without merit.

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[6] Petitioner fails to disclose to the Court that the portion of *Apache Nation* he relies upon for his "real client" theory is taken from the dissenting opinion. *See* Opp'n at 15:23-24 and n.25 (citing *Apache Nation*, 131 S.Ct. at 2333 but omitting (Sotamayor, J., dissenting)). Notably, the majority in *Apache Nation* actually held that "the common law of trusts does not override the specific trust-creating statutes and regulations that apply here." *Id.* at 564 U.S. at 185, 131 S.Ct. at 2330 (rejecting application of fiduciary exception to the government's administration of Indian trusts).

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Petitioner's novel attempt to justify adoption of the fiduciary exception in Nevada by trying to recast it from an "exception" to merely a "***definition*** of who falls within" the protected class likewise falls flat. As set forth above, the Nevada legislature has already defined by statute who falls within the protected class of "client." And the Nevada Supreme Court has expressly rejected efforts to expand statutory privilege definitions based on common law principles or policy arguments. *See, e.g., Rogers*, 127 Nev. 323, 255 P.3d 1264.

In *Rogers*, the defendant sought reversal of his conviction on grounds the district court improperly admitted statements he made to an emergency medical technician (EMT) while being transported to the hospital from an accident scene, arguing that the statements should have been excluded under the doctor-patient privilege codified in NRS 49.225. *Id.* at 325-26, 255 P.3d at 1265-66. The *Rogers* court began by observing that the "existence ***and scope***" of the doctor-patient privilege "depend on statute." *Id.* at 326, 255 P.3d at 1266 (emphasis added). It then noted that the statute's key terms—doctor, patient, and confidential communication—each "has a specific, given definition" and that the definition of "doctor" did not include EMTs or paramedics. *Id.* at 326-27, 255 P.3d at 1266. Despite the defendant's policy arguments to justify the extension of the doctor-patient privilege to first responders, the Nevada Supreme Court concluded that "the doctor-patient privilege in NRS 49.225 does not apply to communications between an EMT or paramedic and patient when those communications do not occur in the presence, or at the direction of ***a doctor, as defined in NRS 49.215(2)***." *Id.* at 327-28, 255 P.3d at 1267 (emphasis added).

The same reasoning applies here. The existence and scope of Nevada's attorney-client privilege and its exceptions depend on statute. *See* NRS 49.095; NRS 49.115. Each of the privilege's key terms are likewise defined by statute. *See* NRS 49.035-49.085. Regardless of what Petitioner wants to label the fiduciary exception—*e.g.*, an "exception," a "definition," or a

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"class identifier"—Nevada's courts are not permitted to narrow the scope of the attorney-client privilege by judicially expanding the definition of "client" or increasing the limited number of exceptions recognized by the Legislature. *See Mitchell*, 359 P.3d at 1100-01 ("[W]e cannot enlarge the doctor-patient privilege by judicially narrowing one of its principal exceptions[.]"). Indeed, if a fiduciary's disclosure obligations to the beneficiary trumped his right to engage in privileged communications with counsel, fundamental fairness would require notice of this fact in advance. The Legislature has never provided such notice. Its silence is telling.

3. Most states to consider the issue have rejected the fiduciary exception.

Relying on *Riggs* and scattered cases from New York, the District of Columbia, and Arkansas, Petitioner proclaims that in "most of the jurisdictions in which this question has arisen [*i.e.*, application of the fiduciary exception], courts have given the trustee's reporting duties precedence over the attorney-client privilege." *See* Opp'n at 13:6-7 and n.25. Not exactly. The reality is that most states to consider the issue in the wake of *Riggs* have outright rejected the fiduciary exception to the attorney-client privilege.[7] For its part, New York has passed legislation

