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 5 OF 7)

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DISTRICT COURT

CLARK COUNTY, NEVADA

IN THE MATTER OF THE TRUST OF: THE SCOTT LYLE GRAVES CANARELLI IRREVOCABLE TRUST DATED FEBRUARY 24, 1998,	CASE#: P-13-078912-T DEPT. XXVI

BEFORE THE HONORABLE GLORIA STURMAN,
DISTRICT COURT JUDGE
THURSDAY, APRIL 11,2019

RECORDER'S TRANSCRIPT OF PENDING MOTIONS

APPEARANCES:

For the Petitioner:	CRAIG D. FRIEDEL, ESQ. DANA A. DWIGGINS, ESQ. TESS E. JOHNSON, ESQ.
For Respondent:	JON C. WILLIAMS, ESQ. PHILIP R. ERWIN, ESQ.
For Other:	JENNIFER L. BASTER, ESQ.
For Special Administrator:	LIANE K. WAKAYAMA, ESQ.

RECORDED BY: KERRY ESPARZA, COURT RECORDER

Las Vegas, Nevada, Thursday, April 11, 2019

[Case called at 1:31 p.m.]

THE COURT: On the record in Canarelli. For just identification purposes, we'll use P-078912 as our general original case number. We'll get appearances for the record, and then I'll ask about how I should approach the arguments. So, we'll start with the Petitioners, and then we'll get the Respondents.

MS. DWIGGINS: Good afternoon, Your Honor. Dana Wiggins, Tess Johnson, and Craig Friedel on behalf of Scott Canarelli, who is also present today.

MR. WILLIAMS: Good afternoon, Your Honor. Colby Williams and Phil Erwin on behalf of Respondents.

MS. BRASTER: Good afternoon, Your Honor. Jennifer Braster on behalf of several subpoenaed sold entities, including AWH Ventures.

MS. WAKAYAMA: Good afternoon, Your Honor. Liane Wakayama appearing on behalf of Frank Martin, the special administrator of the estate of Ed Lubbers.

THE COURT: Okay. With respect to the various motions that we have on calendar, are there any that a particular counsel is here for? And once we did that one, that person can then leave, and that way, we wouldn't need to keep them here to listen to the rest of it, or is everybody pretty much going to be here for the duration?

MR. WILLIAMS: Well, I'll let Ms. Braster speak for herself,

Your Honor, she may want to get out of here. But I was going to suggest starting with the motion to compel and the motion for order to show cause, just because I think they're -- at least hopefully, they're going to be a lot shorter than the privilege objections. That, you know, may be a relative statement, but I think it would probably make sense to get those out of the way before we spend more time on the respective objections.

MS. BRASTER: And I was, Your Honor. I'm here for the subpoenaed sold entities, the motion to compel as to them. Candidly, I probably was going to stay and observe the rest. Just depending on time, I might skip out early, but that is the one that I'm only here for.

THE COURT: Okay. Thank you.

MS. BRASTER: Thank you, Your Honor.

THE COURT: And, Ms. Wakayama, as counsel for the --

MS. WAKAYAMA: I'm just appearing as co-counsel right now for one of the Respondents.

THE COURT: Okay. So, this --

MS. DWIGGINS: It's kind of a double-edged sword, Your Honor. Excuse me. Obviously, I think I tend to agree that the motion to compel is relatively short in comparison. My main concern, however, is in light of the fact that we had a special setting in front of the Discovery Commissioner, and we were barely able to complete the motion that day, I'm very --

THE COURT: Uh-huh.

MS. DWIGGINS: -- concerned as this has been pending since the end of August, or that hearing was. I think it's really critical to the

case that we get through that today, especially depending on your ruling and what the parties decide.

THE COURT: So, that's the motion to compel on the subpoenaed sold entities?

MS. DWIGGINS: No, it's the motion for determination, the objections to R&R.

THE COURT: Okay.

MS. DWIGGINS: That's the one that we had the hearing in front of the Discovery Commissioner in August. You know, if your preference is to dispose of the --

THE COURT: Uh-huh.

MS. DWIGGINS: -- other ones first because it's quicker, that's fine. I'm just very concerned with how long the other one has been sitting.

THE COURT: Okay. All right. So, let's start with the motion to compel, and the contempt motions on these -- the sold entities and the --

MS. DWIGGINS: And I guess, Your Honor, I'm not sure what your preference is. If I could argue them together?

THE COURT: They kind of seem to go together.

MS. DWIGGINS: Well, yeah, one of the arguments definitely overlaps between the both of them, so --

THE COURT: If there's no objection to that, I mean, it seems the issues sort of overlap and --

MR. ERWIN: I think Ms. Braster's issue on the motion to

compel will resolve one of the issues that's addressed in the motion for order to show cause, whereas the motion for order to show cause has a couple extra. There's no need to address --

THE COURT: Okay. So, let's -- if Ms. Dwiggins wants to start with that one, then she can cover both of them, and you can respond separately to the two others. To me, they did seem to sort of -- there seems to sort of be some bleeding over into one another.

MS. DWIGGINS: Perfect, Your Honor.

THE COURT: Okay. So, we'll start then on the motion to compel.

MS. DWIGGINS: Thank you, Your Honor.

THE COURT: Well, sold entities is what I called it in my note.

MS. DWIGGINS: So, Your Honor, we initially had a motion to compel in front of the Discovery Commissioner. We had multiple, but I think it was heard back in July. And one of the things that was mentioned during that time was what information was given -- financial information was given to CB&T Bank. During the hearing, we were talking about the 2013 finance, but I think the initial discovery that was subject to discussion was broader.

Notwithstanding, I went ahead, and I subpoenaed the PMK for CB&T Bank. Since they are located out of state, we had a lot going on in the case, the fees were obviously being accrued substantially, that I proposed just having a conference call with the gentleman, and we subsequently scheduled that as a preliminary matter, and both Mr. Williams and Ms. Braster participated on it.

Mr. Weyers went through a series of documents that were provided to him by "The America West Group", which is kind of just an umbrella of --

THE COURT: Mr. Weyers is the banker, and that's W --

MS. DWIGGINS: Correct.

THE COURT: W-E-Y-E-R-S?

MS. DWIGGINS: Yes.

THE COURT: Mr. Weyers.

MS. DWIGGINS: Just like Meyers, but a W instead.

Significantly what he said was provided to him were basically three main documents, which is what resulted in the subsequent subpoena to the sold entities, as well as similar requests to the Respondents for those entities that had been dissolves. And they were the cash positions of the entities, that was projected forwarded. It was projections of the sales, and then it was a monthly report on the sales.

And these reports were provided by The America West Group to CB&T Bank, roughly in June of 2013, and I think one of them was in July of 2013, which as -- just to refresh your memory, the sale or the purchase agreement was signed on May 31st, 2013, and was retroactive back to March 31st. So, these documents were provided to them shortly thereafter.

We, thereafter, got into a dispute, which kind of leads to the order to show cause as to whether or not this cash report, the projections, and the monthly sales reports fall within the definition of a

business plan, that Your Honor, if you recall, on an objection from an R&R, you ordered that they do produce business plans, being the Respondents.

Thereafter, we sent the subpoena out that's subject to the hearing today, and we went very broad, very specific and very broad, so to speak, but it still all focuses really around those three documents being key. The cash report, the monthly sales report, as well as the projections, which by the way, Mr. Weyers had said projected the finances through the first quarter of 2015, so a little over a year-and-a-half.

We specifically asked that -- and this is significant only in regards to their opposition, because their opposition seeks to really narrow the issue before you, and then they try to dispose of it, except our subpoena wasn't as broad as -- or our -- excuse me -- subpoena was a lot broader than they state it was.

We asked for any cash positions and drafts thereof prepared in part or in full during the period of January 31st, 2013, to October 31st, 2013, which relate to you in any manner whatsoever, directly or indirectly, and irrespective of whether or not such documents were maintained internally or provided by you or The America West Group, or any of the borrowers on your behalf to CB&T Bank, or any other third-party.

So, we basically just asked for, if it exists in whole or in part, created during that period of time, give it to us. They, needless to say, objected, and in their response or opposition to the motion to compel,

they fine tune and only focus on what was provided to Mr. Weyers, and in that regard, they specifically contend, oh, well the stuff that we gave him that he referred to on the call in June and July of 2013, that wasn't in connection with the 2013 loan refinance. It was in connection with the requirements under the 2009 loan that was then in existence, and for compliance purposes, we provided it. Okay.

Well, based upon what I just read, and the requests are very similar with respect to the monthly reports or sales reports, and the financial projections, our response or our request wasn't limited to what was given to the bank. So, therefore, I think on its face, their objection fails.

And we further brought up that again, this all stemmed from the motion that was in front of the Discovery Commissioner back in, I believe it was July, in which -- and we quoted it on our brief -- Ms. Braster represented that no financial information was provided to the bank in connection with the '13 refinance because of the relationship, and I mentioned I found that hard to believe. You're refinancing a multi-hundred million dollar line of credit, and that was what was stated.

And come to find out, obviously, Mr. Weyers states that there was information provided, and this is where, I think, there is complete gamesmanship, yet again, and they try and split hairs and say, well, I didn't misspeak or misrepresent anything to the Court because he was given information, but it was in connection to the one loan and not the other, even though our discovery request would've encompassed both, even though our subpoenas that we issued, I think, in January or

December, whenever it was this year, encompassed both. In fact, it went beyond that and said it doesn't even matter if you gave it to anybody.

So, since we know these documents exist, because they were given to the bank, and they acknowledge they were given to the bank, they're clearly responsive to our request, and I think they're withholding them in bad faith, which goes over to their second argument, which is, well, these weren't broken down by entity. We just put them all together, and there's no underlining documentation.

Well, that's problematic for a couple of reasons, Your Honor. First of all -- and, I guess, let me just back up one second, because what's significant to these documents is the fact that this cashflow analysis that was provided to them, be in the bank, in June or July of 2013, specifically took in account this purchase agreement, and despite the fact distributions weren't allowed, that we know what the purchase agreement says, it specifically took in account the monthly interest payments that were going to be paid to the Irrevocable Trust, Scott's Irrevocable Trust, which were roughly $70,000 something a month, plus the two annual principal payments from each of the entities for $500,000 in April and October of each year, which was $2 million a year.

And the Respondents had to demonstrate to the bank that even after payment of this amount, that there was still sufficient money in order to make payment on the loan, which if Your Honor recalls, and it goes, in part again, to the whole reason why you ordered that they produce business plans, is -- the issue is, and the relevancy is what they knew at the time of the purchase agreement.

And one of the things that the entities have said or responded to or objected to, I should say, is well you don't need the projections because you got the actuals. We gave you all the financials through 2018. And I explain that that begs the question, because it isn't about what the actuals are, it's about what they knew at that time, and Your Honor clearly recognized that during the hearing that we had in front of you on the business plan.

What was their knowledge at the time What was their knowledge on what the market might potentially do, whether or not there would be cash available, because I don't need to reiterate, I think, all the terms of the purchase agreement. I think you've probably heard them enough. But, also, the fact that we do know three weeks before the purchase agreement was executed that Larry Canarelli was quoted in the paper -- in the newspaper, stating that through May 1st, already, that they had sold 280 new homes, and that had resulted in $63 million of new home closings.

Despite that, they wanted to get us out because of the lack of liquidity, the risk of the market, and they wouldn't be able to meet Scott's demands for cash, which was roughly $6,000 to $10,000 a month. So again, going back to the relevancy and what they knew at that time, these reports I think are critical to that issue. They're directly relevant, and they're material, and I think the fact that it might include other entities, that's not our problem, Your Honor.

If that's the way they chose to create their reports, they can't avoid producing them because it contains information in addition to our

entities. The fact of the matter is, is it includes our entities. They are part of each one of those reports, the cash flow statements, the projections, and the monthly sales report.

And, you know, we could probably go back and forth until we're blue in the face, but they're adamant that there's no underlying data. All they have are these combined projections. Well, that, to me, defines logic. I mean, we know that they have a consolidated financial statement that has a summary of the whole America West Group that shows what the entire group is worth, and then as attachments, you have each one of the individual entities.

I would think, and logic tells you that a cash flow statement, or a projection, or a sales report, has to work in a similar manner. How could you project your cash flow without taking into account what properties you have and what entity, what stage they are in building, whether or not you have sales under contract. And the fact that, again, to me, the information has to exist, but even if it doesn't, to me, it doesn't matter because our information is contained within those reports, and if they don't have a way to segregate it out, that's their problem, not ours, because I recall you mentioning in a prior hearing that the way they conduct business might have been fine and dandy while they were all a happy family, but once he got bought out, they had duties and what not, and you can't just continue doing business the same way, and say sorry, you're not entitled to anything.

So, they do not dispute that our information, being the purchased entity's information, is contained within each one of those

reports. Their objection is because it includes other entities in addition to those, and they're all combined, you don't get any of it. And I don't think that's what the law is, Your Honor, because again, it's not the actual numbers that matter to us. It's what they knew at the time.

So, if you look at those cash flow statements, and they're projecting an increase, or their financial projections include increases, or their sales are going up based upon their reports, that shows their knowledge. It doesn't really matter at the end of the day what those number are. It matters whether or not there's a decrease, an increase, or they remain stagnant, because that goes to their direct knowledge, and that's why we're entitled to that information. It is directly relevant to what they knew at the time they executed it.

And just briefly, the last arguments that are in connection specifically with the Respondents is two-fold really, and correct me if I'm wrong, but one, they said, we don't have any business plans. Well, Your Honor, we did a request for production, and they responded. Never said, no we don't have any. We filed a motion to compel in front of the Discovery Commissioner, they objected to it and never said they didn't have any. We objected to that R&R, we're in front of you, and they never opposed or never said, we do not have any. And in fact, if you give me one second, I recall -- and I can give you the portion of the transcript where you specifically state" "The objection is not whether or not the business plans exist. It's Respondents are not going to give it to you."

So, after we go through all that and Your Honor orders it, they say, oh, sorry, we don't have any. I think that's complete bad faith,

Your Honor, but then even going a step further, which to me is even worse, they sign off on the order that requires business plans, and now they say, you know what, we don't know what that means. We don't understand what you mean by business plans, so we can't produce what we don't know it means. That ship sailed, Your Honor. They had multiple times to bring that to the attention of the Court if they didn't "understand" what it meant, and they should've never signed off on an order that had language that they didn't understand.

Again, it's just complete gamesmanship. I don't know if you have any specific questions for me. I know it was kind of a lot, and I dropped them together, but --

THE COURT: Well, this isn't really a motion for a protective order, but I guess my motion is, so assuming it's correct that the type of reporting that went in, it's not possible to -- I mean, it includes things other than what you're asking for. So, I guess my question was, has there been any discussion of, well, then to the extent that there might be some information specific to some other entity that we don't have an interest in, you know, redact that. We still get the total. If there's one entity that we shouldn't have any interest in, okay, fine. Just take them out.

MS. DWIGGINS: Well, I don't think it could be redacted because they're saying it's just one lump sum number of what their cash flow is.

THE COURT: Okay.

MS. DWIGGINS: However, I did offer to allow it subject to a

protective order and confidentiality agreement.

THE COURT: Uh-huh.

MS. DWIGGINS: Again, that's the way they chose to file -- or prepare the report. Again, I find it hard to believe underlying data doesn't exist, but if you take them at their word, it doesn't matter. That information contains our information, and you cannot preclude us from receiving it just because they decided to include other information they're on, because again, the actual numbers don't matter.

It's whether or not there was an increase and what their knowledge was at the time, and there are direct claims for breach of fiduciary duty and fraud, and their actions in entering into the purchase agreement at the time they did. So, I think it could easily be done with a protective order. We already have a confidentiality agreement and protective order with respect to many documents in this case. This one should be treated no different.

THE COURT: Okay. Thank you.

MS. BRASTER: Thank you, Your Honor. I agree with Ms. Dwiggins. There's a lot here, so I'll try to hit the main points, but -- and I do just want to clarify for Your Honor, we did countermove for a protective order, so there's the counter version.

One thing I will get back to at the end of this discussion is that when I was in front of Commissioner Bulla back in July, a representative of the Court, there were no documents that were responsive that were turned over to the bank. There was the discussion, well, I find that hard to believe, back and forth, and Commissioner Bulla

said, we'll take a deposition. Okay. That's never occurred.

Just to reorient everyone, I represent eight of the sold entities. I called the subpoenaed sold entities in my effort to try to distinguish from all of the purchased entities, which is about 30. I don't represent all 30. A lot of them have been dissolved.

In addition to that, there was a loan agreement with California Bank & Trust, CB&T, as well as some other lenders. There's a 2009 loan, then there was a new loan in the end of 2013. There was also one, at one point, as part of AWDI's bankruptcy that had to be pulled out, and this is important.

That loan with CB&T was not just the sold entities, and it was not just the purchased entities. It was the American West Group, which is -- I agree, an umbrella that includes these entities, as well as other ones. I also agree that I can't just redact information. And one of the exhibits that was provided to the Court was Exhibit 17 to the motion to compel. In that is the American West Group's financial statement. And just as an example -- it's just this one sheet -- is, what I was able to do on behalf of my clients is redact other entities and produce information on my entities.

THE COURT: Well, yeah, and that was my question.

MS. BRASTER: Yeah. And trust me, Your Honor, if I could do that, I would do it --

THE COURT: Uh-huh.

MS. BRASTER: -- and we wouldn't be here today.

THE COURT: Uh-huh.

MS. BRASTER: But here's the issue is that -- in stepping back, we were served with subpoenas. I looked at these subpoenas, and there are no responsive documents. And we've been saying that since day one. This isn't new. I'm not hiding the ball here. I've been saying it since day one. There's no responsive documents.

That is all -- and to be clear, that would pertain to the loan compliance reporting, which is there's cash position statements, sales reports on the sale of homes, projections, financial statements, the financial statements we had already turned over. That was the example I just showed Your Honor. There's nothing to produce. So, literally, this is much to do about nothing.

Now, what we try to do to make this very easy for Your Honor is in my opposition, I received the declaration from Bruce Weyers after we spoke with him --

THE COURT: Uh-huh.

MS. BRASTER: -- and Mr. Weyers confirmed there's no responsive documents. That contradicts Petitioner's hunches, and candidly, all they have are hunches. Mr. Weyers stated, under penalty of perjury, that the borrowers, and importantly, it's the borrowers, not the sold entities, not the subpoenaed sold entities, the borrowers provided regular compliance reporting.

The cash position statement, contrary to what Ms. Dwiggins stated, was not on the entities, it was on the borrowers. And, again, that's important because it's not the same thing. Now, Mr. Weyers also stated that the borrowers were always in compliance with their reporting

requirements.

So, the idea that, you know, well, we can't preclude discovery because this is the way you kept the documents. Respectfully, Your Honor, when we did the loan compliance, and I say we as the American West Group, they didn't have litigation in mind. That wasn't the point of it. It was loan compliance, and they complied with that.

Also, the documentation was not broken down by purchase entity in any fashion. You have the cash report, and this is all from Mr. Weyers. Not from my client, he's a disinterested third-party here. The cash report is not broken down by entity or subdivision, because one of the things they say is well, if you have it by subdivision, just give us that.

Now, the other issue with subdivision is that within a subdivision, several entities might own lots in there. Some may be part of the purchase entities; some may not be. But even so, the cash report is not broken out by entity or subdivision. The sales report, the sale of homes, is not broken out by entity, and the projections, which is really the heart of this issue, is the relevance they're talking about, they are arguing that they're entitled to know what the Respondents thought at the time they sold Scott's interest.

That goes to -- and I agree with Ms. Dwiggins as she states -- that goes to what they thought they anticipated. We're not talking about historical, because I have produced thousands and thousands and thousands of pages of historical records in response to the other subpoenas. Those projections are not broken out by entity or subdivision. It is the borrower's projections. I can't redact -- I can't

produce that. This has to do with non-subpoenaed entities, completely unrelated to this case. There's no documents to produce.

And, importantly, Mr. Weyers also confirmed that he never recalls ever asking the borrowers for any information on the purchased entities, nor has he ever seen any records of CB&T asking the borrowers for information on the purchased entities. I didn't make any misrepresentations to this court, Your Honor. My clients didn't make any misrepresentations to this Court. There are no responsive documents to these requests.

Mr. Evans, who is the Senior Vice President of AWDI, he also confirmed Mr. Weyers' statements regarding compliance reporting, and it wasn't limited to, you know, just loan compliance and those two times in 2013, nor was it limited to the loan renegotiation, because they had the information from the compliance reporting. Every -- and don't quote me on this, it's like every quarter, every month, or every bi-annually, they would provide certain reports to that bank. That's --

THE COURT: Well, the thing with Mr. Evans, paragraph 8, he states that in both motions, Petitioner assumes that there are underlying individual financial projections, or per purchased --

MS. BRASTER: Yes.

THE COURT: -- entity, or per subdivision used to create the borrower's quarterly projections. The assumption is false, as Mr. Weyers declares, the projections are not broken out by entity or subdivision. Okay. So, what's the problem with producing the projections? I understand that they aren't going to be specific, and so I guess is the

objection just that it won't lead them to any kind of discoverable evidence, because there's nothing in there that would allow Mr. Canarelli to determine what the entities that he sold -- what the projections were for the entities that he sold.

MS. BRASTER: Your Honor, you hit the nail on the head. That's correct, because there's no part of it that's just, hey, let's just look at -- and I'm going to use Scott, just because it's -- let's just look at Scott's entities, and this is what I think are going to happen with those. That's not how they're done. It's the totality of the group, and those are the projections for the borrowers.

So, it's not as if I can even say -- and trust me, I've looked at them in trying to say, okay, well maybe there is a line for these entities that we can look at, what they think of, and whether, you know, there's commentary or whether this defies logic, how can they do it this way. Your Honor, they did it this way.

Mr. Evans would speak with Larry Canarelli. They discussed what they think the homes they want to build, the sales, what land is out there, what could be acquired, what they may already have in some entities, other entities, and put it all together and put the projections together. And that makes sense, Your Honor, for them, because if you already have an entity in existence, typically, these entities are setup to be homebuilding entities.

So, by the time you have that LLC, you already know what it's going to do. You know, they're home building LLC's, so you say, okay, I want -- Paseos is an LLC, so I'm going to build in the Paseo's. So,

you set it up, and you already know that, at that point.

So, when you're doing the projections for the bank, there's entities that have not even become into existence, and there's also entities that aren't even involved here. So, that's the issue, Your Honor, is there's no projections a specific way that I can extract it to provide it over. So, it would not get to that information. And, candidly, and I go back to what Commissioner Bulla said last July, if you don't believe it, if you think there's more there, take a deposition. Take it.

At that point -- I mean, I have my client's sworn testimony, a declaration under oath, that these don't exist, in contradiction to a hunch that documents must exist. And that's what I'm stuck with here, Your Honor, and I'm being threatened with attorney's fees when there are not documents. I can -- and I agree, I can say it until I'm blue in the face. There are not documents here that can be turned over and produced that are responsive to these subpoenas. There's other entities that are not involved in this litigation at all, not subpoenaed at all. And when we're talking about the, you know --

THE COURT: And so, I guess that's the point. Is that just something to hide behind? Oh, well, you know, there's a couple of entities in here that -- I think Mr. Weyers says in his, he thinks there were -- he remembers 45 entities, and there were 35 of which were the purchased entities. Okay. So, there were five to 10 that weren't.

MS. BRASTER: Uh-huh.

THE COURT: So --

MS. BRASTER: And I only represent eight of those. I

apologize. I didn't mean to interrupt, Your Honor.

THE COURT: Yeah. So, my question is, so what? Why would we not be producing all of this information? It may not get them anywhere. It may be so much information that it's useless to them because it's not going to tell them, specifically, as to any of the sold entities, but why are we saying that because there's -- just because there's information in here that goes to other entities, we can't produce it. Why?

MS. BRASTER: Because these entities have nothing to do with this litigation, Your Honor.

THE COURT: Okay.

MS. BRASTER: So, it doesn't pass the first element of whether it's discoverable. These entities are not at all involved in this case.

THE COURT: No, no. The first element of whether it's discoverable, is it likely to lead to the discovery of admissible evidence.

MS. BRASTER: Correct.

THE COURT: So, why wouldn't that lead to the discovery of admissible evidence then? It may be, as you say, it's too much information, but if they have the information, and then they go through a deposition, and they ask is it possible to extrapolate, and whoever it is that's testifying goes, it really isn't, because this was run as one huge operation, and you know -- but somewhere down the line for accounting purposes, for tax purposes, they had to have somewhere along the line managed somehow to account for what each entity was worth.

MS. BRASTER: And you're absolutely correct, Your Honor.

THE COURT: So --

MS. BRASTER: And they have that. All of the historical information, the actual -- the tangible numbers for each of these entities have been turned over, and they've had it for months. For each of my clients, and it looks like even the dissolved entities.

THE COURT: Uh-huh.

MS. BRASTER: The Respondents -- even though these dissolved entities don't exist, worked it out, so we're not before Your Honor. We produced all of the historical income statements, balance sheets, the general ledgers, the trial balances, the journal entries from 2012 to the end of, I want to say, October 2018. They have all those numbers. All of them.

THE COURT: Uh-huh.

MS. BRASTER: They've all been turned over, because we can, and we did pull that out by entity. What you can't do it for is the projections, and that just does not exist. So, if they want to ask Larry or if they want to ask Mr. Evans or whomever, what did you think was going to happen with Scott's entity --

THE COURT: Because it's not a tangible --

MS. BRASTER: -- they can do that.

THE COURT: -- like actual -- this much money came in on this house that was sold in this location, which is owned by this entity. That you can trace because it's real.

MS. BRASTER: Correct, Your Honor.

THE COURT: This projection is just a projection.

MS. BRASTER: Correct. For the global group, because that's how the group is run. It's not as if we're going to look at it one way or -- because, again, the entities may not be in existence at that point in time. So, how is that going to be, you know, relevant to a claim or defense when it's not even specific to any of the entities that are even -- touched this litigation. That's the issue here, and that's why it's not relevant. Again, if they want to take a deposition, if they want to question Larry about these, you know, these articles that talk about the increase in home building, and things like that, please do, but why would entities that are completely unrelated to this case get dragged into it.

THE COURT: Well, with all due respect, it happens all the time. Entities that aren't part of a litigation get dragged into things that are unique, but -- so, I mean, to me that's not necessarily grounds to say --

MS. BRASTER: Uh-huh.

THE COURT: -- it doesn't -- it makes it non-discoverable. It doesn't. The question is, is there going to be something that will lead to the discovery of admissible evidence. And so that's, I guess -- the question is if the projections are -- if it's relevant to know what the projections were, because that would help the Petitioner understand what it was, was offered for his entities when he was bought out, based on what the projections were, then what you're saying is, it's not going to come from this projection information, it's going to come from actually asking somebody.

MS. BRASTER: That's correct, because those projections aren't going to show that information. And that -- that's the nuts and bolts of it, Your Honor, is that it's not going to show that information for them.

THE COURT: Uh-huh.

MS. BRASTER: So, that's why it goes back to, we do not have responsive documents in response to these subpoenas --

THE COURT: Uh-huh.

MS. BRASTER: -- and that's it. And I will also add, with the respect to the idea that these -- the purchase agreement -- or excuse me, the 2013 loan at the end of the year took into account the purchase agreement, of course, it did, because it was a locked box arrangement. They had to make sure it took into consideration so those payments could be made to Scott, so I don't know where that's going. Your Honor has already protected further information on the buyers, and that's information on the buyers, so I don't know why those arguments are being made.

And, lastly, the request for attorney's fees against us I think is harassment at this point in time. I mean, we've been upfront with what they want. There are no responsive documents which is why, and this is the only time I've done it in this litigation, we've asked for attorney's fees for us because there are not responsive documents here. We have the declaration for Mr. Weyers. I have the declaration from my client at this point.

So, again, if they want to explore this through other means,

I'm not saying they are prohibited from doing so, but my clients -- and that's what we're here on, Your Honor -- is my clients, the subpoenaed sold entities, there are not information responsive to these subpoenas.

THE COURT: Okay. Thank you.

MS. BRASTER: Thank you.

MR. ERWIN: Good afternoon, Your Honor. Phil Erwin for the Respondents. I agree with Ms. Braster on the relevance of the projection, so I'm just going to deal with the issue specific to the order to show cause motion.

Just to begin with kind of a prefatory issue on the Respondent's obligation to respond, substantively respond, to objectionable discovery requests. If the Petitioner serves a discovery request that the Respondents believe is objectionable, we are not obligated to go search for documents to see if documents exist or do not exist. We are not obligated to respond at all until after those objections have been resolved. To flip it, we've put the cart before the horse.

Now, no documents exist is not an objection, Your Honor, it's a substantive response. So, I think the argument that the Respondent somehow played games by, well, not just saying we don't have business plans is not consistent with the rules of civil procedure and how discovery works.

Now, on the issue of business plan, we didn't object to that term, because we didn't believe it was vague and ambiguous. We thought everybody understood what a business plan is. I mean, I go back to my college education in business school of prepare a business

plan. What's in there? It's a compilation of a variety of different things. It's a summary. It's how is this business going to be marketed. Who's the management team? How is it going to work? Where is it going to be located? And financial -- you know, financial projections or what your budget is, that certainly forms a component of it, but one piece doesn't make the whole.

Now, a business plan is generally created to pitch a business, right? To go out and get investors, to get partners. That wasn't happening here. Larry Canarelli and Bob Evans don't need to create a business plan for a subdivision or purchased entity. Who would it even be pitched to? It would be pitched to themselves. So, we don't have business plans as we understand the term.

Now, the Petitioner has tried to rope, you know, these financial projections which we believe are irrelevant standing on their own into the definition of business plan --

THE COURT: Well, it's just the financial projections are not irrelevant. It would not be irrelevance. I said I understand the relevance. It might --

MR. ERWIN: Sure.

THE COURT: -- lead to the discovery of admissible evidence if it would assist in understanding how it was -- a value was arrived at for the sale of these entities that Mr. Canarelli had an interest in. Somebody had to place a value on them. How was that done?

MR. ERWIN: Okay. So, if you'd like me to address the --

THE COURT: And if there is no business plan, there is like no

plan for, we're going to be taking, you know, whatever entity it is, and we're going to build out that development, we've got X number of lots remaining.

MR. ERWIN: Right.

THE COURT: We anticipate we're going to build it out over the next 10 years. You know, maybe that's not a business plan like you go pitch to a bank or as a hedge fund for investment purposes, but it's a plan for how you're going to, you know, run out whatever assets there are to maximize whatever profits you can. I mean, so I guess that's my question is, is the problem that the concept of business plan doesn't apply in this particular industry, and there's a different term for it, and if it's not a business plan, and it's not a projection, what is it?

MR. ERWIN: Well --

THE COURT: I mean, just saying it is not going to --

MR. ERWIN: -- I think you're talking about a business plan of, okay, here's my subdivision, my development. Here's what it's going to be made up of, here's who's going to manage it, here's what we expect it to do. I think that sounds like a business -- you can do a business plan for any industry, so that could be a business plan in the construction industry.

THE COURT: Uh-huh.

MR. ERWIN: We don't have that. Mr. Evans submitted a declaration saying we didn't create business plans. We don't have that. Now, these financial projections that went to the bank, that doesn't equal a business plan. Just because you have one piece that would make up a

whole, you don't just get to ask for the piece when you're asking for the whole. So, I don't know what else to say other than what was just discussed is not a business plan under any sense of the word, in our view.

Now, on the relevance of it and what it can be used for, I think Ms. Braster's point about entities that aren't parties to this case is applicable, because we are under a proportionality, as well. So, I think that comes into play, especially where the Petitioner has all the historical information, but also the issue is what use is this combined figure when you can't extrapolate anything out from it. How do you know which entity is making a -- maybe one entity is making up a lion share of that projection or a greater piece. You just -- you can't tell, so how can it ever be used?

THE COURT: Okay. We're talking about the projection that I was talking about with Ms. Braster. So, the issue you were addressing was the business plan?

MR. ERWIN: Correct, but you had asked me and mentioned relevance, so I wasn't sure if you wanted me to also address that.

THE COURT: No.

MR. ERWIN: Okay. As far as business plans, I don't know what else there is to say other than we don't have any business plans.

THE COURT: Okay. That's kind of amazing to admit, but I guess --

MR. ERWIN: Well, but --

THE COURT: -- but, you know, if they've run this business

this way, successfully, obviously, for a number of years, with literally no plans, then that's really rather remarkable. And kind of startling, and I don't -- you know, the market might kind of wonder about them. If you want to go public and say, yeah, we have built this business with literally no plan --

MR. ERWIN: That's not what I'm saying, Your Honor.

THE COURT: Okay. All right.

MR. ERWIN: There are plans.

THE COURT: Okay.

MR. ERWIN: There are plans between the executive team, between Larry Canarelli and Bob Evans --

THE COURT: Okay.

MR. ERWIN: -- as Mr. Braster just said. They would discuss, they would make a plan, but just because they don't put that in a nice package of --

THE COURT: Okay.

MR. ERWIN: -- here's where our subdivision is going to go --

THE COURT: So, this is what we need to get at. It's one thing to say we don't have a plan. It's another thing to say we do not have a document we have titled a business plan for any particular entity. We don't -- that's not how we operate. We do not create a "business plan" for any particular --

MR. ERWIN: Right.

THE COURT: -- entity.

MR. ERWIN: Right.

THE COURT: Do we have plans? Oh, you bet we have plans.

MR. ERWIN: Yeah, I don't think --

THE COURT: Something tells me they have got a pipeline full of plans. They have got applications pending before the County Commission, they've got building -- they've got people out there going out and doing surveys. You know, they have plans. They discuss what they're doing.

MR. ERWIN: Well, you don't build a business like AWDI --

THE COURT: Exactly.

MR. ERWIN: -- that is worth that much money without having a plan and knowing what you're doing, but --

THE COURT: Exactly.

MR. ERWIN: -- they --

THE COURT: Okay. So here -- this is the thing.

MR. ERWIN: Okay.

THE COURT: So, they send you a request to produce business practices. It's like we do not have a document entitled "Business Plan for Entity X", whatever one of the sold entities was. We don't have a business plan. We don't have a document titled business plan for that. However, what we do have -- and so, I guess, this is what I'm trying to get at, is the point that Ms. Braster made, which is that, you know, subpoenaing these documents is maybe not the efficient way to go about this.

Maybe the efficient way to go about this is to say -- to take a deposition of an executive and say, how would you value this entity or

sold entities. What information would've gone into valuing this, because a valuation had to be reached. Somehow, it was reached. What do you mean by that? I mean, this is why I'm just like -- I'm struggling to understand if we're getting hung up here on terms. I mean, yes, they sent you a request to bring us a "business plan," and if your response is we don't have a business plan, then okay.

MR. ERWIN: Right, but yet we're subject to a request for contempt sanctions.

THE COURT: Right. And so, I guess that my question here is just because you don't call it a business plan, I mean, so the question is, was it not sufficiently defined that you could tell what it is they were looking for? Because if you -- if the definition was, we want your business plan, that is the document that you would have taken to a bank or a hedge fund or some investors to raise funds, and to get financing. If you don't have that, then okay, but you aren't going to go to a bank and get a $100 million line of credit with no plan. They're not going to give it to you.

MR. ERWIN: Well, appraisals --

THE COURT: They're going to think you're insane.

MR. ERWIN: Appraisals and materials like that were given to the bank, and those have been produced.

THE COURT: Okay.

MR. ERWIN: So, this isn't -- we're just not operating willy nilly here, but --

THE COURT: Okay.

MR. ERWIN: -- there is no business plan where Larry Canarelli and Bob Evans sit down and write out, here is where our subdivision is going to be and map out exactly how everything is going to work and put it in a written plan, and that's what the request called for.

THE COURT: Okay.

MR. ERWIN: So, that's just not how it worked.

THE COURT: Okay.

MS. BRASTER: Your Honor, if I can just add to that very briefly --

THE COURT: Uh-huh.

MS. BRASTER: -- because I don't think Mr. Erwin was involved, is just touching on those appraisals, they've had those for years. When you ask that pointed question of how did they value these entities for the purchase agreement --

THE COURT: Uh-huh.

MS. BRASTER: -- it was a mix between the appraisals and then you had cash, and then there was a valuation done, which I know Your Honor is well aware of that valuation and that whole issue.

THE COURT: Yeah.

MS. BRASTER: So, yeah, all of those appraisals were turned over. They did use those things to value these entities, but as Mr. Erwin said, there are not business plans that can be turned over, so I just wanted to clarify for Your Honor.

THE COURT: Okay.

MS. DWIGGINS: I'm going to deal with the easy part of this, but again, they miss the point.

THE COURT: Yeah. Okay.

MS. DWIGGINS: Okay? And I'm going to direct your attention. First of all, Mr. Erwin acknowledged that a financial projection is part of a business plan, but the part doesn't make the whole. Well, your order says on page 2, and I'm going to quote on line 5: "The Court hereby finds that Respondents in their capacity as former trustees of the SKIT , who presumably would've had possession, custody, or control of any business plans for the purchased entity shall produce to Petitioner the purchase entity's business plans that were prepared in whole or in part between January 1, 2013 through October 31st, 2013." So, by his own admission, they have "a part of it" that should be produced.

More importantly, again, Your Honor, it misses the point. The value is not an issue. This does not go to damages. It goes to liability, and what they knew at the time of the market, what the market was likely to do, whether or not it was going to increase in value, whether or not they expected it to, it's their knowledge. As I said earlier, the actual numbers don't matter.

What matters is, is there an increase in their projection, is there an increase in their sales, is there an increase in their cash flow. It's the knowledge. The actual numbers don't matter. Therefore, I don't need to extrapolate anything from it. I just need to know what their knowledge was and what they projected at that period of time. And you know, Ms. Braster uses the words, oh, the borrowers. Well, she doesn't

tell you that each one of those 35 entities were borrowers. They signed the agreement on behalf of -- or by and through their respective officers, or that the Scott Irrevocable Trust himself, or itself, was a borrower and personally liable for that entire loan.

And if these reports were prepared as part of the compliance of the '09 loan in which Scott's trust was personally on the hook for the entire thing, isn't he entitled to it then, irrespective of whether or not it relates to other entities, because if he's personally responsible for these entities, he's a borrower. He's personally on the hook for it, of the '09 loan, and that's what they were prepared in connection with.

THE COURT: Are they -- what Mr. Weyers says is with the exception of financial statements and tax returns described above, no reports provided to CB&T contained a breakout of the purchased entities. Do you have the financial statements and tax returns?

MS. DWIGGINS: I do not have the tax returns because those were denied by the Court.

THE COURT: Uh-huh.

MS. DWIGGINS: I have the financials, but again, Your Honor, you're -- it misses the point, because it's not the value. I'm not trying to extrapolate to find out what the value was for the purposes of calculating damages. It goes to liability and what they knew. And, in fact, at the hearing in this matter, and I'm going to quote Your Honor, that took place on September 18th, 2018, on page 11, you're actually referencing part of my argument, so I just want to put it in context, is starting on line 6, you said: "Okay. Well look at page -- I don't have the complete

transcript. I have a portion of this transcript, so I think I'm looking at page 62. On the bottom where Ms. Dwiggins says, Your Honor, if I understand 42 -- I understand 42, which those were guarantees, just so you know -- but in regards to request 41, could we at least allow production of that until it relates from up until the sale of the purchase."

I mean, our claim is the property was sold with knowledge that there was going to be an expansion of the business, the market was going -- was turning -- or turned around so their business plans are significant to their motives against Scott."

That's where you're quoting me and then you say: "Isn't that a breach of fiduciary duty that we're talking about here." And it goes on to what the rest of my arguments have always been before this Court, and I reference them on page 6 of our reply. Our claim is the property of the -- well, that's what I just said. The property was sold with the knowledge that there was going to be an expansion of the business. Respondents undoubtedly anticipate the market would continue to improve, anticipating expansions and correspondents -- corresponding profits. They put the interest of others above Petitioners, thereby causing a breach of fiduciary of duty.

And Your Honor even went on to say on page 31 of the transcript in September of this year, if they didn't have them, being the business plan, that's a problem that they're going to be raising with you next, but they should've had this. If they were acting as his fiduciaries for his irrevocable trust and making this transaction, doing their due diligence, maybe they didn't, maybe they didn't, maybe they didn't.

So, if they didn't, then fine. That's a different objection you could raise with the Commissioner that we didn't pay attention to our fiduciary duty, and we didn't ask for anything. Okay, is that really what you want to say?

And that's what you said during this hearing when you ordered them, because you understand and acknowledged the relevancy that it goes to their knowledge. It goes to their liability, not damages. So that's why the financial reports are not responsive to this request because those potentially go towards damages. The appraisals go towards damages. The actual financials post-sale go towards damages. This goes towards liability, their knowledge, their motive, and their intent to harm Scott.

So, again, the values don't matter. I don't care, necessarily, what those numbers are. I only care if there was an increase in them and what type of increase was in them because that's what they knew and projected at that time, and if Mr. Weyers is saying that there are five or 10 other entities, okay, we make up 35 of them that we're borrowers. Why is that information not directly relevant, let alone just likely -- or likely to lead to admissible evidence?

THE COURT: And so, the other issue is this concept that they don't have "business plans" as in -- I don't know. I mean, I just -- I don't know what you'd call it. I mean, if you're going to the County Commission saying you want to develop X number of lots somewhere to get the zoning approval, I don't -- that's not a business plan? I don't know. Just --

MS. DWIGGINS: Well, there had to be decisions, and I guess that's what our position is.

THE COURT: So, I guess that's what my question is --

MS. DWIGGINS: Which division do you --

THE COURT: -- if the term is so narrowly defined, if they're able to say, well we don't have a business plan, we don't use business plans, that's not how we operate, we just -- you know, we just know we own a bunch of land and the market looks good. You know, Amazon is going to build a new warehouse in north Las Vegas, we've have some land in north Las Vegas. Let's put some houses there and let's make them be at X price point, because, you know, that's what an Amazon warehouse worker is going to be wanting to buy. I mean, I don't know how they make their decisions.

MS. DWIGGINS: But Mr. Erwin acknowledged that financial projections and cash flows are a component of a business plan, a component. Your order was in whole or in part if there was a business plan, so why aren't those projections being produced? Again, Your Honor, it goes to their knowledge. It's what was given to the bank. We know those documents exist that went to the bank. We could easily enter into a protective order if that's what their concern is because it takes into account other entities, but we make up substantially all of them. I don't need to extrapolate anything. It's through knowledge.

THE COURT: Okay.

MS. DWIGGINS: And I don't know how you make a cash flow statement without any -- Mr. Evans' declaration is interesting. I

parallel your comments. If that's the way they conducted business, and it worked for them, that's great, but you have to decide what property to develop first.

THE COURT: Yeah, it says -- I guess, what I'm trying to understand. If the term "business plan" is too narrow, and that's what they're saying. They're saying, we don't have business plans. Okay, you don't have a business plan. You've got a plan. I mean, this isn't the $100 million business that it is without a plan. It's not. And maybe business plan in the context of, you know, are you going out on the market and selling, you know, stock and IPO? No, it's not that kind of business plan. That's not what we're talking about.

MS. DWIGGINS: Well, Your Honor, these -- the --

THE COURT: So, maybe this is a use -- a term of art that is not properly used in this context. Maybe there should be a different term for this, but the concept was what was the -- can we call it vision? What was the intent? What was the -- I mean, I just -- I cannot understand how they couldn't -- there could not be a plan. There's a plan. These people have plans.

MS. DWIGGINS: Well, not only that, Your Honor. It is --

THE COURT: These people, by definition, are planners. You don't build however many thousands of housing units there are in the State of Nevada with this brand name on them without having a plan. I don't see how you could do it. They are, by nature, planners.

MS. DWIGGINS: Well, again, Your Honor, they already acknowledged that the projections are part of the business plan. So,

give us that. And again, we were borrowers under the '09 in which all of these reports were provided to the bank, so why aren't we entitled to them there?

THE COURT: Okay.

MS. DWIGGINS: There's so many different ways to look at this and each one of them, we get it.

THE COURT: Okay.

MS. DWIGGINS: They admit our information is included therein.