[7] *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."); *Hubbel v. Ratcliffe*, 2010 WL 4885631, *5-6 (Conn. Super Ct. Nov. 8, 2010) ("An exception to the attorney-client privilege is not warranted. . . . Accordingly, the claimed fiduciary exception to the attorney-client privilege is not applicable here."); Hawaii R. Probate 42(a) ("An attorney employed by a fiduciary for an estate, guardianship, or trust represents the fiduciary as client as defined in Rule 503(a) of the Hawaii Rules of Evidence and shall have all the rights, privileges, and obligations of the attorney-client relationship with the fiduciary insofar as the fiduciary is acting in a fiduciary role for the benefit of one or more beneficiaries or a ward"); *Garvy v. Seyfarth Shaw LLP*, 966 N.E.2d 523 (Ill. App. Ct. 2012) ("Illinois has not adopted the fiduciary-exception to the attorney-client privilege. . . . [and] [t]he cases relied on by [plaintiff] and the circuit court do not persuade us to create new law in Illinois by adopting it here."); *Opus Corp v. Int'l Business Machines Corp.*, 956 F. Supp. 1503 (D. Minn 1996) (applying Minnesota law and rejecting fiduciary exception in partnership context); *Murphy v. Gorman*, 271 F.R.D. 296, 305 (D.N.M. 2010) (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

since the time *Hoopes v. Carota* was decided that raises questions about the scope of any remaining fiduciary exception in New York. *See* NY CPLR § 4503(a)(2)(A)(ii) (2016) ("The existence of a fiduciary relationship between the personal representative and a beneficiary of the estate does not by itself constitute or give rise to any waiver of the privilege for confidential communications made in the course of professional employment between the attorney or his or her employee and the personal representative who is the client."). The Delaware legislature, as set forth above, has done the same since *Riggs* was decided. *See supra* at n.5.

In addition to the inability of courts to adopt common law exceptions in the face of statutorily-enacted privileges, a variety of public policy considerations also favor rejection of the fiduciary exception. First, the exception would discourage trustees from seeking legal advice if they knew their communications with counsel would not remain confidential:

> The attorney-client privilege serves the same important purpose in the trustee-attorney relationship as it does in other attorney-client relationships. A trustee must be able to consult freely with his or her attorney to obtain the best possible legal guidance. Without the privilege, trustees might be inclined to forsake legal advice, thus adversely affecting the trust, as disappointed beneficiaries could later pore over the attorney-client communications in second guessing the trustee's actions.

Constitution or the New Mexico Rules of Evidence"); Ohio Rev. Code Ann. § 5815.16; *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 326 P.3d 1181, 1195 (Or. 2014) (*en banc*) (concluding that "OEC 503(4) was intended as a complete enumeration of the exceptions to the attorney-client privilege. Insofar as that list does not include a 'fiduciary exception,' that exception does not exist in Oregon."); S.C. Code Ann. § 62-1-110 (2014) ("Whenever an attorney-client relationship exists between a lawyer and a fiduciary, communications between the lawyer and the fiduciary shall be subject to the attorney-client privilege unless waived by the fiduciary, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. The existence of a fiduciary relationship between a fiduciary and a beneficiary does not constitute or give rise to any waiver of the privilege for communications between the lawyer and the fiduciary."); *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."); *Batt v. Manchester Oaks Homeowners Ass'n, Inc.*, 2010 WL 7371240, *3-4 (Va. Cir. Ct. July 6, 2010) (declining to adopt Fiduciary-Beneficiary Exception to attorney-client privilege).

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> Alternatively, trustees might feel compelled to blindly follow counsel's advice, ignoring their own judgment and experience.