THE COURT: Okay. Thanks. With respect to the term business plan, I will accept that if you look at that as a term of art in the finance industry for an IPO, they don't have it. It's an ongoing concern of many years, business success and history. So, do they have a business plan? No, but conceptually, they're planners. They have to plan in order to build these houses that they're building around town. There are plans.

So, I guess that's my problem is I'm not looking for blueprints, and I'm not looking for a plot plan that you would file with the county to get a subdivision approved. I mean, that's not the nature of what we're looking for here.

So, I guess the term is that the concept of "business plan" doesn't fit as a good definition for what it is that's being reported here. And that the -- so putting that aside, at this point in time, if that was too narrow of a definition and there is no "business plan" because there's no like separate little individual document for each of the 40 entities, 40, 45

entities, you know, this entity owns X number of raw acres of raw land in X number of locations, where however many houses, depending on the density could be built, okay. If they don't have that, okay. Something tells me they have that, but okay, I'm good. I'm going to say okay.

I mean, these guys are planners. They know exactly what they have, exactly what they could build, in exactly every location. These guys have that. They're planners. So, here's my problem. It's not a business plan. Fine, it's not a business plan. There is information that was used, and it was used for a number of different purposes, one of which was valuation, but one of which was that at the time this whole thing happened, the properties were being sold, there was this big refinance, and it was done for a reason. It was done for a reason because there was some sort of -- let's not call it a plan. Let's call it a vision, for what they were going to do next.

They had a vision. Maybe that's the better term for these guys. Maybe they're visionaries and not planners. They had a vision. They had a direction they were going to be going next. Okay, fine. So, they had to somehow have convinced a bank that their vision could be brought to fruition if they just had $100 million to do it, and that they could make it happen. That's, I think, what we are looking for.

And so, if in using the term business plan, that's an error on my part that that's too narrow of a concept and too specific of a term of art, then okay, that's my error, because I understand that it's a different kind -- it's not at that stage of a business where you would go out and say, we want to start a real estate development company, and we want

to build houses in this location.

Will you give us some money, and we'll go buy the land, and we'll plan for the houses, we'll get the zoning approval, and you know, where the school is going to go, and where the grocery store is going to be, and the churches, and maybe the county will let us build it. And we've never done this before, and you know, trust us on this. Okay, it's not a business plan. That's not the kind of people they are.

These are people with a track record, a proven track record of success, and a vision for what they could build on the assets they had available, which is the raw land. And so, whatever you want to call that, that's what we're trying to get at.

So, it seems to me that if the idea is not you can prorate amongst the 45 entities, how much of this cash flow projection went to any particular entity. If we're not looking at getting -- drilling down to that level, then the -- starting with what was given to the bank is probably the best place to start. What did the bank have?

That's probably the best place to start and as Ms. Braster pointed out, probably would take development through actually asking somebody who knows the questions. It's probably not going to be something that could be done just with documents, but if there is no business plan, there is no business plan. Okay. There was something that was given to the bank that convinced them that you're in compliance on your 2009 loan, and we should refinance it. We should go with this new 2013 loan.

What was it? What did they do if it wasn't a business plan?

MS. BRASTER: Can I --

THE COURT: Okay. It's not a problem.

MS. DWIGGINS: It was those specific reports, Your Honor. The cash flow statements, the projections.

THE COURT: Then I think that's the only place we can go.

MS. BRASTER: Can I answer that question, Your Honor?

THE COURT: Okay. Sure.

MS. BRASTER: Hopefully. They have the underlying information that was used to create the information to the bank with one exception, okay? They have the entity-specific actual information. They have the entity-specific information for all of Scott's entities. Not just my clients, all of them, which is the income statements for all of them, the balance sheets, the trial balances, the general letters, all of that. The only document that is forward thinking, shall we say, so to speak, anticipated growth, is what is called the projections.

That's the only document that is forward going that was turned over to the bank, and not actual or historical information. That document is what Mr. Evans was talking about in his declaration in which he stated that that document was created through his discussions with Larry Canarelli. They would look at what land was owned, whether it be by the entities they have, entities they don't have, entities that need to be created, and then would talk and discuss. There's no --

THE COURT: And plan.

MS. BRASTER: Verbally. I agree, Your Honor. Verbally, they would have those planning sessions. I call it a planning session, they do

not. They would meet and verbally discuss all of this. That is where those projections came from. So, to Your Honor's point of turning over what was given to the bank, that is the only document that is the anticipated growth, shall we say, type document here. They have all the actual figures for Scott's entities.

THE COURT: Again, this was the point that -- I was too focused on damages and not looking at the bigger picture, which is what did -- what knowledge or information did they have that Scott didn't have when they said, okay, we'll buy you out, and here's a great deal. And that's the point. Okay.

So, it seems to me that -- okay, I understand if there is no plan, there is nothing that is written down that says we have a bank of raw land, and we're going to draw on that bank and, you know, in any particular location, we believe that the type of houses that will go there that we'll market in that neighborhood are this type of house. We think we can get the Planning Commission to give us, you know, this much density per acre.

Okay. If they don't have a plan -- these guys are planners. They've got plans. If they don't have a plan for that, okay, fine. Then it's not a business plan. Fine, I'll accept that, but that gets us only past one part of these motions. The other part of the motion is, nevertheless, they went to the bank, and they went to the bank with a wealth of information that Mr. Weyers, who -- you're dealing with this kind of lending, I'm sure a very sophisticated lender. He knew what he was looking at, and he was satisfied that this was a good investment for his bank and that he

should make this loan. What was that?

MS. BRASTER: Okay. And that loan was made years prior.

THE COURT: Well, in 2009 one was.

MS. BRASTER: Correct. Correct.

THE COURT: And again, that makes Ms. Dwiggins' point which is at which time Mr. Canarelli wasn't -- had an interest in those entities, and so isn't he entitled to the information for 2009?

MS. BRASTER: And to discuss your other point is that at that point in time in '09, it was a lock box arrangement with that bank. The bank wasn't lending them anymore money at that point in time. Any of the proceeds or the profits from the sale of any of the homes was going back into the bank. This was all during the time period of leading up to AWDI's bankruptcy. All of the monies that were earned from the sale of these houses was going to the bank.

So, just to correct, Your Honor, the conception that the bank was lending money to them --

THE COURT: Okay.

MS. BRASTER: -- during this time period at issue is not true at all.

THE COURT: Okay.

MS. BRASTER: It was going to the bank. They were keeping the profits, and that's why they got permission in order to -- that's why that 2013 loan then showed the payments being made to -- under the purchase agreement, because it had to, because otherwise, they couldn't do it.

MS. DWIGGINS: Which, Your Honor, that goes to a different point and why we're entitled to all three of those or four of those reports that we have delineated in the subpoena and the motion to compel. Is the cash flow statements take in account the monies that are going to be paid over to Scott's trust in relation to the purchase agreement because they have to demonstrate to the bank that hey, after they do this, they will still have enough money to pay on the loan.

Well, that goes directly to our claim of breach of fiduciary duty, as well, that they didn't have any money to make distributions to us. Yet they have 70 -- they can't make 6- to $10,000 a month, but yet, they could make 70 something thousand dollars in interest payment and $2 million a year in principal payments? That's why the cash flow statements are relevant. We're entitled to everything that was given to the bank at that period of time, because it goes to their knowledge. And again, it's not the value, it's the knowledge. It's liability, not damages.

MS. BRASTER: I'm not sure what else to say, Your Honor, because --

THE COURT: Okay.

MS. BRASTER: -- all the historical --

THE COURT: Okay, yeah. So, here's the -- because we've got two different motions. We've got one motion --

MR. ERWIN: Your Honor?

THE COURT: -- which is the motion to compel.

MR. ERWIN: Can I just make one statement?

THE COURT: Sure, and then we'll let Ms. Dwiggins have the

last word.

MR. ERWIN: No, no, no. I just want to object to the suggestion that's been made a couple of times that my clients are withholding documents, that documents exist that we're not turning over. That is not the case, Your Honor. Just because there is not a written proposal explaining a business idea or explaining a subdivision doesn't mean that they're off operating this business without a plan. They have plans. They just don't memorialize them in writing.

THE COURT: Okay.

MR. ERWIN: And just because that didn't happen doesn't mean that they're withholding information from the Court and submitting false declarations.

THE COURT: Okay. Well, I never said they were. So, what I'm saying is that it doesn't fit in the unique definition of a business plan that might be acceptable at Harvard Business School. Okay, fine. That's fine.

MR. ERWIN: Your Honor, they provided the definition.

THE COURT: And that's what I'm saying. So, it was too narrow of a definition. Okay, fine. So, sit back down because you're going to talk me out of this. So, the -- there is no "business plan" that can be produced. If there's no documents responsive to the request, then there's no documents responsive to the request. I am convinced that there is no "business plan", as I said, in a format that one would find under the definition that is as -- narrowly defined as a business plan that is the kind of business plan that one sees through -- that you write when

you going and get your master's at Harvard, okay fine, or Warren, or whatever you want to go. Fine. Fine. There's no such thing as a business plan. Fine, I'm okay with that.

There are plans, though. There are plans. And the question is, to how does one determine what these plans are? They're not in a "business plan" format. Fine. Then there's nothing responsive to that request.

So, the motion for order to show cause by Respondent should not be held in contempt for failing to comply with this court order should be denied because there's no "business plan", but there are documents, and we know there's documents, and we know that there are plenty of documents that have been provided. And one place we know they went, and this is what's just -- I just don't understand what the resistance is here, is to the bank.

Why is Mr. Canarelli not entitled to the same information the bank was entitled to? This is what I'm just not understanding. Just because there were other entities -- because I read what he said very carefully, very carefully, because it's really significant. He understands this pretty well. He did this on a flow chart, which I thought was really interesting. I built a spreadsheet with the purchased entities as defined in the deposition subpoena, and he really did an analysis. You know, I'd like to see it. I think it's probably pretty interesting. It's his work product, so I don't get to see it. So, that's fine.

Upon receiving the deposition subpoenas, I reviewed the records of The American West Group. During that time frame, he was

the loan officer for that loan. Okay, fine. Okay, great. The borrowers were required to provide regular compliance reporting. Okay, great, and he listed all the things that they needed for compliance. Fine, fine, fine, fine, fine.

So, then he builds a spreadsheet, and he -- this is where I think it's a little bit squishy, but 35 purchased entities, and I estimate that there's a total of approximately 40 to 45. See, this is the problem. You know, if it's not possible to separate out non-purchased entities and purchased entities, even he can't tell because the information is all smushed together. So even he -- they're -- because this got analyzed. I was really -- I thought he -- I just thought he sounded like he really took this very seriously, and he really tried, and even he couldn't say specifically how many entities there are. He can't tell from the information provided, but it's the only information we've got that tells us what was the data set that they were working from, and maybe that's the better definition, because it's about the broadest definition we can come up with.

What's the data set of information they were working from that they had represented to their banker if we go through with this transaction, if we buy out these entities, if we do all this with respect to Scott's trust, we're still in a position to go forward with our plans, with our projections. There will be a cash flow. We have plans. We don't have a business plan, but we have plans.

So, what is that data set of information?

MS. DWIGGINS: Your Honor, I think it's in paragraph 5 of his

report. It's the--

THE COURT: And --

MS. DWIGGINS: -- compliance reporting which includes --

THE COURT: Yeah, that's the only thing I can think is that that's what Scott would be entitled to. He'd be entitled to know what it is was this data set of information that was like, we can buy Scott out of his interest that's part of this 2009 loan package, we can redraw this, and we can start this whole new trust over, and I don't -- you know, to me, what's really significant is even this guy who built a spreadsheet -- I mean, that's the part that I just love. This guy must be -- I don't know -- an accountant or something. I mean, he does a spreadsheet, and he still can't figure it out. He thinks, he thinks that there's 35 purchased entities that Scott got bought out of. There's approximately 40 to 45, so five to 10 more. Their banker can't even tell, and no wonder you can't redact it. There's no way we could redact it. The banker can't even tell what goes specifically to what entity. That's the data set of information that was available. That's what's significant when you look at what's calculated to lead to the discovery of admissible evidence.

What was the information they were basing this all on? There wasn't a "business plan". Okay, fine. I mean, we'll pass that. I don't want to talk about business plans anymore, but there's a data set of information from which this guy -- I mean, this is the best thing I've seen all day. It really helped me understand it more than really anything else, because he differentiates in his last paragraph -- he does say, and this is what Ms. Braster says, I do not recall asking the borrowers -- who

are the borrowers? He never defines borrowers. Borrowers for financial information for underwriting the October 2013 loan as we had the compliance reporting.

It's not that it was like an ongoing relationship, and so we didn't need any more information from him; are you kidding? He had all the information he could hope to have. He had the full data set. I have not located any business records of CB&T asking the borrowers for information on the specific purchased entities. He didn't need it. He didn't need it. He had all the information. These other -- is it five or is it 10? It doesn't matter. We don't have any other entities that work, it doesn't matter.

So, that's, I think, the distinction between a very, very specific drill down. What's a business plan? They don't have it. Fine, move on. There's no business plans. Denied.

The information that the bank had, though, his affidavit is really compelling, and I mean, he had the entire universe of information. What was it? What did he have? I think they're entitled to know, because he made a decision based on that, and they obviously made a decision based on that. He's entitled to know what that information is. That's what leads to discoverable evidence -- to admissible evidence.

So, different outcomes on the different motions. Business plan is denied, but I do think that despite the fact that there may be entities that are non-parties that are not part of the purchased entities, it doesn't matter because even the banker couldn't tell you what they are. He can't even tell me if there's 40 or 45 total entities, because it was just

such a huge conglomeration of information, but it was information upon which he could make a decision, a business decision for his bank, and upon which we have to assume they made a business decision for the rest of the entities and how it applied to Scott's trust. I think he's entitled to the information.

So, with respect to the subpoenaed sold entities opposition to the Petitioner's motion to compel, that one, I'm not quite sure what the objection is here and what you're looking for other than just to compel a response to the subpoena duces tecum because here's -- the problem being if they say, well that information in particular is from one of these five to 10 other entities that Mr. Weyers isn't sure. Maybe there's five or maybe it's 10. It might only be eight. Wow. Okay.

MS. DWIGGINS: Again, Your Honor, it doesn't matter how many, it's what their knowledge is, so our subpoena --

THE COURT: Yeah.

MS. DWIGGINS: -- requests everything that was prepared during that period of time that is a cash report, a monthly sales report, a cash position report --

THE COURT: Right.

MS. DWIGGINS: -- projections, whether or not they were given to the bank. So, at a minimum, we want what was given to the bank --

THE COURT: At a minimum.

MS. DWIGGINS: -- in that period of time in 2013, as well as the other time period. I think we had 2012 in there, as well as any other

documents that exist of similar nature or fall within those categories that were prepared, that were not provided to the bank, if they were prepared for internal purposes.

THE COURT: Okay. So, I'm going to grant this motion. But I need to know specifically, you know, what is it you're asking for? Because for my purposes, when I look at this, it seems to me that what you're entitled to is what the bank had.

MS. BRASTER: Can I make a proposal, Your Honor?

THE COURT: Yeah.

MS. BRASTER: Just -- and well, just for the record, I respectfully disagree with the outcome of this motion.

THE COURT: Uh-huh.

MS. BRASTER: But knowing what was turned over to the bank --

THE COURT: Right.

MS. BRASTER: -- may I make a suggestion is that I understand the rationale here is what was their mindset at the time the sale occurred, in March of 2013. So, second half of 2012, through and I think it was signed May 24th, 2013, I think it was. I'm just making the proposal for discussion, I don't need to be interrupted in the middle, I'm trying to short-circuit this.

THE COURT: Uh-huh. Uh-huh.

MS. BRASTER: Is that we can look at the second half of 2012 through May 24, 2013, what was provided to the bank. We know it was provided to the bank, it's in the loan agreement, it's identified in Mr.

Weyers' declaration. It's identified in -- during his discussion that we had. So, we know what that was.

And if that's the rationale of what they knew at that time, that will get there, because you have what the proposals -- or excuse me, projections as well as the historical information that we have already have, but that will get you there.

MS. DWIGGINS: And, Your Honor, that specifically excludes exactly what we're talking about then, and that she's trying to manipulate the subpoena and what this Court's ruling is. Your Honor, ordered business plans that were prepared up until October 2013. And there's no reason why we shouldn't get this same exact information during the same exact period of time. It doesn't matter if it was actually signed on May 31st, and this was given on June 1st. The fact of the matter is, we know this stuff was given in June and July of '13, based upon Mr. Weyers, and --

THE COURT: Well, it doesn't say we got it.

MS. DWIGGINS: -- and that's what -- her proposal is exactly trying to exclude it.

MS. BRASTER: He doesn't say when he got it, you're correct, Your Honor. I was making a proposal, not trying to manipulate the Court.

THE COURT: Right.

MS. BRASTER: If --

MS. DWIGGINS: She knows it was given --

MS. BRASTER: -- they read the loan agreement --

THE COURT: Counsel, counsel, please. Because what he specifically said in paragraph 14, this is the one that was interesting to me, is I do not recall asking the borrowers for financial information for underwriting the October 2013 loan. Well, we know that the October 2013 loan didn't get written in two minutes. He worked on this for, I'm sure, some period of time. And so, he didn't need any additional information as we had the compliance reporting.

MS. BRASTER: Correct. And the compliance reporting was done regularly. And I don't want to misspeak.

THE COURT: Yeah.

MS. BRASTER: I believe it was quarterly, that's when it was done. And there is compliance certificates that go with it. That's my point, Your Honor, is I can -- what I'm proposing is turning over what was given to the bank, the compliance reporting he is speaking of. I proposed a time period because if the rationale is that what did they know at the point and time of the sale, that's why I proposed that time period. I was not party to this business plan issue.

THE COURT: Uh-huh.

MS. BRASTER: I was just trying to propose a time period. The sale occurred in the spring of 2013. That made sense to me.

THE COURT: So, let's have --

MS. DWIGGINS: And, Your Honor, she was a participant of that call, that knows these reports were --

THE COURT: Okay, okay, all right.

MS. DWIGGINS: -- provided in June of July.

THE COURT: So -- all right. I don't want to get into this, let's move on. So, I guess the question for me is I know that he didn't just make this loan in October of 2013, based on -- I mean he had to -- this had to have been something that was presented to him over some period of time, and it took some time to get it done. And that's what we don't -- he doesn't tell us. He just says, as we have the compliance reporting. And I don't know what compliance reporting. I mean up to what point? What information was he relying on? Like I had the compliance reporting up to January of 2013, or I had the compliance reporting up to June 31st of 2013?

MS. BRASTER: I'd like to say it's quarterly, and it's probably -- and I say probably because I don't want to misrepresent to the Court, usually probably 30-45 days after the quarter, because you have to have the quarter closed in order to do it.

THE COURT: Okay.

MS. BRASTER: That's my understanding of it generally speaking.

THE COURT: So, that's what I would -- would think would be relevant that because specifically in paragraph 14 he talks about an October of 2013 loan. He didn't need any new information because he had compliance reporting, but he doesn't tell us what the time period was for the compliance reporting. And that's -- so for me, what -- what information was he relying on for that 2015 loan?

MS. BRASTER: What --

MS. DWIGGINS: It was up until the loan was signed in

October, which you previously ordered in connection with the business plans. We get everything up until that period of time --

THE COURT: And it may be --

MS. DWIGGINS: -- so this should be no different.

THE COURT: -- and it may be quarterly. It may be quarterly. So, it's what went into that -- what went into that decision --

MS. BRASTER: And what I don't understand --

THE COURT: -- that he talks about in '14.

MS. BRASTER: I apologize, I didn't mean to interrupt. What I don't understand is if their rationale is what they knew in March and May, in the spring, when they decided to sell, I don't understand that connection between the renegotiation in October. That's why I was suggesting the proposal I suggested --

THE COURT: Uh-huh.

MS. BRASTER: -- which, because it was quarterly -- and again, I think it's quarterly. It was regular --

THE COURT: Well, what's the projections?

MS. BRASTER: It's in the agreement.

THE COURT: Because the thing is --

MS. BRASTER: Yes, yes. And the projections --

THE COURT: Were those projections being --

MS. BRASTER: Yes, yes.

THE COURT: Have they changed their position? Have they done something -- you know, they signed this on May -- whatever date it -- whatever day it was. On June 1st, did they do something different that

totally changed everything? You don't know, until you've seen the information.

MS. BRASTER: Your Honor, I would defer the Court to let me know the time period. That's why I was preparing that time period.

THE COURT: That -- that's what I'm saying is he specifically says compliance reporting -- I relied on the compliance reporting in making the October 2013 loan. Okay, what? What was that universe of information? The date set that he had.

MS. DWIGGINS: Can we just put the date at October 13 for our definitive time frame.

THE COURT: Whatever he had that he relied on for one year prior up to the date of the -- of the loan.

MS. BRASTER: Okay. So, I don't remember the exact date. If it's October 13th, it's October 13th.

THE COURT: Yeah, so October --

MS. BRASTER: Whatever in a year prior.

THE COURT: October 2012 to October 2013. Whatever information that he had in that period of time.

MS. BRASTER: Was provided to the bank.

THE COURT: That's a little -- that may be more information than you want, it may be less, because it doesn't go back as far as you suggested, which was the last half of 2012.

MS. DWIGGINS: Well, hold on, Your Honor. She just is trying to limit it to what went to the bank, and Your Honor even -- our subpoena goes well beyond that. Even if it was prepared internally or

given to someone else, and you even said, at a minimum what they gave to the bank.

THE COURT: Yeah, that's -- I will start with that. I -- I would order that be produced. Because that may be enough. I'm not saying anything any further. If there's something that needs -- else that we need -- I am -- for me, for my purposes, what helped me in understanding why I thought this was relevant was, like I said, I -- Mr. Weyers' affidavit. I mean I wish we could see his spreadsheet, but it's his.

So, I actually think it's great that, you know, he did a spreadsheet, and he tried to figure this all out. I mean he really tried to be responsive, and that's impressive. I'm -- I -- he has a good -- he has a good work partner. He really knew what he was doing. And it proves Ms. Ms. Braster's point, nobody can tell how many entities there were in all this information. It's just a bunch of information that's -- but it was sufficient enough that they could refinance this loan after -- after buying out Scott, so was it? That's what we need.

MS. BRASTER: So, just so I'm clear that it is October 2013, date of the loan --

THE COURT: Correct.

MS. BRASTER: -- one year prior --

THE COURT: And here's the thing --

MS. BRASTER: -- the compliance reporting provided to the bank --

THE COURT: -- if the information --

MS. BRASTER: -- starting there.

THE COURT: -- if they have the -- if the information they got on October -- had on October 1st, 2012 was received on like September 3rd, okay, that's the information they had on October -- on October 1st. So, we go back to September 3rd and capture that. What's the information he has? What's the compliance information he has during these -- these dates? Not received on those dates, but what's the information he has available to him for that time period? And he may have gotten it on October 1st. He may have gotten it on August 31st. But he had it on October 1st.

MS. DWIGGINS: And I want to be clear --

THE COURT: So, what's the information he has --

MS. DWIGGINS: -- that the compliance reporting --

THE COURT: -- in that year?

MS. DWIGGINS: -- includes the cash flow statements, the financial projections --

THE COURT: Right.

MS. DWIGGINS: -- the monthly sales report. Exactly what's in that one paragraph.

THE COURT: I understand that it's going to be impossible to differentiate as to how much goes to any one entity, because even Mr. -- even with his spreadsheet, he couldn't figure out how many entitles there were.

MS. BRASTER: And just a point you just made, Your Honor, on -- if they're doing regular compliance reporting October 1st, he would

have had everything historically prior.

THE COURT: Well, for that date -- what's the most current information?

MS. BRASTER: That -- okay, most current information. Okay.

THE COURT: That he has on -- starting on October 1st --

MS. BRASTER: Okay.

THE COURT: -- what's his --

MS. DWIGGINS: What was submitted to the bank prior to that period of time?

THE COURT: The most immediate prior submission as of that date.

MS. BASTER: Okay.

THE COURT: And then -- because I'm assuming that he -- that he got something at the end of the third quarter.

MS. BRASTER: Okay. I just wanted to clarify --

THE COURT: He may have gotten it on October 1st --

MS. BRASTER: -- what Your Honor -- I understand -- what -- the most current information he has of -- we'll just say, October 1st, 2012 going forward.

THE COURT: Okay.

MS. DWIGGINS: I -- god, she -- sorry, Your Honor, she keeps narrowing it. You just said we get a year period of time, and now we're just into the immediate prior.

MS. BRASTER: Well, Your Honor, just said it's the most

current information --

MS. DWIGGINS: Well, we keep -- we keep narrowing it.

MR. ERWIN: For each -- for that year period.

MS. DWIGGINS: Everything that went to the bank for a year prior is what you said.

THE COURT: Right.

MS. BRASTER: Yeah.

THE COURT: And here's -- here's my point. Is that he may -- the information that he has on October 1st, 2013, he may not have received that day. He may have received it August 31st. That still means you get it because it's what does he have on any given date.

MS. DWIGGINS: Within that year period of time.

THE COURT: The year --

MS. DWIGGINS: Thank you.

THE COURT: -- before that loan was made.

MS. BRASTER: Okay.

THE COURT: And if the loan was made on the 31st of October, instead of the 1st of October, I'm just looking at whatever that date is. That loan date is for the year prior up to that loan date.

MS. BRASTER: Okay, I believe I understand it.

THE COURT: What's the loan -- I don't know what the loan date is.

MS. BRASTER: So, on October 1st, whatever he had at that point and then going forward, anything given after that date --

THE COURT: Right.

MS. BRASTER: -- October 1st, 2012 going forward --
THE COURT: Right.
MS. BRASTER: -- until the loan date in October 2013.
THE COURT: Whatever date that would be.
MS. BRASTER: Got it. Thank you.
THE COURT: Yeah.
MS. BRASTER: And we can mark this confidential?
THE COURT: Yes.
MS. BRASTER: Thank you.
THE COURT: Subject to your same confidentiality agreement.
Okay. Can we move on? Now we have -- did we do the privilege? Is that the next one --
MS. DWIGGINS: Yes, Your Honor.
THE COURT: -- to be done? Or it's the -- probably privilege is probably the next one?
MR. WILLIAMS: I think it's the two sets of objections regarding the privilege VCRR, Your Honor.
THE COURT: There -- it's all --
MR. WILLIAMS: So, they're interrelated.
THE COURT: -- and it's basically interrelated. Okay.
MR. WILLIAMS: It's all the same.
THE COURT: So, we have the -- so we did those two. So, we have the objections -- the Respondent's objections to the VCRR and the Petitioner's objections to the -- on the privileged designation So, we'll

start from, yes, I acknowledge there is no fiduciary exception in the State of Nevada. However, this is something that the Commissioner and I have struggled with for years now. And when I was reading this thing, I got to the excerpt of the transcript at page 30, and she asked my question. But I think the question is who's the client. And who's -- and the fiduciary exception has not been determined in Nevada yet. It's -- because the problem is, if you have a person that's wearing multiple -- multiple hats, he may be an attorney, but you know, you're not talking to him because he's your attorney, you're talking to him because he's your trustee.

So, it's --you know, can you say that I'm -- I'm protecting my information that I'm giving to you, because oh, goodie, you know, you were smart and hired an attorney for your trustee, as opposed to a financial planner, or, you know, your accountant. So, therefore, you get this privilege, because it now becomes my work product. It's like -- it doesn't work that way. That's the concept in -- in -- I mean, I appreciate, you know, maybe we're pushing the envelope here, but that's the concept, is that it's -- the person is not acting as an attorney when he gives you -- when he has that conversation with you. He is acting as your trustee, and so, therefore, is the information that's produced privileged. And so, I guess the question is in looking at what was produced, and we have this whole claw back issue, I'm looking at the information produced. And the other part -- and the other part of it is in anticipation of litigation.

The anticipation of litigation, does that have to be, I'm

anticipating you're going to sue me, your trustee, or are you going to be suing your trusts, or is it just in anticipation that some litigation is going to evolve? It doesn't have to be directed at me, but, you know, I anticipated that some litigation would result. So, I guess those were kind of my questions about privilege in general, after reading all of this.

MR. WILLIAMS: Right, Your Honor. Well, with that I was going to let Ms. Dwiggins go first, but it sounds like you're focused on my issues. So, let me go ahead and jump --

THE COURT: Okay.

MR. WILLIAMS: -- on -- on those. And then I'm sure there will be other things that come up as -- as I make my presentation.

THE COURT: Yeah.

MR. WILLIAMS: So, I guess we'll just start with the fiduciary exception, Your Honor. And I'm fully aware that you have dealt with this, and the Discovery Commissioner has dealt with this, far more times than I have. And I, you know, read the briefing where Petitioner says that you've adopted it, or applied it, or applied *Riggs*, whatever the case may be in other cases. And I'm not here to say, you know, whether that's accurate or not. I mean I wasn't involved in those cases. All I know is I'm here on this case.

And what's gone on in prior cases isn't precedential here. And it's not law of the case here. So, I think we're writing on a clean slate, insofar as whether the fiduciary exception applies in this case. Whether it exists in Nevada, first of all, and then whether it applies in this case. I think there's two things we have to be looking at here.

So, the first is whether Nevada recognizes a fiduciary exception, Your Honor. And I think the unequivocal answer to that question is no, it does not. Nevada's attorney-client privilege is based on a statute. A statute enacted by the legislature. That reflects what the public policy of the State is. The legislature has enacted five exceptions to the attorney-client privilege. And unlike other exceptions, dealing with other kinds of privileges, Your Honor, there is no catch-all. Other statutes, for example, the social worker and the client statute 49.254 NRS, lists the number of exceptions. And then at the end it says, or if disclosure is otherwise required by state or federal law. Pretty broad.

And so, if the attorney-client privilege had that as the sixth exception, then I could see where there would be some latitude for a Court to say well, I think the common law exception of the fiduciary exception can apply. Okay. But the attorney-client privilege doesn't have that.

THE COURT: When did Scott ever hire Mr. Lubbers as his attorney?

MR. WILLIAMS: Well, that's not what we're talking about, Your Honor.

THE COURT: Do we -- do we -- do we have a retainer agreement? I mean --

MR. WILLIAMS: It's -- most respectfully, what we're talking about is Mr. Lubbers' retention of Lee Hernandez's law firm. This is not about Scott hiring Ed Lubbers. Not at all. That is not what we're talking about. What we are talking about are notes that Ed Lubbers created after

the petitions in this action were filed by Scott.

THE COURT: Uh-huh.

MR. WILLIAMS: He created them. He then went and saw a lawyer, or talked to a lawyer, his own lawyer.

THE COURT: Ed Lubbers.

MR. WILLIAMS: Lee Hernandez -- it's the Lee Hernandez Firm. There are two lawyers at that firm, Mr. Lee and Ms. Renwick. Scott had his own counsel, of course, Solomon Dwiggins. The petitions get filed. He hires his own counsel. This has nothing to do with Ed acting as Scott's lawyer.

THE COURT: Okay .

MR. WILLIAMS: So, let me clear that up right at the beginning.

THE COURT: Okay.

MR. WILLIAMS: Now, the social worker and client privilege isn't the only one that has a catch-all. There's a victim's advocate and victim privilege that also lists a number of exceptions, and then at the end it says or there can be a disclosure of the communication as otherwise required by law. The point, Your Honor, is this. When the legislature wants to have some latitude or build in some flexibility for courts to find that a privilege doesn't apply, it knows how to do it. And it has not done it with the attorney-client privilege.

Your Honor, we cited a number of cases dealing with statutory-based attorney-client privileges versus *Riggs*, which is, you know, the case you see as sort of the you know, preeminent case dealing

with the fiduciary exception. But that, at that time, Delaware's attorney-client privilege was premised on the common law. And so, that Court had the ability to embrace the fiduciary exception more than Nevada District Court judges do, or at this point, that the Nevada Supreme Court does. Most respectfully to all of those tribunals. The legislature enacts the policy. And it's -- Your Honor, as I said, we've cited several -- many cases, but I just want to focus on a couple.

We cited the *Wells Fargo* case from the California Supreme Court. We cited the, and I don't know if I'm pronouncing it correctly, the *Huie v. DeShazo* case from the Texas Supreme Court. And the *Crimson Trace Corporation* case from the Oregon Supreme Court, sitting en banc.

And I'm not going to go through all of those, but the Oregon one is interesting, because Oregon's attorney-client privilege is nearly identical to Nevada's. Statutory has the exact same five exceptions, identical. And the Court went through this analysis. And it relied on one of the principles that we've cited to you, and I'm not going to even try to cite, quote "the Latin." But the concept is, the expression of one thing is the exclusion of another.

And so, when the legislature expresses five exceptions, but doesn't say a word about the fiduciary exception, it's excluding it. And it's doing so intentionally. That is what the law compels us to find.

And the Oregon Supreme Court, in dealing with this. This is how it concluded, Your Honor, because I think this paragraph sums it up. We conclude that OEC503(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. And the trial court erred in relying on that exception to compel production of communications that otherwise fell within the general scope of privilege. That's what we're saying here, Judge. That is Nevada. The Courts are not permitted to expand on that.

Now, the Nevada Supreme Court has not dealt with this. We know that. We know that there's the *Marshal* case out there, that we're not even going to get into it. They have some analysis of the fiduciary exception, and then they don't resolve the issue one way or the other. But what we do have is the Nevada Supreme Court addressing other statutory privileges. Where parties have come to them and have said, either at the District Court level and then it's being reviewed on appeal, where they said, I should fit either within the privilege, or I should fit within an exception. And this is where you see this language. One of the things you see repeated throughout the Petitioner's brief, is privileges have to be construed narrowly.

And that's why you can't find Mr. Lubbers' notes to be privileged. Your Honor, respectfully, what that means is if Mr. Lubbers was here, or I was here on behalf of Mr. Lubbers, saying look, Mr. Lubbers spoke with a law school graduate who had just taken the bar exam and is waiting for their results, but hasn't gotten them yet, and tried to claim that those communications were privileged. They're not because a law school graduate who's taken the bar, while close to be a lawyer, hopefully, doesn't fit within the statutory definition of attorney. The statute can't apply in a situation like that.

That's what we talk about when we say privileges have to be construed narrowly. And the Supreme Court has done exactly that with the physician-patient privilege in the *Rogers v. State* case that we gave you.

Your Honor, for background, the party in that case was an injury victim who was riding to the hospital in an ambulance. He spoke to the EMT and made some incriminating statements about drug use. When he was later charged criminally, he said timeout. You can't use those statements. I made them to an EMT. They're covered by the doctor-patient privilege and went to the Supreme Court. And the Supreme Court affirmed and said wrong. The attorney-client -- or the physician-patient privilege is defined by statute. The word physician is defined by statute. EMTs, first responders, don't fit within the definition of a physician. The privilege does not apply.

And this is how they finished, Your Honor. This is the Nevada Supreme Court. Granted, not attorney-client privilege, but doctor-patient privilege. It is for the legislature, not the Court to extend the literal language of the doctor-patient privilege statute to include paramedics. It is a policy decision best left to the legislature.

Your Honor, it is the same thing here. If the legislature wants to adopt the fiduciary exception, knock itself out. They're in session now. But courts can't legislate from the bench to find an exception that hasn't been recognized by the legislature.

So, what we see is an attempt to -- it's not an exception. It's not an exception. It's a client identifier, or it is a -- yeah, definition of

who falls within the privilege, no, Your Honor. No. The statutes define who falls within. The statutes define what constitutes a client. What constitutes an attorney. Nothing in the definition of client says if the trustee is the one that retains the lawyer, well he's really retaining it for the beneficiary -- there's nothing in there that expands that. And in fact, I would suggest that the law tells us just the opposite. You have NRS162.310(1) is something you're familiar with, you know, more than me. And that says, "An attorney who represents a fiduciary does not solely as a result of such attorney-client relationship assume a corresponding duty of care or other fiduciary duty to a principal." In other words, in this scenario, just because Lubbers goes and retains the Lee Hernandez Firm, the Lee Hernandez Firm doesn't owe Scott any fiduciary duty. He is not their client, under the definition of what a client is under the statute.

So, the fiduciary exception doesn't exist in Nevada. But Judge, even if it did, even if it did, it wouldn't apply here. Okay. Let's look at --

THE COURT: So, assuming it did, Mr. Lubbers, in getting this petition says, okay, I've got my trustee hat on here. I need to go over and talk to independent counsel to advise me as a trustee and an attorney -- because I'm going to be an attorney and a trustee, but I need an attorney to advise me of what I need to do on behalf of the trust in response to this petition.

And so. who is the trustee representing then? Is he representing himself, as I'm the trustee and I'm going to get sued, or is

he representing I'm the trustee and I have beneficiaries I'm obligated to protect?

MR. WILLIAMS: My position --

THE COURT: So, I need legal advice on behalf of the beneficiaries I'm obligated to protect.

MR. WILLIAMS: Your Honor. our position has been, and is, that Mr. Lubbers consulted the Lee Hernandez firm for his own protection. They want to tell you that the initial petition was just some benign pleading, we just sought an accounting. No big deal in the probate world.

THE COURT: Uh-huh.

MR. WILLIAMS: Okay, it wasn't a complaint, you know. Your Honor, I think we went through this at length below, and I'm not going to take the Court through everything here, but the initial petition that was filed here clearly is hostile to not just Larry and Heidi Canarelli, but to Ed Lubbers as well, Your Honor.

So, just a couple of legal principles before we get there. And I know, again, you know this. But for the record, the -- the Petitioner has the burden of proving that the fiduciary exception applies here. Okay. I have the burden of showing that the attorney-client privilege applies. But if they want to say there's an exception to it, that's on them. And they haven't come forward with any evidence to suggest that, Your Honor.

And the law is, I think, equally clear. I don't think there's any dispute that if the trustee is consulting counsel for his own protection,

the fiduciary exception doesn't apply there. And I think an important point, Your Honor, is even if what he was talking to Lee Hernandez about related to "administration of the trust", which is some magic language, you know, with respect to whether the exception applies, what the *Met* Court says from the Ninth Circuit, the case they cited, Judge, their case. The *Met* Court says that when you're talking about a trust, or legal advice concerning a trust, anything can be construed as relating to administration, at least indirectly. The point is that when a trustee seeks legal advice for its own protection, which we submit Mr. Lubbers was doing here, the fiduciary exception does not apply, even though that advice may relate to trust administration.

So, what did the petition say about Mr. Lubbers? Court's indulgence. I just have to flip around a little bit here. So, what the petition says, and we're going to talk about what happened before the petition, but what the petition said, Your Honor, in these allegations that were benign and nothing adversarial, and everything's hunky dory, it says this about -- I'm not even talking about what's being said about Larry and Heidi, but it says, Lubbers admitted that he had little or no knowledge over the SKIT's management or assets, despite serving as the independent trustee. That's paragraph 815. It accused the family trustee, singular, at the time the petition is filed, this is Ed Lubbers, of "violating his fiduciary duties." That's paragraph C6. It alleged that the purchase agreement we've been talking about may have been done to punish him. Okay.

Mr. Lubbers entered that purchase agreement as trustee of

the SKIT, so -- and then it's raising questions about "the propriety of the purchase agreement," and whether it should have been effectuated, paragraph D9.

So, when Mr. Lubbers gets this -- these allegations, and there are more, but we'll leave it at that for now, he goes and consults counsel, Your Honor.

THE COURT: Okay. So, I guess in going through -- I don't know if I've got at all the pages, but in reading them, I was trying -- do we -- do we know from how they were kept, either in Mr. Lubbers' files or -- I don't know how else we would know, what the notes were from? And like do we know -- and I think this is where -- when the Commissioner was going through and saying start at first there was resistance to Scott's demands --

MR. WILLIAMS: Your Honor -- most respectfully, Your Honor. What -- below we were very careful not to read the content of the notes into the record. Our position is that these are privileged.

THE COURT: Okay.

MR. WILLIAMS: They shouldn't have them. They should have been clawed back, and now we're here arguing about them.

THE COURT: Right.

MR. WILLIAMS: But I don't think we should be talking about the contents of the notes on the public record.

THE COURT: Okay.

MR. WILLIAMS: Okay.

THE COURT: So --

MR. WILLIAMS: And I apologize for not raising that earlier. I should have started by telling you.

THE COURT: Okay. Well, it's in the report, in the recommendations. So --

MR. WILLIAMS: The specific language is not, other than identifying what's to be redacted and what's to be --

THE COURT: Right.

MR. WILLIAMS: -- disclosed. It says like first sentence starting with this word --

THE COURT: Yeah.

MR. WILLIAMS: -- and ending with that. But the content of the notes has not been made public.

THE COURT: Exactly. And that's what I'm saying.

MR. WILLIAMS: As part of this proceeding.

THE COURT: She starts there. So, I guess my question is how is it -- how -- or do we know -- or how is it identified to the Commissioner that a note made on X date was made as he was sitting in a meeting with his attorneys. And we know that because X tells us --

MR. WILLIAMS: Right.

THE COURT: -- versus some of these other just random things. And like the typewritten page was really confusing to me. I was like where did that come from? That looks to me like something that you would type up in advance --

MR. WILLIAMS: Right.

THE COURT: -- and take over with you.

MR. WILLIAMS: Right.

THE COURT: So, to ask your -- and or was some of this doodling? I mean, I'm just not -- some of this like my attorney said to me I have to do X --

MR. WILLIAMS: Right.

THE COURT: -- so I mean -- so this is why I'm just sort of like -- none of this anywhere is how do I say this is information that Ms. Renwick or Mr. Lee gave to Mr. Lubbers such that it should be protected, because it's information that his attorneys gave him.

MR. WILLIAMS: Well --

THE COURT: As opposed to he, as a trustee is saying here's the legal questions that were raised for me. I need an answer to these things.

MR. WILLIAMS: Well, Your Honor, I don't think the attorney-client privilege turns on who said it. I mean it -- I mean if Lubbers was conveying the information to the lawyers, versus the lawyers conveying the information to Lubbers, I mean those are privileged communications. I mean setting aside what we're talking about. But just conceptually, it doesn't have to flow in one direction or the other, for it to be attorney-client privilege, but let me -- let me think -- try to answer the Court's question --

THE COURT: Okay.

MR. WILLIAMS: -- with respect to, you know, how the -- when the notes were prepared, and how they were conveyed, and that.

Your Honor, we all recognize it would be a lot easier if Mr.

Lubbers were here --

THE COURT: Right.

MR. WILLIAMS: -- to provide us with direct evidence of what happened. Okay. We don't have that. But I don't have to have that. Circumstantial evidence is entitled to equal weight. The law makes no distinction between direct evidence and circumstantial evidence. You know that jury instruction very well. What the law says with respect to notes, and we get chastised a little bit about this for trying to address their -- their skepticism on when the notes were created, is our position, and what we articulated is our position, these notes were prepared as an outline in anticipation of a meeting with counsel.

Now, we also addressed the fact that if there were a memorialization of what counsel -- what transpired in that meeting, that, too, would be privileged. As would a, you know, contemporaneous recording of what was going on in the meeting. But sticking with the first scenario, that they were prepared as an outline to meet with counsel, Your Honor, what the law tells us is that notes prepared as an outline of topics to discuss with counsel can be privileged. And contrary to what was argued at length in the opposition, they don't have to -- Mr. Lubbers didn't have to go give those notes to counsel for them to be privileged. That's not what the law says. He didn't have to physically deliver the notes.

The point is that the contents of the notes had to be communicated. Okay. And we've cited you several cases for that. And just for purposes of record, *United States v. DeFante*, that's a Second

Circuit case, *United States vs. Jimenez,* the Southern District of Alabama, *Birnbach vs. Timex Corp.*, District of Connecticut. And so, what is the evidence that we have on that, Your Honor? What is the circumstantial evidence that we have?

Well, starting at the top, there is a handwritten date of October the 14th, 2013, okay. That is the date corroborated by the billing records that we provided, as Exhibit 5 below, and it's part of our briefing in front of the Discovery Commissioner. That is the date that he consulted with attorneys at Lee Hernandez. He also talked to them on other dates, on the 15th and 16th, as is reflected in the billing records. But the handwritten date on the typed notes, which is also the handwritten date you see on the set of handwritten notes, same one -- same date, October 14, 2013, is when he consults with the Lee Hernandez attorneys.