Huie, 922 S.W.2d at 924-25. Even the cases relied upon by Petitioner recognize this as one danger of an expansive fiduciary exception. *See Mett*, 178 F.3d at 1065 ("an uncertain attorney-client privilege will likely result in [ ] trustees shying away from legal advice regarding the performance of their duties."). This is not in the best interests of beneficiaries as they should prefer "well-counseled trustees who clearly understand their duties." *Id.*

Second, attorneys representing trustees would be reluctant to provide the full and frank advice that is essential to the proper functioning of the attorney-client privilege if they knew the beneficiary could ultimately use that advice against the Trustee. Attorneys would instead be inclined to provide hedged advice given the likelihood it may be disclosed to the beneficiary and thereafter weaponized. This lowers the quality of the advice received by the trustee and, again, only hurts the beneficiary in the end. Of course, "a trustee's fear that her lawyer will be used against her may well translate into [ ] an unwillingness to serve at all[,]" *Mett*, 178 F.3d at 1065, thereby having the anomalous effect of diminishing the number of qualified individuals and institutions available to serve as trustees in the first place.

Finally, recognition of the fiduciary exception in Nevada will burden judicial resources by vastly increasing the need for *in camera* review to determine whether trustee-attorney communications relate to trust administration (which may, in certain cases, be subject to production under the exception) or the trustee's own protection (which would not). This line, however, is often blurred. The *Mett* case, relied upon by Petitioner, recognized the dilemma: "this view of the fiduciary exception threatens to swallow the entirety of the attorney-client privilege for [ ] trustees. After all, any advice concerning [a trust] could be construed as relating, at least indirectly, to the administration of the [trust]." 178 F.3d at 1065. Given the lack of a bright line

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between distinguishing what is a protected communication and what is not, adoption of the fiduciary exception threatens to mire the district courts in endless discovery disputes. And because those disputes revolve around the issue of privileged communications, they will often be the subject of actual or attempted writ review, thus fostering yet more delay and uncertainty.

4. NRS 49.115(5) has zero application to this case.

Relying on the Discovery Commissioner's finding in another case (*Steiner*) and this Court's apparent affirmation thereof, Petitioner contends that the exception to the attorney-client privilege embodied in NRS 49.115(5) also justifies the production of Lubbers' notes. *See* Opp'n at 17:12-19:8. The argument fails for multiples reasons. Again, decisions in other cases are not precedent or law of the case in this matter. Petitioner, moreover, continues to ignore the plain language of the statute, which requires him to have been an actual client of LHLGB by retaining or consulting the firm in common with Lubbers. *See* NRS 49.115(5); *see also* Resp. Objections at 13:11-14:10. That never occurred. Lastly, Petitioner's refrain that Lubbers was consulting LHLGB for Scott's benefit—which is wrong for reasons set forth below—fails to transform Scott into a client of the firm. *See* NRS 162.310(1). Whether the Discovery Commissioner and Petitioner view NRS 49.115(5) as an adjunct to the fiduciary exception or an alternative thereto, it provides no support for the production of Lubbers' notes.

D. Even if It Existed in Nevada, Petitioner Has Not Satisfied His Burden of Demonstrating the Fiduciary Exception Applies Here.

Respondents have explained in detail that even if the fiduciary exception exists in Nevada, it would not apply to Lubbers' notes. *See* Resp. Objections at 14:11-17:4. Unlike the threshold issue of establishing whether the attorney-client privilege applies to a particular communication, for which Respondents bear the burden, it is Petitioner who bears the burden of establishing that the fiduciary exception applies to a given communication. *See Mennen v. Wilmington Trust Co.*,

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2013 WL 4083852, at *4 (Del. Ch. July 25, 2013) ("the Beneficiaries bear the burden of showing that *Riggs* applies to each of the categories of documents they seek to compel."); *Mett*, 178 F.3d at 1064 (imposing burden on government to establish fiduciary exception applied to three memoranda prepared by counsel for defendant trustees). He has not come close to doing so.