We produced the typed notes, inadvertently, but they're part of four other pages of handwritten notes that are also part of this. And --

THE COURT: Yeah, and so that was my question. I have those four pages that -- because those are related to Ms. Dwiggins, but there's -- there's other pages. So, I guess with respect to your objection, what is it -- the relief that you're looking for in your objection?

MR. WILLIAMS: Sure. So, my objection is actually pretty simple.

THE COURT: Uh-huh.

MR. WILLIAMS: It's this. The Commissioner found that the typed notes were attorney-client privileged, but she then -- and she

protected the top part -- top one-third, I'll call it, of those notes. My position is all of the notes should be protected and should not be subject to production here.

THE COURT: All four pages? Typed and handwritten?

MR. WILLIAMS: I'm talking about typed right now.

THE COURT: Okay.

MR. WILLIAMS: I'm just talking about typed. Because I think that's really the crux of what we're here on. But with respect to the typed ones. So, she redacted the top part saying it was attorney-client privilege. I, of course, agreed with that. What I disagreed with, and what the basis of my objection is, is that the remainder that she allowed to be subject to production, she did so on grounds that there were facts contained in the notes. Quote/unquote facts. Factual statements. And that two, the fiduciary exception applies. And so, my position is -- I've talked to you about fiduciary exception, and you know why I don't think that applies.

THE COURT: Uh-huh.

MR. WILLIAMS: I don't know if I finished my argument there, but -- but I don't think it applies. And with respect to there being facts imbedded within an attorney-client privilege communication, no one here is disputing that facts aren't subject to privilege. I get that. But the law is equally clear. The *Wardley* opinion, the *Wynn Resorts* opinion, *Upjohn*. I mean it goes on ad infinitum. Facts contained within a privileged communication don't get disclosed. You don't get the communication just because there are facts within it. You don't get to

see what the person was talking to his lawyer about in the context of the facts. They can go depose Larry Canarelli and get facts. I mean I'm not -- I'm not, you know, saying that they can't, ultimately, but those are my problems with the Commissioner's findings on the typed notes.

And she basically made the findings, similar findings, with respect to the handwritten notes, finding a combination of either they were protected by attorney-client privilege, or they're protected by work product, but they're subject to production, either because substantial need has been shown, or there's a fiduciary exception that applied.

THE COURT: Because there was a separate set of December notes.

MR. WILLIAMS: Right, the -- now, those are a little different, and I think they're a little cleaner, because we're only talking about work product, not attorney-client privileged with -- with respect to the December notes. Work product only.

And the argument there is that I think she found -- when I say I think -- she found, if the work product doctrine applies to those notes, they're subject to production because they reflect facts and Scott has a substantial need to get them. And -- and that's part of my objections, but -- but there's no attorney-client privilege issue related to the December notes issue related to the December notes.

THE COURT: Okay. So, the objections to the report recommendation findings -- okay. Not containing opinions of information from -- and so this was the -- in talking about the, I believe October, there's substantial need that the documents not be deemed

protected because there's no other way for Petitioner to obtain said information from Lubbers via a deposition. And this was because it was hotly litigated whether there was going to be a deposition of Mr. Lubbers and in deference to his physical condition it was delayed, and he was passed away. Everybody was surprised; it was unexpected.

So, I guess your point being that that alone is insufficient to --

MR. WILLIAMS: On substantial need you want to talk about now?

THE COURT: Right.

MR. WILLIAMS: Okay. I know there's a lot here, so Your Honor, I'm happy to answer whatever questions come up because I imagine there's a lot of them. But with respect to substantial need, okay. This is within NRCP 26(b)(3), right. In order for substantial need to apply, you have -- you can't be able to obtain the substantial equivalent of the materials, right. That's the magic language used. You can't -- the reason you're able to get them is if you can't, without undue burden, obtain the substantial equivalent of the materials, then courts sometimes find that, you know, you're able to get work product from the other party. But here's the problem. They list why they want the note in their briefing below. And they say Ed Lubbers could have testified to all of these things and okay. That's fine. But they list seven things, Your Honor. They use the language, a vast range of topics. Great. If you look at the topics, the seven topics that Lubbers they say could have testified about, that's not what's at issue in the notes. So substantial -- they aren't the

substantial equivalent of what they think Lubbers could have talked about. So that's one problem.

THE COURT: Uh-huh.

MR. WILLIAMS: The other problem is that to the extent that you could divine some subset of categories that are encompassed within the notes talking about, I'm just speaking generally here, distributions let's call it in the purchase agreement, those general topics. Well, there are other avenues to get discovery on those, Your Honor. The underlying documentation and Larry Canarelli. I mean, the bulk of what we're talking about here in terms of the distribution issue was when Larry was the family trustee, not Ed. So, I don't think that they've shown substantial need contrary to what the discovery commissioner found so.

THE COURT: Okay. So, where the commissioner says to you page 93, I guess I can -- "we have a date on the typewritten memo consistent with the day he consulted with his attorneys. And we have some handwritten notes. And what I would consider to be things you talk to your attorney about. But then there is also information here that is factual. That is not necessarily something that I would say would not be discoverable in some form. And there's where I really struggle. We can call this attorney-client, and we can protect that the problem is we have the trustee exception that I do believe applies. And so, anything that deals with the trust, with Scott's trust, anything that deals with managing that trust or from a factual, you know, just mechanical perspective I'm really reluctant to protect because it's fact."

MR. WILLIAMS: Right.

THE COURT: So --

MR. WILLIAMS: Right. And that's my objection, Your Honor. So, she's -- it's two pronged, right. With respect to the --

THE COURT: Uh-huh.

MR. WILLIAMS: -- typed notes, we've talked about this. She's saying, okay. There's factual content within there. And that you know, some of this relates to administration of the trust.

THE COURT: Uh-huh.

MR. WILLIAMS: I mean, that -- I get what she's saying. And because it's administration of the trust fiduciary exception applies, but I think that that's wrong. I just, most respectfully to the commissioner --

THE COURT: I mean --

MR. WILLIAMS: -- and --

THE COURT: -- how much more comment to the administration of a trust do you get from the accounting?

MR. WILLIAMS: Well, Your Honor, I get that accounting is trust administration, but you have to look at what else -- I mean, this petition is very hostile toward them, okay. And even if it is related to administration, the Met court tells you that if you're seeking legal advice for your own protection, even though it interrelates to trust administration, that doesn't mean the fiduciary exception applies.

If you look at the notes, Your Honor, and I know you have them, Mr. Lubbers I will say, it's a fair interpre -- is concerned about these petitions and what the implications are. And one of the things that's at issue again, stating generically is this purchase agreement. And

what are we here fighting about? What is all of this about? And they're questioning from the outset in their petition the propriety of the purchase agreement. Whether it ever should have been done. If it was done to punish Scott.

And Ed sees these, and he goes, and he meets with his own lawyers. Scott has his own lawyers, okay. So, the -- you know, I think any fair interpretation is he's --

THE COURT: But I just -- we have to get -- like it is a fundamental premise of fiduciary law that if you're being sued -- you know, when can you expect the trust to pay for your attorney's fees because you're being sued for something that you've done --

MR. WILLIAMS: Right.

THE COURT: -- in the administration versus when you need to protect yourself because you screwed up and you breached your fiduciary duty, then you need your own attorney. So, doesn't that kind of beg the question? I mean, if there's --

MR. WILLIAMS: But I don't know if I agree with that from a -- I don't know that --

THE COURT: -- if there's a fiduciary --

MR. WILLIAMS: First of all, there are allegations that he breached his fiduciary duty in the initial petition, okay.

THE COURT: Because --

MR. WILLIAMS: So that's in there.

THE COURT: The trust --

MR. WILLIAMS: Okay. Now it's not a surcharge petition, I

get that.

THE COURT: Right.

MR. WILLIAMS: That's you know, what got filed in June of '17. But they are claiming Ed Lubbers violated his fiduciary duty in the initial petition.

THE COURT: Uh-huh.

MR. WILLIAMS: He goes and consults counsel.

THE COURT: Well, but I mean, I'm not saying that that's the sole determining factor whether or not you can have the trust pay for your attorney's fees. Because you didn't produce an accounting is like a whoopsie and is like go to your attorney and find out, do I need to produce an accounting. Yeah, you do. Okay, whoopsie, versus -- let me think of something.

MR. WILLIAMS: Stealing money.

THE COURT: Well, you sold all the stock to yourself, I don't know, something.

MR. WILLIAMS: Right, yeah. No, I get it. I understand that there are grades of all this, but the question has to be, Your Honor, what was Ed Lubbers' subjective belief, and was it objectively reasonable? Now what had happened prior to the petitions being filed? Okay. Mr. Solomon from Petitioner's firm had sent a letter --

THE COURT: I think I've got that.

MR. WILLIAMS: -- in November of '12 accusing not just the Canarellis, but Ed Lubbers of acting in per se bad faith, okay. Threatening to file actions in the court. Making demands regarding

distributions that were, "non-negotiable". And what does Ed do? What is his subjective reaction to that? Is he creates an agenda the next day and sends it to Larry Canarelli's secretary and Bob Evans with a bullet point saying Scott, lawsuit threatened, okay.

So, when we're looking at what his subjective belief is and is it objectively reasonable he gets a letter that is hostile by any measure and the next day creates that agenda. And what you'll hear is well, the only person that could have gotten sued then was Larry and Heidi (phonetic). Okay, fine. But the notes we're talking about --

THE COURT: That was going to be --

MR. WILLIAMS: -- were created after this petition was filed --

THE COURT: Because that was going to be the question.

MR. WILLIAMS: -- involving Ed.

THE COURT: Hostile to whom? I mean, so because you have to remember what -- Mr. Lubbers had a lot of hats on.

MR. WILLIAMS: Sure.

THE COURT: And one of his hats and the hats that's relevant to this litigation is he was Scott's trustee, okay. So, I would suggest that Ms. Dwiggins should respond to what you said and address her points and then you can wrap up and address both her petition and yours as well.

MR. WILLIAMS: Fair enough, Your Honor.

THE COURT: Because I think --

MR. WILLIAMS: Thank you.

THE COURT: -- that they overlap somewhat. And they're not

happy with --

MR. WILLIAMS: Let me just get my stuff out of the way --

THE COURT: -- what they've got.

MR. WILLIAMS: -- and I'll sit down.

THE COURT: Okay, all right. So --

MS. DWIGGINS: Thank you, Your Honor. I brought a chart for ease. I realize it has reference to the documents, but I don't intend on stating those out loud or making this an exhibit. It's really -- if I may approach? Just because the report and recommendation is kind of confusing it just puts it in context --

THE COURT: Okay.

MS. DWIGGINS: -- of what the findings are specific to each part of that typed memo since the Court has --

THE COURT: So, we can just return these to Ms. Dwiggins at the end of the hearing and that way they don't become part of the --

MR. WILLIAMS: And there's not going to be any reference to the content of the notes?

MS. DWIGGINS: No. Just it's there for -- just for ease of seeing what specific findings relate to those. I will not --

MR. WILLIAMS: Okay. Well, we'll just -- we'll proceed as we go, Judge.

THE COURT: Okay.

MR. WILLIAMS: That's fine.

THE COURT: Do you want to --

MS. DWIGGINS: I'm not sure where to start.

THE COURT: First address maybe the issues raised by Mr. Williams, just that none of this should be produced and it should all have been allowed to be clawed back on the fiduciary privilege. And then we can discuss your counter to that which is she should or shouldn't have predicted any of what she did predict.

MS. DWIGGINS: Okay.

THE COURT: So, I've got your opposition here to --

MS. DWIGGINS: Yeah. I apologize, Your Honor. There's kind of a lot of documents and things going on. I guess first and foremost, the fiduciary exception in all candidness, was something that the discovery commissioner raised on her own. We took the position and we maintain the position that even if -- and I disagree for the reasons I'm going to go into, but even if the document is privileged, the facts contained therein are not, okay. And I'm going to get to that in a little more detail and specifically you know, Mr. Williams referenced a couple cases. And his own cases cite that the facts contained within the memo are not protected.

And it's important because we all agree that facts aren't privileged and it's the communication which would be the telephone call. And it was a telephone call that Mr. Lubbers had with the attorneys in October '13. It wasn't an in-person meeting.

So, I don't think anyone disputes the actual conversation, but that doesn't make the underlying notes, which we don't know when they were created. It's an assumption that the date on them is the date that he was talking to them. There are a lot of assumptions made. And the

discovery commissioner made a lot of assumptions, and I'm going to go through that too. But you can't lose sight of the fact of what Mr. Lubbers' personal knowledge was. You recognize the fact he wore a lot of different hats.

He was our family trustee at the time it was signed, but he had only become the family trustee a week before. He drafted the purchase agreement in his capacity as an attorney for the Canarellis. He communicated directly with Scott regarding distributions even in 2012 when the Canarellis were still trustees, which Mr. Williams just referenced I guess in the tail end of his argument that even in November my firm wrote to Mr. Lubbers and was threatening litigation.

What he fails to mention is, we wrote to Mr. Lubbers in his capacity as an attorney --

THE COURT: Okay, thank you.

MS. DWIGGINS: -- for the Canarellis.

THE COURT: Thank you, thank you.

MS. DWIGGINS: And I think that is a significant point. And Mr. Lubbers was merely acting as a conduit between the Canarellis and my firm and Scott at the time.

THE COURT: So, the idea that the -- because he had only recently become the independent trustee that he may have looked at Scott's petition and had concerns. Might not be because he had concerns as a trustee for what had happened with the trust, but because he personally had been involved in this process for some period of time and had concerns about what his clients, when he had, as an attorney

dealing in this whole process. He was an attorney for Heidi and Larry.

MS. DWIGGINS: In their capacity as family trustees.

THE COURT: And so, when he was their attorney.

MS. DWIGGINS: And perhaps short answer, I don't know the answer to that because of the fact that he is no longer here. We didn't have the chance to depose him. What we do know is just based upon the documents my firm sent him a letter in his capacity as an attorney in November, and he was representing the Canarellis in their capacity as family trustees.

So, when Mr. Williams is saying there's threats and accusations being made, they're being made against the Canarellis as family trustees. There is no way that Mr. Lubbers could interpret that subjectively or reasonably that it's geared towards him when he's acting in his capacity as an attorney for them.

And he continued to work on with my firm after this period of time on a budget that Scott was submitting. He is -- Mr. Lubbers who on behalf of the Canarellis initially denied the distributions that my firm was requesting. And this is all by way of correspondence. He on behalf of the Canarellis then communicated that they were going to be agreed to. He routinely discussed expenses and distributions with Scott during this period of time. What's not subject to documents and what's contained in this memo is the reasons why those decisions were made.

And the fact that he ultimately became the trustee and signed the trust on our behalf. He is a material witness in this case. There is no question about that. Any statements made by him are an

admission of a party opponent.

And so, we believe that those particular parts of the memo which I think is on page 2 of the handout I gave you, that is all factual information. It's not his belief on anything, it's not his opinion. It's pure facts, Your Honor. And I think it boils down to a very simple question as to whether or not this is privileged.

If I were to ask him during a deposition questions that would elicit those answers would he have to testify? Would he have to testify, and again going back to the correspondence, were distribution requests made? Were they denied? Why were they denied? Why were they subsequently agreed to? Was there a purpose? Did he know about the purchase agreement? Was it disclosed to Scott? Why it wasn't disclosed to Scott?

So, if you look at just this portion of the memo that the discovery commissioner ruled is factual and not protected at all under either the attorney/client or the work product doctrine again, simple question. If I asked him questions that would elicit those answers, would he have to testify to them? And the answer is yes. They're admissions of a party-opponent, and I'm entitled to receive them. The fact that I could potentially ask Larry those questions doesn't matter when we're talking about a material witness. We're talking about credibility. We're talking about a lot of issues. And his personal knowledge, the fact that he, being Mr. Lubbers, was wearing so many different hats.

I'm going to address the fiduciary exception just to get it out of the way because I think it's a little quicker than the privilege issue, but

you don't get to the fiduciary exception unless you first find there's a privilege. And because the discovery commissioner didn't find a privilege as to this particular part of the memo, realistically her findings that the fiduciary exception would apply is really just dicta.

And it is specifically on this page of the chart I gave you, the one on the right, it says, "the commissioner further hereby finds that to the extent the factual statements are contained within an attorney/client privilege communication, they nevertheless fall under the fiduciary exception and NRS 49-115, because the topics are administrative in nature and otherwise factual in nature".

Okay. I think the purpose is she's talking about the entire document, but I notice Mr. Williams didn't address the common interest under 49, which the discovery commissioner has ruled in connection with the fiduciary exception. But again, he said this to me, I've said it to this court before, I'm going to say it again, it's in my briefing. It's a misnomer. It's not an exception, okay. There's many courts that have said it's a misnomer. So, we don't get into the whole legislation and whether or not it has to be done by the legislation because it's statute and privileges are statutory. It has to do with the fiduciary obligations.

And all the courts that have found the applicability of the fiduciary exception have really done so on two different -- or a few different bases. One, the beneficiary is the real client. That's the Wells Fargo case. I admit our court traditionally being mainly you, the probate commissioner, and the discovery commissioner have never made that specific finding. And so, you've never relied upon the Wells Fargo case

or whatnot. Which by the way, his reference to our statute that says an attorney for a trustee, or a principal doesn't owe an obligation to the agent, we all know that that was a statutory or the legislation response to overturn *Charleston v. Hardesty*, which did specifically find a fiduciary duty. That has nothing to do with the fiduciary exception and no bearing on it though.

But the real reason, and what this court has adopted, the discovery commissioner has adopted is advice is being sought for the benefit of the beneficiary. And that the disclosures are limited only to the beneficiary so that a privilege still exists vis-a-vis a third party. It's essentially just an extension of the privilege. And you have specifically stated it's -- the question is whether or not the beneficiaries are in a class of people that are intended to be protected. Are they entitled to that information and does the trustee have an obligation to disclose it?

And those obligations fall both under common law and statutory law. The fact that a trustee has a duty to provide beneficiaries with opinions given to a trustee to carry out their fiduciary obligations, that's both in the restatement second and the restatement third.

The restatement third also references advice obtained by a trustee in the fiduciary capacity concerning decisions or actions taken in the course of administering the trust as discoverable by a beneficiary to either enforce the beneficiary's rights or prevent a breach of trust. And in fact, the United States Supreme Court in *U.S. v. Jicarilla Apache,* as said that a trustee cannot withhold attorney/client communications from the beneficiary of the trust.

MR. WILLIAMS: Your Honor, is that the dissenting portion of that opinion that was quoted in the brief or is that --

MS. DWIGGINS: If you'd like to reference it instead of interrupting me --

THE COURT: Alrighty, thanks.

MS. DWIGGINS: -- it was in our brief if you'd like to --

THE COURT: Okay.

MS. DWIGGINS: -- reference it.

THE COURT: Thank you, Mr. --

MS. DWIGGINS: But they rely upon the *Met* case. Did you handle the *Met* case? Well, let me find it in a second, Your Honor. Can I have the *Marshal*? You know, they reference in the *Marshal* case, and I understand it's an unpublished decision. It was brought up by the discovery commissioner. It was referenced I believe in one of their briefs. But in the *Marshal* case, the court really didn't have to get to the issue of the fiduciary exception based upon its ruling, but it did specifically recognize that a beneficiary is entitled to inspect any opinions of counsel -- or it says, generally a beneficiary is entitled to inspect any opinions of counsel the trustee procures in administering the trust.

And it references the fact that different states view it differently, but it does say that the common law recognizes an obligation on the part of the trustee to provide full and accurate information to the beneficiary. And as part of that obligation they must make available to the beneficiary any communications with an attorney that are intended

to assist in the administration of the trust.

Again, the petition, he could call it adversarial. The question is, who is it adversarial against? Did we raise concerns regarding the purchase agreement? There were statements made. We had just learned about the purchase agreement after the fact. We knew nothing about it prior to.

And so, the initial petition that was filed with the court in September 2013, the only relief of thought was an accounting, an inventory, all the documents relating to the purchase agreement so that we could review and make an assessment and then an appraisal be done pursuant to the terms of a purchase agreement because it had not been done. Those were the only allegations that were made.

And the fact of the matter is, that there were no claims made against Lubbers. There was no claim made against the Canarellis at that time. There was no anticipation of litigation. There was no right to cross-examine witnesses. There were no depositions, no scheduling order, no evidentiary hearing, there was nothing that falls within the whole anticipation of litigation that would allow them to believe that it was adversarial in nature. It asked for information and that's all it did.

So, when Mr. Lubbers consults with an attorney on the information that needs to be provided in connection with it, he basically agreed to the information that we were requesting. There wasn't a formal objection as to anything stated in there. And then we ultimately agreed to the appointment of Nikolatus (phonetic).

I don't know if Your Honor has anything else on the fiduciary

exception, but I mean, the bottom line is that the nature of the consultation, the petition and what was being requested and what was ultimately ordered by the court and stipulated to by the parties was all within the trustee's fiduciary obligation in administering the trust. Duty to account, duty to provide information, duty to disclose.

THE COURT: So then with respect to your objections, anything further on Mr. Williams objection to the court recommendation?

MS. DWIGGINS: Yes, there is. And it goes into the work product.

THE COURT: Okay.

MS. DWIGGINS: I was just going to deal with privilege real quick though. There is absolutely no evidence that anything in that typed memo, which is the exhibit here, was even communicated to the lawyers. There's no evidence at all. It's pure speculation. The only thing we do know are the handwritten notes that Mr. Lubbers took during that phone call, okay. And whether or not the court considers, or whether or not those documents are privileged work product, it's important for the court to just look at them in the context of what was possibly discussed during that conference call.

The attorneys billed .40 for their phone call, okay. They discussed three petitions. That's less than 24 minutes. Three petitions. There was the petition in this matter that requested an accounting, inventory, appraisal, and disclosure of documents. There was the secondary trust in which we requested an accounting and an inventory.

And then there was also the protection trust where we asked for similar relief. Mr. Lubbers has three page of handwritten notes that you will see one correlates with each single trust, okay.

Your Honor understands how complex this matter is and how even the provisions of the trust and what he's entitled to under each trust is very complex. So, when you look at those three handwritten notes and what was discussed, that I don't think there's any dispute that that's what was discussed during the call, those handwritten notes. Is it really feasible that he got into potential litigation questions as they characterize it, or causes of concern of claims or lawsuits against them in less than 24 minutes? There is no evidence at all. It's pure speculation as to what that date handwritten even means. It is speculation as to whether -- when it was even prepared by Mr. Lubbers.

In fact, the court in the R&R even says, it's actually on page 2 of the R&R, and it just talks about these documents in general. Even if the disputed documents are protected by the attorney/client privilege certain of them are subject to disclosure. The Court [sic] constantly waivered back and forth on her factual findings, and she only applied the exceptions to the extent the privileges may have applied to the dispute documents. And during the hearing she even acknowledged that there was no indication of the point that I raise, that they were actually sent to the lawyer.

The law is clear that speculation and assumptions are not sufficient enough to find an application of the privilege. Therefore, we think she was clearly erroneous to -- when she made provision in the

findings to the extent it may constitute. It assumes, maybe. All that stuff is clearly erroneous because it's not based upon actual evidence. And that's actual -- a fundamental finding of whether or not a privilege provide -- applies, excuse me, is whether or not it is communicated to the attorney.

Mr. Williams did submit a declaration in connection with the opposition. And he says it was prepared by Mr. Lubbers prior to the call. Mr. Williams wasn't counsel at that time so I'm not sure how he has personal knowledge of that. But even if it is true it's still not protected because jurisdictions have found that the attorney/client privilege does not apply to preparatory communications.

And in fact, they cited the *DeFante* case that specifically says that it is -- if it is specifically shown that there is an outline of a top -- something that the client wants to show or discuss with the attorney it may be privileged. But again, we don't know when this exactly was prepared by him, why it was prepared by him. It's all based upon speculation.

And other courts have held that any writing made -- if you accept the law that any writing made with an eye towards seeking counsel is protected, that is way too broad of an interpretation of the attorney/client privilege, and it should not apply. And that is also in the *DeFante* case they cite. What's ironic is even though Mr. Williams submits a declaration that it was prepared beforehand, their opposition in response to our objection says it was prepared afterwards as a memorialization of what occurred during that conference call.

So, their own briefing contradicts his declaration, which again leads us -- we don't know when it was prepared. And notwithstanding, memorialization is not applicable in this case because it contradicts Mr. Williams' testimony. And if you look at his handwritten notes those two stand separate and apart from one and other. There's nothing in that -- in the hand -- or the typed notes that's really reflected in the handwritten notes. And we know the handwritten notes is what was discussed during the conference call.

The billing records that they rely upon in the declarations of the attorneys provide no assistance either. They're vague. The attorneys never looked at anything other than their billing record that says lengthy telephone call with Ed Lubbers regarding retention for hearing on petitions filed by Scott Canarelli. Issues require a clarification by court. That's all it says.

I think it's reasonable to conclude that the facts that are set forth in the memo that are on page 2 of this don't require a clarification at all. There's no question he had a duty to account, no question he had a duty to disclose. No question he had a duty to provide us information relating and the documents to the purchase agreement or that an appraisal had to be done.

And it really doesn't boil down to whether or not we're questioning the credibility of one of those attorneys. We're questioning the assumptions that they're making. They never looked at their file. We still don't know to this day if they've ever received a copy of the notes. Whether or not any of those things were discussed with them. We don't

know if any of those facts were even communicated to them. All we have is a declaration that relies upon a billing entry and then vaguely summarizes what was discussed five years ago off memory. I don't think that meets the burden of proof in any matter to show that they're in fact privilege.

And as I said, it's significant because you have to first find their privilege before you even get to the fiduciary exception. In regards to the work product we do object to the second finding that is here on this page that it says, "while certain portions of this document may constitute opinion work product, the factual statements constitute ordinary work product".

Well, first of all, Your Honor, the court held earlier in its findings that the opinion work product doesn't apply because he's a party to the case. He wasn't acting as an attorney. He was acting as a trustee. And the rule specifically says that opinion work product only applies to an attorney or a party's representative and not a party.

THE COURT: Okay. So, sometimes in here he does state what appear to be what, for example, I don't believe there's a requirement. I mean, so he is an attorney, although acting as a trustee. So, some of this where he makes some sort of like he's read a statute and here's what he thinks it says.

MS. DWIGGINS: I guess I'm not sure what page you're on of that.

THE COURT: Well, looking at the --

MS. DWIGGINS: I don't think there's a -- oh, on the first

page. "I don't believe " --

THE COURT: Right.

MS. DWIGGINS: -- "there's a requirement".

THE COURT: Right. So --

MS. DWIGGINS: I mean, Your Honor, you could read that as he's writing his own question and answering his own question. We don't know. He could easily look at the statute and come up with an answer. The court did hold that that part of it was both -- or protected under both the attorney/client and work product.

THE COURT: So, she found that the first page here that starts with the handwritten -- it's the handwritten notes and it has the names of the attorneys he's talking -- the date and the names of the attorneys he's talking to. She said that was protected. She said it was protected over through the Scott analysis down to the word first.

MS. DWIGGINS: Correct, Your Honor.

THE COURT: Okay. And you --

MS. DWIGGINS: Which is the first page of this she found is protected by both the attorney/client privilege and the work product.

THE COURT: And your objection there is okay, fine or she's wrong about that too?

MS. DWIGGINS: Your Honor, I don't think it's privileged, but we all know the heart of this motion is the second page of this --

THE COURT: Okay.

MS. DWIGGINS: -- and the factual --

THE COURT: All right.

MS. DWIGGINS: -- statements.

THE COURT: So, then we aren't to worry about that, then we can move onto the second page, okay. And your problem with the second page from the typed note is what start with -- starts with "first".

MS. DWIGGINS: I believe she correctly found that they were factual in nature and subject to disclosure. I object to the second finding there where it says it may constitute opinion work product because I don't think it's -- it's not even a finding by her. It's may -- it either is or it isn't before you get to one of the exceptions.

Same thing with the privilege. To the extent it does, it's either privileged or it's not. I mean, that's why I think those are dicta is she's not making a definitive finding. She's saying to the extent it is, I'm going to find an exception, but I'm never finding it is.

THE COURT: Okay.

MS. DWIGGINS: But I don't think it's work product under any circumstance, whether it be opinion or ordinary work product, because I don't think it was made in anticipation of litigation. I don't believe it reflects his mental thoughts of a lawyer as required under the statute, but irrespective I think we've met both the substantial and the compelling need by the fact that he is a material witness in this case. He has personal knowledge. I shouldn't have to be able to get that from a co-defendant.

I unfortunately did not -- I was not able to take his deposition despite my multiple efforts to do so. And again, it goes back to, if I asked him questions that would have elicited these answers, would he have

been required to testify to them and the answer is yes.

THE COURT: So --

MS. DWIGGINS: Therefore, it can't be protected under either the work product or attorney/client privilege.

THE COURT: So, with respect to starting with "first" and ending with "business", okay, fine. Now then there's after that indented portion then there's whether and that sentence ends with the word happened. So again, your view is --

MS. DWIGGINS: I believe --

THE COURT: -- it's factual?

MS. DWIGGINS: -- that's factual in nature.

THE COURT: Uh-huh.

MS. DWIGGINS: He is confirming that's what happened; it's an admission.

THE COURT: So, your objection is though, to her finding starting with "I" and ending with "Defendant" and then the -- so we'll talk about that one because I think the second one, the annual ending with the word "so". Those are two completely different concepts that are mentioned in those two sentences I think maybe seem a little different to me.

But -- so, what's your position with respect to her finding on, starting with "I" --

MS. DWIGGINS: And ending in "so". I believe --

THE COURT: Yeah.

MS. DWIGGINS: -- she did not commit error and that's a

proper finding.

THE COURT: Okay.

MS. DWIGGINS: And I do not believe her last finding is proper. Whether or not it relates to a different trust, it still shows their knowledge and motive. But again, I don't think it's disputed that the second page that starts with "first" and ends with "happened" is the real critical portion of it in this case.

THE COURT: Okay. All right. Anything else?

MS. DWIGGINS: I guess just if Your Honor has questions, we fully briefed it --

THE COURT: Yeah, very thoroughly.

MS. DWIGGINS: -- well, I guess there is the waiver of the privilege in connection with AWDI and the fact it was disclosed to them. We did object to the discovery commissioner's finding that there's a common interest between them. And I mean, just very briefly, I mean the law's clear that there has to be an anticipation of litigation against a common adversary on the same issue or issues in the case. We have conceded from the time they filed the bankruptcy motion that we are not suing AWDI or any of the other entities.

THE COURT: So, I guess that does kind of beg the question, who's got standing to even object to this disclosure. It would seem to be Ms. Wakayama's client.

MS. DWIGGINS: Well --

THE COURT: So, kind of like why --

MS. DWIGGINS: Well, no. Because --

THE COURT: -- why do the Canarellis even have the standing to --

MS. DWIGGINS: Well, because --

THE COURT: -- object to this disclosure?

MS. DWIGGINS: -- Mr. Williams is still representing the estate as well, their co-counsel.

THE COURT: Oh, okay.

MS. DWIGGINS: But that -- those documents that were disclosed and the ones that are subject to this motion --

THE COURT: Uh-huh.

MS. DWIGGINS: -- were disclosed to us in December of 2017.

THE COURT: Right.

MS. DWIGGINS: And when they were turned over to counsel to be copied, they were sent to AWDI and their offices. And we do know through an email that at least one employee looked through them. We don't know what protocols were in play or anything, but there is no common interest between them that would allow the protection to stand. And that it does -- that it constitutes a waiver of the attorney/client privilege. Because the question is, if he provided to another party for the purposes of rendition of legal services. I don't think copying documents -- I mean, we're talking about Ed's files. Ed's not -- wasn't in the same position as the Canarellis as far as vis-a-vis being an officer and director and ownership of the company.

THE COURT: Okay.

MS. DWIGGINS: Ed Lubbers and the Canarellis had a similar interest between them in that they were being sued for a breach of fiduciary duty, but that can't be said with respect to AWDI, which is the one that was in possession of the documents based upon the email and the girl's signature page. I mean, there's no chance of AWDI being sued. We went through that already --

THE COURT: Okay.

MS. DWIGGINS: -- in connection with the whole bankruptcy thing. They were never our fiduciary that we could sue them on. So, the issues are not the same as they are in this case.

THE COURT: All right. So, what are you looking for?

MS. DWIGGINS: A finding that the documents provided to AWDI, which we believe include these since they were produced to us at that period, or shortly after the documents were returned to AWDI, is a waiver of the attorney/client privilege, and therefore we're entitled to them under that theory. They want us to prove that the documents were in the box.

We know there were seven to nine boxes that constituted Ed's file that went over to AWDI and that the Respondents subsequently produced them. I don't -- I mean, they're in the best position and they never said it was or it wasn't. I think it's a reasonable presumption if they're returned to AWDI or sent to AWDI in November and then they're disclosed to us in November that they were in the boxes.

And again, there's no common interest between them. And the law's clear that a mere a financial interest is not enough to find a

common interest.

THE COURT: So then despite what the commissioner said in going through and determining privilege and that would all go out the door because the disclosure to the third party, which it was, wipes out any claim to attorney/client privilege and there's the --

MS. DWIGGINS: Well, it's a waiver.

THE COURT: -- claw backs?

MS. DWIGGINS: So, you find a privilege, and then it's a waiver.

THE COURT: So, the claw back is -- and so your clients would be entitled to keep the whole thing, not just those portions the commissioner found --

MS. DWIGGINS: Correct.

THE COURT: -- to be discoverable?

MS. DWIGGINS: Correct.

THE COURT: All right.

MS. DWIGGINS: And then I will rely on the briefing about the whole violation of the ESI and their, for lack of better words, complete disregard of actually trying to properly review documents. I mean, the discovery commissioner specifically asked them what protocols they put in place to make sure privileged documents weren't disclosed. And the only response was well, we have the claw back provision.

And she commented that that's obviously not sufficient and that puts a burden on us and not them. And to this day we've never

seen a declaration or anything to show why those were produced, not one time but twice.

THE COURT: Uh-huh.

MS. DWIGGINS: And the second time being after we filed the petition earlier in September. In May of -- or I'm sorry; May of 2018. And the same day that they objected and tried to claw it back they disclosed it again. I mean, if you have proper protocols in place it should have never been disclosed the first time versus the second and of course there was no privilege log ever done.

MS. DWIGGINS: -- second, and of course, there was no privilege log ever done.

THE COURT: Okay.

MR. WILLIAMS: All right, Judge. I know we've been here a long time, and I will try to move through this as quickly as I can. So maybe I'll just start at the end where Ms. Dwiggins left off. The issue of inadvertent disclosure. And they're now claiming, oh, because it was a reckless disclosure, we're entitled to the document. There's been a waiver.

Your Honor, very succinctly, their entire argument on that is premised on the Federal Rule of Evidence, 502, which we don't have in Nevada. I spent a lot of time in federal court. I'm very familiar with Rule 502. And you do things differently over there. You have to get an order entered by the court. And -- and believe me, I'm familiar with the rule. I know how you do it there. I'm not there. I'm here. And what we did is we entered into an ESI protocol with opposing counsel where we

specifically agreed that inadvertent disclosures would not be grounds to argue waiver. And Ms. Dwiggins acknowledged that in front of the Discovery Commissioner.

So, I think that -- you know, we can go through the 502 factors and why I believe that the disclosure clearly was inadvertent. We're here fighting about it. It's unlike some of the cases that they've cited where a document was -- I think this is their New Mexico oncology case where they reviewed a document, they redacted it, they labeled it as privileged. They then found it responsive, removed the redactions, produced it. It started to get used in the litigation. And the parties said, wait a minute, that's a document I wish I didn't produce.

That's not what we have here. It's completely different. But I would, likewise, rely on the briefing, but particularly the ESI protocol that the parties agreed to. We don't have Rule 502 here. We have a different waiver provision in Chapter 49, and it requires a voluntary disclosure or consent to disclosure, which is not what happened here. With respect to the argument on AWDI, Judge, they've presented with -- you with no evidence that anyone at AWDI, or American West Group, which -- whichever entity you want to use or group of entities you want to use, has reviewed Lubbers' notes. After we produced all the documents -- I represent both Larry Canarelli, Heidi Canarelli, and originally Ed Lubbers, and now the Special Administrator of the Estate along with Ms. Wakayama. I represent all of them.

So, after we were producing documents, Mr. Lubbers' widow didn't want to keep holding all of these things, so I gave them to my

other client to keep them safely stored. What they're relying on is the fact that Tina Good, a woman who has assisted in the production of all the documents we have been fighting about in this case, referenced a completely different document that Ed Lubbers had drafted regarding the deferral of interest payments. She hasn't seen these documents. And there clearly is a common interest between Ed and Larry or Mr. Lubbers' estate and Larry in defending this litigation. And there's a common interest with AWDI.

The law is very clear, Your Honor, with respect to common interest. Believe me. I've spent way too much time litigating this in front of Judge Gonzalez with Wynn Resorts and Mr. Wynn. Trust me. I know all about it. You don't have to be co-parties. Okay, AWDI does not have to be a party in this litigation in order for it to have a common interest agreement with the Lubbers Estate or Ed and Heidi Canarelli. That is not the law. The law is very clear; that it just has to be a common -- common, legal interest, not litigation. So, it doesn't --

THE COURT: Well, what's the relief that you're looking for?

MR. WILLIAMS: Well, the relief that I'm looking for is just to affirm the Discovery Commissioner's finding; that there was no waiver. That's not my objection. She -- she -- excuse me. To sustain what she -- she found there was no waiver with respect to the fact that ADI [sic] possessed this document allegedly. There's no proof of that. But, you know, let's assume that that threshold fact is correct, that those documents are at Larry's office, which is at AWDI. Then that's not a waiver. That's what the Commissioner found, and that -- and I think that

should be upheld.

THE COURT: Okay. And what's the relief that you're seeking?

MR. WILLIAMS: The relief that I'm seeking on my objections?

THE COURT: Uh-huh.

MR. WILLIAMS: Oh, I apologize. That -- talking about the typed notes that are 13285?

THE COURT: Yes.

MR. WILLIAMS: That entire document should be withheld. Whether you want to call it -- I -- I should get it back, clawed back. It was inadvertently produced. I should get the whole thing back.

THE COURT: Okay.

MR. WILLIAMS: With respect to the other notes, Your Honor, she had made the findings that they were protected by work protect, and -- but yet there was substantial need. I've talked to you about substantial need.

THE COURT: When you say, "other notes," are you talking about the October 14 notes or are you talking about the December notes?

MR. WILLIAMS: I'm actually talking about both, but it's the same point. With -- I'll talk to you briefly about the December notes just so you know what they are. They're -- they're a little different. Those notes were taken at a meeting that Ed Lubbers attended. I was actually there. Scott was there. Mr. Solomon was there. Mr. Nicolatus

[phonetic], Bob Evans was there. And Ed took notes during the meeting.

And so, you know, those reflect what he believed was important to take down. Those are, you know, his mental impressions as to what was important. But the point is, is if Scott's interested in what happened at that meeting -- I mean, let's set aside the fact that he was there for the entire meeting -- I mean, he can take Bob Evans' deposition, he can take Mr. Nicolatus' deposition. I mean, there were other people there that -- you know, if he wants more information than he was able to observe personally, he -- he can do that.

So, there's -- I don't see what the substantial need is regarding the December notes. So, Your Honor, I don't know if you want me to focus on anything else. I'll just tick off the points that Ms. Dwiggins had very quickly here. She said that the phone call -- no one's disputing that the phone call that Mr. Lubbers would have had with the attorneys is protected. Well, then doesn't that eliminate the concept of the fiduciary exception applying here? Right? I mean, if we're admitting that Mr. Lubbers was talking to those lawyers, and they've said that the telephone conversation would be protected, then why are we talking about the fiduciary exception?

So, I would just make that observation. Similarly, I don't know if there's a dispute because it's -- it's unclear in the briefing. But it seemed to me that they were questioning if -- if Lubbers created these notes. But you've heard Ms. Dwiggins now say repeatedly that these are admissions. Well, they're only going to be Lubbers' admissions if they're Lubbers' notes.

So, I think we can take that dispute off the table to the extent that there was one on that.

.115 that the Discovery Commissioner talked about. Judge, I -- most respectfully to the Commissioner, and now Judge on the Court of Appeals, 49.115 has zero application in this case. None. The -- I mean, by the plain terms, the situation with 49.115, that exception to the attorney-client privilege is if there are two clients who retain the same lawyer and they later get into a dispute with each other, then the communications that they had with the lawyer remain protected vis-a-vis the rest of the world. But either one of them can compel the lawyer to testify in a dispute that occurs between those two parties.

Now, the Lee, Hernandez firm never represented Scott. He never consulted them. He never represented -- that firm never represented him. So, the very -- the threshold requirement for that exception to apply just has not been met. There is zero evidence of it. And that's why I brought up NRS 162.310 that Ms. Dwiggins says I don't understand how it applies. I do -- I think I understand how it applies, and that is, is just because Ed goes and sees Lee, Hernandez, they don't then owe a fiduciary duty to Scott. This exception isn't, you know, going to apply just because of that.

So, I think that takes care of that. We've talked about the fiduciary exception, you know, at length, Your Honor. And this whole notion of the misnomer, the real client theory, all these different things all come back to the fact that it is an exception to the attorney-client privilege, which is statutory based, and the fiduciary exception is based

on the common law. I've argued that a lot. I don't need to keep harping on it, Your Honor. I think you get what my position is on that. And even if the exception existed in Nevada, then it didn't apply here because Lubbers was consulting that law firm for his own protection. Because the petition, contrary to what we want to keep saying, was adversarial and did constitute the Commissioner -- let's recall what the Commissioner's finding is. She said repeatedly that she found Ed Lubbers reasonably anticipated litigation. Okay? That's what she found.

And so, while she may have found that there was substantial need to allow work product to be produced, her threshold finding is that Lubbers anticipated litigation. So, let's talk about the adversary nature of the petition, because I heard Ms. Dwiggins say there was no right to cross-examination, we never did discovery, et cetera, et cetera. Judge, NRS -- and again, I know that these are probate statutes, but -- that aren't my specialty. But NRS 155.180, "The Nevada Rules of Civil Procedure apply in probate proceedings except as otherwise provided."

Okay. We'll start there. NRS 155.170, "Parties have the right to conduct examinations as authorized by the law or the Nevada Rules of Civil Procedure." And then their petition is also based on NRS 153.031, subpart 1, subpart F, which, "Permits the review of the trustee's acts, including discretionary acts," Your Honor.

The initial petition was expressly premised on this, asking you to review Mr. Lubbers' discretionary acts. That's, by definition, adversarial. But the point is this: What the case law focuses on to determine whether something constitutes litigation is whether there are

two sides to the dispute, and whether each side is represented -- whether each side has the right to participate in the proceedings and whether they have the right to conduct cross-examination.

It doesn't matter if no discovery was done so the need to conduct cross-examination didn't come to fruition; it's whether they have the right to. That's the *Fru-Con* case. We cited it. They've cited it. Your Honor, that's all that is required in order to determine whether something constitutes litigation, which we contend the initial petition certainly was.

Continuing to move through this very quickly, Your Honor, no evidence that the contents of the notes were shared with the lawyers, no evidence regarding when the notes were created. Now, Judge, I talked a little bit about this, and this is what I will wrap things up with. Most respectfully, I just couldn't disagree more. You have to understand, and I know you do, the context that we're operating in here. I'm here defending a privilege. Okay? I can't defend that privilege by engaging in actions that constitutes a waiver of that privilege.

So, when Ms. Dwiggins complains about the content of the declarations from the attorneys, Judge, I can't have them come in and give you a declaration that says, here's everything we talked about with Mr. Lubbers. That would be a waiver. I can't do that.

So, I've tried to provide what you would provide on a privilege log, which are the general subjects that were discussed. And in their declarations -- not just on October 14th, by the way. They want to focus on the. 4 entry on October 14th. But they state in their

declarations, and the billing records back up, that they talked to Mr. Lubbers on multiple occasions about topics that are entirely consistent with what are in those notes.

So, when we talk about what the circumstantial evidence is, that he conveyed this to the lawyers, that's a big part of it, Judge. And with respect to when he created the notes, and this issue of what I've said in my declaration, and somehow I'm now being inconsistent, I didn't take the definitive position in our briefing in opposition to my declaration by saying, I first said they were prepared in anticipation of the meeting, but now I'm saying they were prepared after the meeting. No.