Petitioner's justification for the application of *Riggs* and the fiduciary exception to Lubbers' notes is by now familiar—*i.e.*, the Initial Petition only sought an inventory, accounting and valuation, it did not assert any claims against Lubbers, the allegations of wrongdoing were only directed at the Canarellis, *et cetera*. *See* Opp'n at 16:11-17:11. Scott, thus, argues that Lubbers' consultation with LHLGB must have been for trust administration purposes. *See id.* Respondents have already demonstrated how Petitioner's revisionist characterization of the Initial Petition contradicts the established record. *See* Resp. Objections at 15:6-16:2 and n.8. They have also set forth the totality of facts demonstrating that Lubbers reasonably anticipated litigation with Scott at the time he prepared his notes such that his consultation with LHLGB in October 2013 was clearly for his own protection, not trust administration. *See id.* at 16:3-16. But even if Petitioner's strained arguments were supported by the facts, they still would not justify application of the fiduciary exception here.

For starters, "[p]ending litigation against the trustee is not [ ] a prerequisite to finding that the trustee had a legitimate personal interest in legal advice. That determination must be made in light of all the facts at hand." *Mennen*, 2013 WL 4083852, at *5. Here, of course, Scott had already filed the Initial Petition which, whether he wants to admit it or not, alleged that Lubbers had breached his fiduciary duties as Family Trustee.

That the Initial Petition sought other relief arguably administrative in nature is likewise inapposite. As *Mett* has recognized "any legal advice concerning [a trust] could be construed as relating, at least indirectly, to administration[.]" 176 F.3d at 1065. That does not mean, however,

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that all trustee-attorney communications are fair game just because they may relate to trust administration. When a trustee "seeks legal advice for his own protection, the legal fiction of 'trustee as representative of the beneficiaries' is dispelled, ***notwithstanding the fact that the legal advice may relate to the trustee's administration of the trust***." *Id.* (emphasis added).

Respondents submit the contents of Lubbers' notes and the surrounding facts make clear that Lubbers consulted LHLGB for his own protection. Even if this was a close call, and it is not, any doubt must nonetheless be resolved in Respondents' favor. The *Mett* opinion addressed this issue as well: "most importantly, where attorney-client privilege is concerned, hard cases should be resolved in favor of the privilege, not in favor of disclosure." 176 F.3d at 1065 ("an uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.") (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393, 101 S.Ct. 677, 684 (1981)).

E. Respondents Have Not Waived Any Privilege or Protection that Applies to Lubbers' Notes.

Petitioner contends that Respondents waived any privilege over Lubbers' notes because they were allegedly in the possession of a third-party, AWDI. *See* Opp'n at 19:9-15. Respondents have addressed this issue previously, *see* Resp. Opp'n to Pet. Objections at 28:2-33:8, and will not repeat their arguments here.

F. Scott Is Not Entitled to Lubbers' Notes Based on Substantial or Compelling Need.

Scott seeks production of Lubbers' notes on the basis he has demonstrated "substantial need" to obtain ordinary work product and "compelling need" to obtain opinion work product (although he disputes that any of Lubbers' notes comprise opinion work product). *See* Opp'n at 19:16-24:18. Because the Group 1 Notes are protected by the attorney-client privilege, Scott's arguments are irrelevant. As it relates to the work product protection over the Group 1 and Group

2 Notes, Scott's overreaching establishes the lack of any substantial need.

The Discovery Commissioner properly found that the Group 1 Notes (*i.e.*, RESP0013284-85) are protected by the attorney-client privilege. That finding renders a discussion of substantial or compelling need beside the point as these principles do not apply in the context of privileged communications. *See, e.g., Gruss v. Zwirn*, 276 F.R.D. 115, 131 (S.D.N.Y. 2011) ("since any factual material contained in the interview notes and summaries at issue in this case is protected by the attorney-client privilege, plaintiff's showing of substantial need as to those portions of the interview notes and summaries is ultimately irrelevant."), *rev'd in part*, 2013 WL 3481350 (S.D.N.Y. July 10, 2013); *Salvation Army v. Bryson*, 273 P.3d 6546, 660 (Ariz. Ct. App. 2012) (in contrast to the work product doctrine, "a claim of attorney-client privilege makes a discussion of substantial need and unavailability of the substantial equivalent irrelevant. Rule 26(b)(1) recognizes that privileged material is not discoverable.") (quotations omitted).[8]