What they're saying -- and they're saying it here -- is, we don't know when they were created. What I'm saying is it doesn't matter. It doesn't matter. If you prepared it as an outline prior to the meeting and you shared the contents of the notes with the lawyers, protected. If he prepared -- if he was on a computer typing that up during the call -- and I'm not suggesting he is -- but if he was, that too would be protected. If he prepared it as a summary of what he and the lawyers discussed after the call, that too would be protected. That's the point I'm making. I'm not being inconsistent. It's that they would be protected as long as there is evidence that the contents of the notes were actually shared with the lawyers. And I submit there is more than substantial evidence that it was. Unless the Court has any more questions, for me, I'll sit down.

THE COURT: Thank you. With respect to both the petitions, I -- I do not see a lot to disagree with the Commissioner about. But I

guess we -- we have to start with the -- the typed page. It has the handwritten date on it, and then the Commissioner makes an assumption that that handwritten date was written by Mr. Lubbers. I -- and I guess my question is, how do we know that the handwritten date was written for anything other than just a reminder to him that this -- this should be filed along with the notes from that telephone conversation?

I mean, why are we assuming that? It says it's an analysis, which to me seems to be that this is the trustee analyzing a petition that he has received. Did he do it before or after? I don't know. And I think I probably agree with Mr. Williams that I don't know that it matters. But I don't know why we're assuming that it's part of an attorney-client communication at all. There was nothing to indicate that it is. I mean, it doesn't say, here are my things I want to talk to the attorneys about, or, here's what I talked to the attorneys about. It doesn't say any of that. It just says it's an analysis.

And so, for that reason, that's why I'm struggling to say whether I think the fiduciary privilege applies or not, because I just -- I think this is just the trustee's work product. And he's not doing this work product as an attorney; he's doing this as a trustee, who, in his role as trustee, is just to receive service of a petition. And he's trying to figure out what he needs to do next.

I'm -- so I'm not sure we should assume it is part of an attorney-client communication. That's an assumption we're making. And nobody can tell us that, because Mr. Lubbers isn't here to say, yes, I wrote that down so that I would have a checklist of things I wanted to ask

the attorneys, or, I wrote that down afterwards because, based on what they said to me, I then analyzed the petition, and here's what I came up. We don't have that.

So, we're starting from an assumption that I don't know that we can make. And that -- so that's my problem with the report and recommendations to start with, is that I view the handwritten notes and the typewritten very differently.

I understand the Commissioner's analysis of the handwritten notes. I don't take issue with -- with her analysis of the handwritten notes because of the fiduciary exception where she's talking about the need to provide an accounting for the SKIT. So, she -- the first page in the notes, that's page 13284, and the last page of the notes, that's page 13288, again, at 13288, it's unclear what it -- when it was produced. If it was part of the whole thing, I mean, it -- it's just not clear when -- when all these notes were actually created. But that one is very -- that page is very clearly talking about just fiduciary administration things.

So, 13288, I understand why she said that should be produced, because it is purely factual, and it's produced strictly with the trustee's administration of the trust and would be discoverable to a beneficiary for that reason. So, I get that one.

I understand her point about 13286 and 13287 being unrelated to the petition. So, she was going to protect those. I won't disturb her determination with respect to that.

I am -- it's a little less clear to me that it's about fiduciary administration. The last sentence, the last line of that page, that's -- the

page is dated at the top 213 -- 2013 on lined paper, and the last two words are -- the last line of that has to do with typical fiduciary activities.

So, as to whether the rest of that page should be produced or not, that doesn't appear to me to be related to the -- to anything other than the attorney-client relationship, because that would -- that -- the rest of that page seems to me to be related to what information's going to be provided to the attorneys, who the attorneys are, that appears to be related to the attorney-client relationship between Mr. Lubbers and his attorneys. And really the only thing on there is -- actually, it's a question, and that question is related to fiduciary administration matters.

So, the Commissioner seems to have found the whole page discoverable for that reason. I'm -- I'm not convinced on that. It seems to me that really the only relevant information on there that -- that could arguably be said to have to do with fiduciary administration would be -- I guess I could -- would start with the date, and the question of -- that's at the last line, starting with "when."

MS. DWIGGINS: And you're on 13284, correct?

THE COURT: 13284.

MS. DWIGGINS: Okay.

THE COURT: Right. So, to me, I -- to me, that page, unlike the last page, is not clearly related to fiduciary activities. It's not. So that -- that's my problem with -- on page 13284. I would just analyze it differently than she did. I don't necessarily think she's wrong in her analysis. There is specific reference to fiduciary activity on that page that are just purely administrative that would clearly fall within, for lack

of a better term, what's called the fiduciary exception. But really the only -- there's only the one line that has anything to do with it.

So, if that's her analysis, then I'm not understanding why the rest of the information was disclosed. So that would be my only comment with respect to where I think the Respondent's request to have that page clawed back or information on that page clawed back would be supportable.

I -- I just view this page, 13284 -- 285 totally different from really how everybody else does. It's just -- to me, there's just a lot of assumptions being made here that I don't think there's any evidence for. I have -- there's nothing that tells me this -- why this would be privileged at all. So, I guess that's -- starting from that, I don't think she's wrong in her analysis that would protect starting from the word "Scott." It seems to be related to attorney-client communications. I understand that. But it doesn't seem to be adversarial.

The one thing that leads me to think it might be questions he wrote before a conversation with an attorney is that he asks a rhetorical question starting with the line "could" and ending with "filed question mark." That has a handwritten notation next to it, the word being response. That to me seems to indicate he had a question that somebody answered for him and told him how -- gave him an answer to that question. But that's how you would deal with his question.

So, that seems to be an indication that these notes were more likely prepared in advance of a conversation with an attorney. And whether he asked them of the attorneys or not or just gathered the

information somehow, he seems to have gotten an answer to that question. Then he's got another handwritten annotation in here that seems to be more in the nature of establishing a timeline. It's -- it's not really -- it's factual.

So, for that reason, I'm kind of wondering why, since that's purely factual, she didn't find that handwritten notation to be discoverable, and instead started with "first." I don't know. It's a very -- you know, we can't ask her. She's not there to send this back and ask her anymore. So just dealing with this myself, because I am not taking issue with her analysis, and I'm willing to accept it and I think there is sufficient information here to understand why she reached those conclusions, I'm not going to overturn that. Although, I -- I do believe that that handwritten notation, starting with the word "Larry" is a fact.

And if she thinks facts are discoverable, I'm not understanding why that fact -- she didn't include that in the facts that could be discoverable. I just -- I don't understand that. I mean, if that -- unless her issue was the facts that Mr. Lubbers would have been operating with. Why -- yeah, I'm not understanding why that -- why she didn't include that as a fact. But anyway, so with respect to her analysis on page 13285 and the reports and recommendations where she -- 13285 -- where she states that she finds --

> "Typed document with handwritten notes. The handwritten date is consistent with the date he consulted the attorneys, and the notes reflect the type of things one would discuss with his or her attorneys. They therefore appear to be

attorney-client communications."

I don't know how she gets there. I mean, I -- the only thing that seems to me to indicate is it seems he got an answer to a question he asks. Anyway, and that she further finds that the handwritten portions were authored by Mr. Lubbers, although she's not -- can't be completely sure that he typed the typed portion, But they do appear to be consistent with the kind of questions a trustee would ask him or herself upon reviewing these petitions.

So, her finding is that from the beginning of 13285, including the handwritten notes to the indented paragraph start with the word "first" is work product and protected under the attorney-client privilege without an applicable exception.

Okay. So, her -- her ultimate finding on 13285 is that that portion -- I don't understand why she left out Larry. I don't get it. Anyway, her view of what is factual in this particular document -- whether it happened is factual. Okay. And I understand and I agree that -- that starting with "whether" and ending with "happen," totally factual. And then she goes on to state that, "Certain portions are intertwined with opinion." But again, here's my problem with saying this is opinion work product, because Mr. Lubbers should not and cannot be considered to be a then operating -- there is no trustee work product. You don't get a work product if you're a trustee. You're just a trustee.

MR. WILLIAMS: Your Honor, most respectfully on that point, and I don't want to interrupt your train of thought, the argument that was made below, and -- and that I would just quickly present here is that Ed

Lubbers as the trustee is a party, and parties undisputedly can create work product without the involvement of an attorney. And that was --

THE COURT: Okay.

MR. WILLIAMS: -- briefed at length below. So, I think that --

THE COURT: Okay. Well, that's --

MR. WILLIAMS: That's all I'm saying.

THE COURT: -- what she's basing it on. Then she -- then, "in creating the work product for your attorney" -- but again, here's -- here's the problem I think that Ms. Dwiggins raised, which is we do not know that the attorneys were ever given this. I understand and I agree that a client can create something and give it to their attorney for their attorney to create -- create a legal pleading from. But we don't know if that ever happened.

So, she concludes that everything is -- is otherwise factual in nature. So, the second sentence starting with "whether" and ending with "annual" are subject to disclosure, and this is substantially for -- so I can't disagree with her of -- on the idea that these -- these are factual and that we cannot presume that these were exclusively attorney-client privilege, so. They're administrative in nature. There's no denying that. And her -- her final conclusion, again, I can't disagree with her that the final paragraph of this page, 13285, is totally unrelated.

As far as we can tell, I don't know what he's talking about. It seems to be a different trust. And her -- her view is that, to the extent that there is a fiduciary exception, Mr. Lubbers, in seeking legal advice as the trustee being name by a beneficiary, he's entitled to seek legal

advice. Not necessarily to defend himself, but to find out what his obligations are as a trustee in response to this petition. Perfectly reasonable, but it ultimate benefits his beneficiary.

So, the beneficiary's entitled to the facts that are related to that. And those facts would be, as I indicated on page 13284, the line starting with "when" and ending with "due question mark." And on 13285, I -- I guess that if she thinks the line starts with "Larry" is related to the last line on the page, which is a different trust, that might be why she didn't include it. I mean, as I read it, I -- it appears that that's the same -- referencing the same trust that she found to be unrelated, and therefore not discoverable. It's factual. It's part of the timeline. And it's just a fact, but it does appear to be related to that other trust, which she said was not discoverable.

So, okay. I -- as I said, I cannot see disturbing her findings. I think she analyzed it pretty carefully. As I said, I might have looked at this differently, but I can't say that I think she's wrong. I just am not convinced that the analysis should start from, the typewritten page is an attorney client communication, because it was somehow prepared to be produced to the attorneys for their, I guess, response to the petition. I mean, the only thing that leads me to think that may be correct is he -- that rhetorical question starting with "could" in the middle of the page that has a handwritten notation next to it appears to be a question that he had answered.

So, to that extent, if he is asking a question and he gets an answer, I see how she concluded that that was an attorney-client

communication. It still seems to me that it's related to the accounting issue. I don't know. I'm just -- I'm just still struggling with why she's -- why she kept that out. But --

MS. DWIGGINS: Your Honor, if I may, I'm just a little confused --

THE COURT: Yeah.

MS. DWIGGINS: -- and I'm not sure if Mr. Williams got all that. The way I understood your ruling as to 13285 is that it's -- initially I thought you said you looked at it differently and you don't believe it to be protected because it's based upon assumptions that you don't think there's adequate evidence for.

THE COURT: Right. That this was --

MS. DWIGGINS: And that the handwritten --

THE COURT: -- an attorney-client communication.

MS. DWIGGINS: -- notes are very different than the typed notes, and that Scott's analysis to you indicates that the trustee was analyzing the petition he received in his capacity as a trustee.

THE COURT: Right.

MS. DWIGGINS: So, I guess to that extent, aren't you overruling her findings? But then I guess if --

THE COURT: Well --

MS. DWIGGINS: -- for some reason it is privileged, you agree with part of her findings? I guess that's what I'm a little --

THE COURT: Yeah. I'm trying to figure --

MS. DWIGGINS: -- confused on.

THE COURT: Yeah. I'm trying to figure out why -- why she found certain things were discoverable and not. Because I just -- I don't -- I understand Mr. Williams' point, that a client can create work product. So, if it's work product, then how is it protect -- what part of it is protected? That -- so I guess that's -- that's probably what I should have stated. Because I -- I'm otherwise not sure I agree with her in her analysis that it's -- that this is protected by the fiduciary exception because it doesn't really seem to be related to -- I don't know. It's -- it's so -- it's such an odd memo. It's -- it is just sort of free form. And I'm -- and I -- so I guess my concern here is there's no way to tell if he ever actually talked to an attorney about any of this.

I understand that some of this may be -- I can see why she could say maybe she -- he did talk to an attorney about some of this, because the sentence in the middle of the page that says "could" seems to have a word written next to it that indicates that question was answered. And that's how -- that was the response that was deemed appropriate to the petition.

MS. DWIGGINS: But I guess making assumptions, he could have easily answered it himself, too.

THE COURT: Right. Exactly. So, we don't know. Then there's another handwritten line in there which seems to me to be purely factual. And I wasn't sure why she didn't order that produced. But on the other hand, it does relate to the last sentence of this memo, which is related to a different trust, which she said you can't look at. Okay. Fine.

So, if her view is anything related to that other trust isn't

discoverable because it's unrelated to the petition at hand, then I understand why she would say that's not discoverable. Because to the extent he was making notes about something, talking to an attorney about something, it may have been something unrelated to this litigation, because she specifically found that with respect to the -- the other two pages, 13286 and 13287.

So, if she -- if she's still following that same analysis, then I understand that, and I can see why those particular lines of this document would be excluded no matter what. So, then I have to go back to, you know, why was she excluding the rest of it? What is there about this that makes her think this was an attorney-client communication? The Larry and final -- the Larry handwritten line and the final line related to the other trust excluded because they're unrelated to the petition that Scott had brought and arguably would be subject to the fiduciary exception.

So those two things, okay, fine. The line beginning with "could" appears to be a very specific legal question that he seems to have gotten an answer to. So, I can see how that's very specifically related to his attorney-client relationship; what should I do with this petition that I got? So, I can see why she excluded that.

I'm just -- in looking at the other lines of that -- above that, starting with "Scott" and ending with "orally," she clearly views those as not factual and more asking for legal advice, which I -- arguably I guess you could say was obtained in that handwritten note, the little one-word note; that that answer's not just for the line starting with "could" but

would also apply to all the -- to the two paragraphs above it. Okay. Fine. So, there's a reason to exclude those -- actually, it's for those eight lines.

I don't like disagree with her at all on her analysis of the rest of it to the extent that she says, "I believe this is factual." I believe that is factual. And similarly, I guess -- what did she do with -- what did she do with the line that starts with "annual" and ends with "do so"?

MR. WILLIAMS: She allowed that to be produced, Your Honor.

THE COURT: Yeah. I -- I thought so. So, I'm okay with that. Okay. Then I'm okay with that as well. I just -- huh. Wow. All right. So, at this point then, I'm -- I am not going to change her analysis starting with the word "Scott" down to "first" because the -- the one handwritten word there could -- I believe could be interpreted as meaning that Mr. Lubbers did discuss this with counsel and obtained an answer to essentially that whole question which is purely procedurally as trustee, how do I respond procedurally to what's -- to having been served with this.

It doesn't get into the accounting and the duty that are owed -- that's owed to Scott. Anything that was related to the accounting and the duties owed to Scott, she said under the fiduciary exception absolutely should be produced. So, in rereading this upper portion of the typewritten portion, I -- I think that, for no other reason, then that appears to be the kinds of questions that a trustee would ask upon being served with a petition, and it appears he got an answer to those questions. That for that reason then, it would be protected, because that

appears to be attorney-client communication directed at the trustee, how does the trustee as a trustee respond to the petition that he received?

So, in the end, other than, as I said, I think I slightly disagree with her on that first page, I don't otherwise disagree with her.

MR. WILLIAMS: Okay.

THE COURT: So, I -- I think for different reasons than she did maybe, but I think she ended up in the right place ultimately.

MS. DWIGGINS: So, I guess if I understand you, going back to what you initially said, they -- there's assumptions made this is even privileged.

THE COURT: Correct.

MS. DWIGGINS: But if it is privileged, you agree with her analysis on the typed notes?

THE COURT: Correct. Yes. Because I can -- I can see how she would interpret that first -- everything above "first" as being essentially, as a trustee, how do I respond to the petition I was just served with? And if you look at that one handwritten note, that's the kind of thing that if you got an answer from your attorney, that would be the answer, because it answers all of his questions.

So, for that reason, that appears to be his attorney-client communication with his attorneys and would not be subject to the exception because it has nothing to do with what his obligations are to Scott. His obligations are to Scott, I believe Scott's entitled to know. So, anything having to do with the accounting, I agree with her; Scott's entitled to all of that. He's also entitled to the facts as the trustee who

was dealing with him.

So, for that reason, I -- I think that only with the respect to that typewritten note, I -- I would deny the objection because, although I might come to the same conclusion for a different reason, I think I come to the same conclusion she does. And that is that I believe that at least a portion of that can be interpreted as, I'm a trustee. I've been served with a petition. You're my attorney. How do I respond to it? And you get an answer. So that would be privileged. The rest of it would not be, other than the information that's unrelated.

So, yeah, I come to it -- I come to it from a different direction, but I don't believe in the end I disagree with her conclusion. I think we end up in the same place, just for different reasons.

MR. WILLIAMS: So then for clarification, Your Honor, with the exception of the slight modifications you made to 13284 --

THE COURT: Correct.

MR. WILLIAMS: -- then you're otherwise affirming or overruling the -- whatever the terminology is?

THE COURT: Yeah. I going to deny the objection. Because although I believe I would have come to it from a -- for a different reason, I concur in her conclusion ultimately. I think we would -- we would agree in the end, our conclusions are -- are similar with respect to what's privileged and what's not --

MR. WILLIAMS: I understand.

THE COURT: -- for different reasons.

MR. WILLIAMS: Okay.

THE COURT: But I believe it's because you can interpret that handwritten note. Like I said, there's nothing that tells you, I talked to my attorneys about this, this is what I'm going to ask my attorneys. It doesn't say that. But if you read it, it appears to be questions, and there's an answer --

MR. WILLIAMS: Understood.

THE COURT: -- the handwritten note is an answer.

MS. DWIGGINS: So, I guess just for clarification for the record, could we put what -- I guess basically what you just said, that you come to the same conclusion for a different reason?

THE COURT: Right. That I -- that I believe that of this typewritten note -- because we can't tell that this is really discussed --

MS. DWIGGINS: That the assumptions --

THE COURT: -- with counsel --

MS. DWIGGINS: -- but even if --

THE COURT: But --

MS. DWIGGINS: I gotcha.

THE COURT: But those first like eight lines down to the as colon appear to be questions that an -- reasonably questions -- can reasonably interpreted to be questions a trustee, upon being served with this petition, would ask of an attorney. And it appears he got an answer. The handwritten-in line there starting with "Larry," I'm assuming the reason she excluded that is the same reason she excluded the last two lines. It's unrelated.

So, I concur with her on that. But I -- I agree. The rest of it is

-- is purely factual and would otherwise -- and should come in. And then, as I said, similar to the other -- the other two pages, I agree with her 100 percent on anything related to the accounting, because that's the trustee's obligation to -- to his -- to the beneficiary. And that is the fiduciary exception.

MS. DWIGGINS: I guess just for clarification, too, where the "Larry" is handwritten, do you think that one word before trust is NAP that you keep referencing that -- in the last paragraph?

THE COURT: I think it is.

MS. DWIGGINS: Okay.

THE COURT: And I think --

MS. DWIGGINS: It's hard to -- I don't know what it says.

THE COURT: -- it's -- you know, I have horrible handwriting. So, I could read pretty much anything. That's the only thing I can understand that to say. And while it appears to be purely factual and just part of a timeline, and therefore I was like why is she not allowing that information in, the only thing I can conclude is if we start from the assumption that the final two lines should not be disclosed because they are totally unrelated to this particular petition, why it's written in that location, I don't know why you put it there, but it appears to be related to those last two lines.

And so, for that reason, I'll -- I'm not going to overturn her finding that it should be excluded. But the -- so I just think that -- your point being, she made some assumptions. I don't necessarily agree with all of her assumptions. But from what I can see, there's a rational reason

to say a portion of this is purely his attorney-client communication with his attorneys. The rest of it's not, because there's no way to say that it was ever produced or given to them. There's nothing else on that page that would indicate any of the rest of this was ever produced or given or discussed with counsel such that you could say it's protected by work product or anything else. It just doesn't.

MR. WILLIAMS: So, I obviously disagree with that last part, Judge.

THE COURT: Right.

MR. WILLIAMS: But that's not why I'm standing up.

THE COURT: I will return this so --

MR. WILLIAMS: May I approach? I'll give it back --

THE COURT: -- it's not --

MR. WILLIAMS: -- counsel.

THE COURT: -- floating around. And the rest of it, we'll just shred the documents.

MR. WILLIAMS: So, Your Honor -- and I don't want to prolong this. I want everybody one to be able to get out of here and go home. But I have a question for you sort of how to proceed next, because --

THE COURT: Right. Because --

MR. WILLIAMS: -- since this does deal with privilege --

THE COURT: Essentially, I would be denying your objection to report and recommendation except as to I do believe that some of the language in that first handwritten page should not be produced.

MR. WILLIAMS: Right. I think between --

THE COURT: That's all.

MR. WILLIAMS: -- Ms. Dwiggins -- we can get the order that emanates out of this drafted.

THE COURT: And a lot of --

MR. WILLIAMS: I think we can deal with that.

THE COURT: -- her objections are to kind of the assumptions that the Commissioner made in her analysis. My analysis is a little different, but I don't disagree with the outcome.

MR. WILLIAMS: Got it. So next question, next complication to deal with, because this deals with privilege and work product issues, and I think it -- this is an important thing that needs to be resolved one way or the other ultimately, we intend to pursue a writ.

THE COURT: Um-hum.

MR. WILLIAMS: I don't know if Ms. Dwiggins does because of her positions and -- and how she feels about the order. But I know that we're going to want to. And so, the question I have then is I would like to move the Court for a stay. I don't know if I should do that now and get that on the record or if you prefer that I do it --

THE COURT: We're on notice that you're going to move for a stay.

MR. WILLIAMS: Okay.

THE COURT: And you --

MR. WILLIAMS: So, you would -- you would then -- you would want me then to file a written brief --

THE COURT: To -- we need an order.