Setting aside the privileged nature of the Group 1 Notes, Scott has nonetheless failed to show compelling or substantial need to overcome the work product protection that applies to both the Group 1 and Group 2 Notes. Compelling need to obtain opinion work product exists in very rare circumstances, and is limited to where counsel's mental impressions are at issue or counsel is testifying as an expert witness. *See* Resp. Objections at 18:3-19. Neither applies here. Scott instead argues that a party can only create ordinary work product, not opinion work product, such

[8] *See also, Wynn Resorts, Limited v. Eighth Judicial Dist. Ct.*, 399 P.3d 334, 341 (Nev. 2017) ("Mere facts are not privileged, but communications about facts in order to obtain legal advice are."); *Wardleigh v. Second Judicial Dist. Ct.*, 111 Nev. 345, 352, 891 P.2d 1180, 1184 (1995) (same); *Upjohn*, 449 U.S. at 395-96, 101 S.Ct. at 685-86 ("The protection of the privilege extends only to communications and not to facts. ***A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?'*** but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.") (emphasis added) (quotations omitted).

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that the compelling need standard does not apply to Lubbers' mental impressions contained in the notes. Several courts have, however, disagreed with Petitioner's cramped view on this issue.[9]

As for substantial need, Petitioner recounts a laundry-list of facts that Lubbers purportedly could have testified to but for his untimely death. *See* Opp'n at 23:21-24:18. Petitioner's overreaching is his undoing as the "vast range" of issues he identifies extend well-beyond the actual subject matter reflected in Lubbers' notes. The principle of substantial need, by its terms, applies only when a party is unable to obtain the "substantial equivalent ***of the materials*** by other means." *See* NRCP 26(b)(3) (emphasis added). Because the materials at issue here do not encompass the seven categories of issues upon which Petitioner claims the need for discovery, the principle of substantial need cannot be used to compel production.

G. *In Camera* Review.

Petitioner devotes nearly two pages of his Opposition to defending this Court's ability to review Lubbers' notes *in camera*. *See* Opp'n at 24:19-26:9. In so doing, he attacks an argument never presented as Respondents do not contend the Court lacks authority to review potentially privileged documents *in camera* or that it is incapable of rendering an "unbiased ruling." As officers of the Court, Respondents' counsel simply alerted Her Honor in advance that the notes at issue reflect, in part, Lubbers' opinions as to how the Court may view this case. Because the Court is the trier of fact in this action, Respondents believe it should be permitted the opportunity

[9] *See, e.g., Duplan Corp v. Deering Milliken, Inc.*, 540 F.2d 1215, 1219 (4th Cir. 1976) ("[O]pinion work product immunity now applies equally to lawyers and non-lawyers alike."); *Nicholas v. Bituminous Cas. Corp.*, 235 F.R.D. 325, 332 (N.D.W.Va. 2006) ("The key issue, thus, in this case is whether mental impressions, conclusions and opinions were documented by either a lawyer or nonlawyer 'in anticipation of litigation.'"); *Massachusetts Eye and Ear Infirmary v. QLT Phototherapeutics, Inc.*, 2001 WL 1180694, at *2 (D.Mass. Sept. 25, 2001) ("[T]he mental impressions, opinions, or litigation theory of a party's non-attorney employee may qualify as opinion work-product when the party's non-attorney employee is acting on the party's own behalf.").

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to make an informed choice either to resolve the privilege dispute on its own, or—in the event the Court is concerned about becoming inadvertently tainted—to refer the matter to another judicial officer who will not be rendering the ultimate decision herein.

CONCLUSION

Based on the foregoing, the Court should sustain Respondents' Objections and grant the relief requested therein.

DATED this 21st day of March, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of March, 2019, I caused a true and correct copy of the foregoing **Respondents' Reply in Support of 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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