MR. WILLIAMS: -- seeking a stay?

THE COURT: We -- yeah. We need an order --

MR. WILLIAMS: Okay.

THE COURT: -- so that we know what --

MR. WILLIAMS: Okay.

THE COURT: -- we're staying.

MR. WILLIAMS: Understood.

THE COURT: So, we don't have an order yet.

MR. WILLIAMS: Okay. Fair enough.

THE COURT: So good luck writing an order on this one.

MR. WILLIAMS: Well, we did the Discovery Commissioner's order. But I don't know how --

THE COURT: So --

MR. WILLIAMS: -- helpful that was for you, Judge, but --

THE COURT: Okay.

MR. WILLIAMS: Okay.

MS. DWIGGINS: I guess just one other thing procedurally. I mean, Mr. Williams had indicated that this was likely to go up on writ regardless --

THE COURT: Um-hum.

MS. DWIGGINS: -- I think of what the outcome, or someone was going to be unhappy. We currently have a scheduling order in place that is not practical by any means. And I had preliminarily discussed it with him. And obviously if he seeks a stay, it's -- it's definitely going to

change. But at least now, for the time being --

THE COURT: Yeah.

MS. DWIGGINS: -- I don't know if we just vacate it or --

THE COURT: Well, do you want --

MS. DWIGGINS: -- I mean --

THE COURT: -- to get the -- because who knows, you may agree ultimately. Who knows, you may ultimately end up saying, we don't want to take a writ. We'll just do this. Because right now your trial is on -- it's technically only -- not technically a trial date. It's just on for a hearing about whether you're trial ready on September 5th. So --

MS. DWIGGINS: No. I think the trial -- didn't the trial get pushed to like April of next year?

MR. WILLIAMS: I thought it was vacated, and that we had a status check to discuss it sometime in the file. I have --

MS. DWIGGINS: Yeah. I mean, we --

MR. WILLIAMS: I have the order. --

MS. DWIGGINS: -- have expert disclosures due next month, which is obviously not practical in light of your decision even on the motion to compel --

THE COURT: Right.

MS. DWIGGINS: -- because we need a time to get documents.

THE COURT: Right.

MS. DWIGGINS: So --

MR. WILLIAMS: Yeah. So, we can talk. Again, I don't want

to take up the Court's time. I'm happy to talk about this. I -- I -- and I don't think the schedule's going to be workable either. We're definitely going to seek a stay --

THE COURT: All right.

MR. WILLIAMS: -- Judge. And my intent, and I need to go talk -- confer with my colleagues, but is we're going to seek to stay the whole case to get this dealt with one way or the other. We're not going to stand on our -- or you know, drag this out. We'll get a writ filed promptly, and we'll see if the Court takes it or not.

THE COURT: Um-hum.

MR. WILLIAMS: But this is definitely going to have to be modified. No question about it.

THE COURT: Okay.

MR. WILLIAMS: So, I'm happy to work with counsel on that.

MS. DWIGGINS: I mean, I just want to -- if we could put something on the record that at least for now the initial disclosures and the deadline to supplement are vacated and subject to rescheduling.

THE COURT: The -- we are going to -- we'll vacate the scheduling order and put it down for like 30 days to have a new scheduling order. And hopefully by then we'll have the petition for stay and everything else on file. Just so that you know you don't have to deal with these deadlines. You're not being prejudiced by that. But that we keep everybody's feet to the fire to actually get -- as Mr. Williams has indicated, they intend to do it posthaste.

So -- because there's -- there's the two different orders.

There's the one on the -- the compel slash production and then there's this one.

MR. WILLIAMS: Right. I'm only --

THE COURT: So --

MR. WILLIAMS: -- talking about the privilege one, not the --

THE COURT: Yeah

MR. WILLIAMS: -- the underlying discovery motions.

THE COURT: Because I don't -- I don't know what they're going to do on that.

MR. WILLIAMS: Yeah.

MS. DWIGGINS: Thank you --

THE COURT: So, do you want --

MS. DWIGGINS: -- for your time and your --

THE COURT: Do you want to --

MS. DWIGGINS: -- patience, Your Honor.

THE COURT: -- a status check in 30 days to see if we are -- because we have to -- we have to put -- it would actually have to be on the 9th, right?

THE CLERK: Well, let's see. Do you want to set a hearing for --

THE COURT: Or the 30th.

THE CLERK: -- a motion to stay and -- and just do the status --

THE COURT: Well, here's my problem: In May I'm -- I'm -- May's a crazy month. I'm just not here much in May. I'm here on the 9th

and the 30th in May.

MR. WILLIAMS: Okay.

THE COURT: May --

MS. DWIGGINS: Do you want to -- I have set -- I'm willing to stipulate to an OST on a motion to stay and have it heard this month. I mean, I think it obviously is better dealt with sooner than later --

THE COURT: Right.

MS. DWIGGINS: -- if we do it. Are you here at the end of the month?

THE COURT: I'm here on the 25th. What's the 25th look like?

MS. DWIGGINS: Are you amendable to that or --

THE CLERK: It's not bad.

THE COURT: The 25th?

MR. WILLIAMS: As long as we can get the -- I mean, I have some stuff going on, without my calendar here. But I mean, we'll get it -- we can get a motion to stay drafted quickly. And if Your Honor will hear it on an OST, I mean, we can work on a date that's acceptable for everybody, and the Court, of course.

THE COURT: Okay.

MS. DWIGGINS: And I'm sorry, when did you say you were here in May? The 9th and --

THE COURT: The 9th -- the 9th and the 30th.

MS. DWIGGINS: Okay.

MR. WILLIAMS: So, Your Honor, we're here. It's the 11th. Seemingly, if everyone's amenable, are there -- I presume there's dates

later in April that the Court is available.

THE COURT: The 25th.

MR. WILLIAMS: April I'm talking about. So, April 25th?

THE COURT: April 25th, yeah.

MR. WILLIAMS: Sorry. Okay. Well, we'll get a motion drafted and submitted to you. And I'll -- I'll keep opposing counsel, you know, apprised of what we're trying to do. But we'll shoot to have it done so that they have adequate fine -- time to respond, and we'll hear it on the 25th.

MS. DWIGGINS: And our hearing next week was vacated because of the transfer over here, right?

MR. WILLIAMS: Yeah.

MS. DWIGGINS: Okay.

THE COURT: Oh, with Potter?

MR. WILLIAMS: Right.

MS. DWIGGINS: Yeah. I believe that was taken off calendar.

THE COURT: Yeah. There's -- there's nothing on the calendar next week. Oh, you know, the -- all the -- did we ever get them to consolidate them all?

MS. WAKAYAMA: I believe so. I believe I did get them [indiscernible].

THE COURT: I think they -- I think they do have a -- I think -- Ms. Wakayama gave us all those case numbers last time, and I think we were able to --

UNIDENTIFIED SPEAKER: Yeah, we --

THE COURT: -- get the clerk's office to consolidate them all.

UNIDENTIFIED SPEAKER: -- we sent that to the [indiscernible].

[Counsel confer]

THE COURT: So, everything's -- everything's --

MS. WAKAYAMA: Everything's before you, Your Honor?

THE COURT: -- been consolidated. Yeah.

MS. WAKAYAMA: Okay.

THE COURT: And so, it will be filed in -- it's easiest for us if you file it under just this case number. It's the way we're able to find things.

So, there may be something -- is there anything on the calendar?

All right. Yeah, nothing's on. We looked at-- all the -- they've got all the case numbers linked for us now and nothing's on.

MS. DWIGGINS: Thank you.

THE COURT: It's all good.

MS. DWIGGINS: All right. Thank you, Your Honor.

MS. WAKAYAMA: Thank you.

THE COURT: All right, everybody.

/////

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/////

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MR. WILLIAMS: See you. Thank you.

MR. IRWIN: Thank you.

[Proceedings concluded at 5:14 p.m.]

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

_____

Maukele Transcribers, LLC
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DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of: SCOTT LYLE GRAVES CANARELLI IRREVOCABLE TRUST, dated February 24, 1998.	Case No: P-13-078912-T Dept. No: XXVI Date of Hearing: April 11, 2019 Time of Hearing: 1:30 pm

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

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

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

A. RESP013284

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

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

B. RESP013285

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

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

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

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

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

C. RESP013286-RESP013287

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

D. RESP013288

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

NOW, THEREFORE, IT IS HEREBY ORDERED:

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

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

3. The remainder of Respondents' Objections are DENIED.

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

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

DATED this 31st day of May, 2019.

DISTRICT COURT JUDGE

Agreed as to Form:

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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' MOTION TO DISQUALIFY THE HONORABLE GLORIA STURMAN** **HEARING REQUESTED**

NOTICE: THIS MATTER SHOULD BE REFERRED TO THE CHIEF JUDGE AS THE MOTION TO DISQUALIFY MUST BE DECIDED BY A DISTRICT COURT JUDGE OTHER THAN JUDGE STURMAN. ***See Towbin Dodge, LLC v. Eighth Judicial Dist. Ct.*****, 121 Nev. 251, 112 P.3d 1063 (2005).**

Respondents Lawrence Canarelli ("Larry") and Heidi Canarelli ("Heidi") (collectively "the Canarellis"), and Frank Martin, Special Administrator of the Estate of Edward C. Lubbers ("Lubbers" and together with the Canarellis the "Former Trustees"), as former Family Trustees of the Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998 (the "SCIT"), by and through their undersigned counsel, hereby submit their Motion to Disqualify the Honorable

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Gloria Sturman. This Motion is based on the papers and pleadings on file herein, the exhibits attached hereto, the following Points and Authorities, and any oral argument the Court considers at the time of the hearing.

POINTS AND AUTHORITIES

I. INTRODUCTION

The instant Motion arises out of a long-running dispute over a set of privileged notes prepared by Edward Lubbers, the former Family Trustee of the SCIT, which were inadvertently produced to Petitioner Scott Canarelli ("Petitioner" or "Scott") and his counsel in this litigation.[1] Lubbers prepared the typed notes to assist him in a conference with his legal counsel regarding his responses to three probate petitions filed by Scott in September 2013. The notes contain a series of questions that Lubbers—a licensed attorney—sought to pose to counsel as well as his assessment of certain legal issues and strategies, including potential strengths and weaknesses, thoughts on how the Former Trustees should respond to Scott's petitions, and where they may have risk. Most importantly for the purposes of this Motion, the notes describe Lubbers' "beliefs" about how the Court may view the merits of the case. *Id.*

Because the content of the notes expressly address the Court's potential views of the case, the Former Trustees repeatedly warned the Honorable Gloria Sturman that—as the ultimate trier of fact in this action—she may not want to review the notes or the portions of Scott's papers where the notes were quoted or otherwise relied upon. The Former Trustees' suggestion was premised on abundant legal authority that a trial judge sitting as the fact-finder should carefully

[1] Scott's counsel from the law firm Solomon Dwiggins & Freer, Ltd. ("SDF") did not alert the Former Trustees to the inadvertent disclosure and instead used the notes to expand Scott's claims in this action through a supplemental petition filed on May 18, 2018. SDF's misconduct is more thoroughly addressed in the Former Trustees' Motion to Disqualify SDF filed concurrently herewith.

consider whether another judicial officer should be appointed to review privileged materials because the content may require recusal. In other words, the Former Trustees took steps to warn Judge Sturman that her review of the notes could result in her being unwittingly tainted if they were found to be attorney-client privileged and/or work product protected. Despite the Former Trustees' efforts to protect Judge Sturman's impartiality as the ultimate trier of fact, she nonetheless reviewed the notes in detail when ruling on the parties' respective objections to the discovery commissioner's report and recommendations concerning the protected status of the Notes—including the portions detailing Lubbers' "beliefs" about how the Court may view the merits of the case.

On May 28, 2020, the Nevada Supreme Court, sitting *en banc*, unanimously granted Respondents' Petition for Writ of Prohibition and confirmed that the notes are protected by the attorney-client privilege without exception. *See Canarelli v. Eighth Judicial Dist. Ct.*, 136 Nev. Adv. Op. 29, --- P.3d --- (2020). The Supreme Court's ruling now requires an examination of whether Judge Sturman can continue to sit on this case. Because the district court reviewed the privileged notes despite the Former Trustees' express warnings about the potential consequences of doing so, Judge Sturman's impartiality might reasonably be questioned as she is now aware of, *inter alia*, Lubbers' "beliefs" about how the trier of fact in this action may analyze the merits of the case. Regretfully, the Former Trustees are left with no choice but to seek Judge Sturman's disqualification from these proceedings under Rule 2.11 of the Nevada Code of Judicial Conduct.

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II. BACKGROUND[2]

A. The SCIT Litigation

Larry and Heidi are Scott's parents. Larry is the former head of the American West Homebuilding Group ("AWG"). Larry and Heidi gifted Scott minority interests in various corporations and limited liability companies that comprised part of AWG's homebuilding operations, which assets Scott then contributed to the SCIT. Scott's parents served as Family Trustees of the SCIT from its formation in February 1998 until May 24, 2013. Lubbers had served as Independent Trustee of the SCIT since or about 2005. He became successor Family Trustee after the Canarellis resigned in May 2013. Lubbers ultimately resigned as Family Trustee in October 2017, and died approximately six months later on April 2, 2018.

Scott retained SDF in or about May 2012 to assist him in obtaining distributions from the SCIT, which Scott alleged had been stopped due to "hostility" on the part of Larry and Heidi. By November 2012, the "hostility" between Scott and his parents, who were still Family Trustees of the SCIT at that time, and Lubbers, who was then Independent Trustee of the SCIT, had worsened. After receiving a letter from Scott's counsel at SDF characterizing the Trustees' handling of distributions to Scott as "*per se* bad faith" and threatening to file suit to remove Larry and Heidi as trustees, Lubbers promptly noted in a written agenda: "Scott – lawsuit threatened."

On May 31, 2013, Lubbers, who was then successor Family Trustee of the SCIT, entered into a purchase agreement whereby he sold the SCIT's minority interests in the AWG homebuilding entities for more than $25 million. On September 30, 2013, Scott filed his petition to assume jurisdiction over the SCIT, to confirm Lubbers as Family and Independent Trustee, for

[2] Unless stated otherwise, this factual background is taken from the Nevada Supreme Court's recent opinion, the Former Trustees' Motion to Disqualify SDF, and the supporting exhibits filed concurrently therewith or otherwise attached hereto. A true and correct copy of the *Canarelli* opinion is attached hereto as Exhibit 1.

an inventory and accounting, to compel an independent valuation of the trust assets subject to the purchase agreement, and to direct Lubbers to provide all information concerning the purchase agreement (the "Initial Petition") (on file). The Initial Petition included a number of adversarial allegations against the Former Trustees. Scott filed two other petitions the same day related to two different trusts of which he is the beneficiary.[3]

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

Less than two weeks after Scott served the Initial Petition, Lubbers retained attorneys David Lee and Charlene Renwick to represent him in connection with responding to the Initial Petition (and the two other petitions filed by Scott). The contemporaneous billing records from Lee and Renwick reflect that they conducted a conference call with Lubbers on October 14, 2013 that lasted approximately a half hour. The general subject matter of the call was regarding "responses to petition."

In connection with the October 14, 2013 call, Lubbers prepared handwritten and typed notes (the "Group 1 Notes"). The handwritten notes were a contemporaneous recording of the matters discussed during the call. The typed notes, which are at the heart of the parties' privilege dispute, initially set forth a series of questions that Lubbers sought to pose to counsel regarding how to respond to the Initial Petition.[4] The notes go on to describe Lubbers' "beliefs" regarding the case, including how the Former Trustees should respond to the Initial Petition, and how the Court may view the case. Finally, the notes reflect Lubbers' assessment of certain legal issues and strategies, including potential strengths and weaknesses, and where the Former Trustees may

[3] *See* Case Nos. P-13-078913-T; P-13-078919-T.

[4] The Former Trustees will only describe the general subject matter of the Group 1 Notes in this public filing. Because this Court will not be the ultimate trier of fact in this case, the Former Trustees will provide the relevant pages of the notes for *in camera* review.

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have risk.

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

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

On or about December 2, 2013, the parties entered a revised stipulation appointing Stephen Nicolatus to conduct a valuation of the SCIT's assets sold pursuant to the purchase agreement. While the Parties had agreed to the appointment of Mr. Nicolatus, Scott expressly reserved his rights to seek redress for the conduct of the Former Trustees as it related to the purchase agreement. Following the valuation process and unsuccessful efforts to resolve this family dispute, Scott filed his surcharge petition on June 27, 2017 alleging various claims against the Former Trustees. The Former Trustees served their initial disclosures pursuant to NRCP 16.1 on December 15, 2017. As part of their initial disclosures, the Former Trustees inadvertently produced the Group 1 Notes.

On May 18, 2018, Scott filed his supplement to the surcharge petition, which is akin to an amended complaint (the "Supplemental Petition"). With no forewarning, SDF unilaterally included the Group 1 Notes (Bates Nos. RESP0013284-RESP0013288) as Exhibit 4 to the Supplemental Petition. While the Exhibit itself was submitted "*in camera*," SDF nonetheless quoted substantial portions of the typed notes (Bates No. RESP0013285) in the publicly-filed body of the Supplemental Petition as constituting an alleged "admission" that the Former Trustees

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had breached their fiduciary duties.[5] Not only did SDF expand Scott's breach of fiduciary duty claim based on the typed notes, it also added a new fraud claim premised thereon.

At the same time the parties were engaged in motion practice before the discovery commissioner regarding the privileged status of the notes, the Former Trustees moved to dismiss the Supplemental Petition on June 29, 2018. On August 13, 2018, after briefing on the motion was complete, the undersigned counsel wrote a letter to Judge Sturman in anticipation of the hearing date set for August 16, 2018. The letter to Judge Sturman in pertinent part reads as follows:

> Exhibit 4 to the Supplemental Petition (filed May 18, 2018) is a set of hand-written and type-written notes prepared by Edward C. Lubbers. These notes were inadvertently produced in this action as they are attorney-client privileged and work product protected. Petitioner disagrees with Respondents' position, and the parties have engaged in motion practice related to this dispute that is set to be heard before Commissioner Bulla on August 29, 2018. While Exhibit 4 was submitted *in camera*, Petitioner quoted from a portion of the notes in the body of his publicly-filed Supplemental Petition at p. 18, l. 24 – p. 19, l. 8. Petitioner has additionally quoted from Mr. Lubbers' notes in his Opposition to the Motion to Dismiss (filed July 31, 2018) at p. 27, ll. 19-20.
>
> Respectfully, Respondents believe it would be inappropriate at this time for Her Honor to review the notes submitted as Exhibit 4 or the portions of Petitioner's papers where those notes are quoted. This position is not meant as any disrespect for the Court. It is just the opposite; Respondents seek to prevent the Court from being unwittingly tainted if, in fact, the notes are deemed to be protected. An opinion from the Arizona Supreme Court, sitting *en banc*, recently explained a similar situation as follows:
>
> > [T]he trial court must determine whether the [disputed] documents are indeed privileged. To that end, the court properly ordered JS & S to produce a privilege log and Miller and Bradford to file a response.
> >
> > The trial court, however, erred by ruling that it would review all the documents to determine whether they are privileged. The court should have awaited the responses to the privilege log and considered the parties' arguments regarding privilege and waiver to

[5] *See* Supp. Pet. at 18:24-19:8 (*i.e.*, Paragraph 37) (on file).

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> determine whether *in camera* review was warranted for particular documents before reviewing them.
>
> ***If in camera review is needed, the trial judge should consider whether another judicial officer should conduct the review in light of the possibility that a review of privileged materials may be so prejudicial as to require the judge's recusal. If the trial judge conducts an in camera review and upholds the privilege claim, the judge should consider whether recusal is then necessary.***

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

The letter continued:

> Unlike this Court, Commissioner Bulla will not be sitting as the ultimate trier of fact in this matter. Thus, we believe she is an appropriate "other judicial officer" capable of reviewing the notes *in camera* without creating the potential for possible recusal as referenced in *Lund*. If either or both parties wish to seek review of Commissioner Bulla's recommendations after the August 29 hearing, perhaps the parties and the Court can discuss the best way to handle such review at that time.[6]

D. Procedural History Related to the Privilege Dispute.

The discovery commissioner conducted a lengthy hearing on Scott's motion for privilege determination and the Former Trustees' countermotion for remediation on August 29, 2018. The commissioner found that portions of the Group 1 Notes were protected by the attorney-client privilege and work product doctrine, but that other portions were discoverable because they contained facts and/or fell within the fiduciary and common interest exceptions to the attorney-client privilege.

Scott and the Former Trustees each filed objections to the discovery commissioner's report and recommendations. Again, the Former Trustees reminded Judge Sturman to be cautious before deciding to review the notes *in camera*:

> Petitioner provided copies of Lubbers' notes to the Discovery Commissioner *in camera* as sealed Exhibits 1 and 2 to his underlying Motion. In the context of

[6] *See* Letter to Hon. Gloria Sturman dated 8/13/2018, a true and correct copy of which is attached hereto as Exhibit 2.

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> moving to dismiss Petitioner's Supplemental Petition filed on May 18, 2018, which attached certain of the notes at issue herein as Exhibit 4 thereto, Respondents notified the Court that it may wish to exercise caution before reviewing Lubbers' typed notes so that it did not become unwittingly tainted as the notes reflect Lubbers' beliefs as to how the Court may view this litigation. *See* Letter from C. Williams dated August 13, 2018. Respondents wish to remind the Court of this issue so that it has the chance to consider how best to proceed with the review of the DCRR.[7]

Notwithstanding the Former Trustees' repeated warnings, Judge Sturman reviewed the Notes in detail before affirming the report and recommendation and allowing Scott to retain the disputed notes, or portions thereof.[8] The Former Trustees, in turn, promptly filed their writ petition challenging the district court's ruling.

On May 28, 2020, the Nevada Supreme Court, sitting *en banc*, issued a unanimous decision granting Respondents' Petition for Writ of Prohibition. *See Canarelli v. Eighth Judicial Dist. Ct.*, 136 Nev. Adv. Op. 29, --- P.3d --- (2020). The Nevada Supreme Court held that the district court clearly abused its discretion to the extent it found the notes were not protected by the attorney-client privilege. *Id.* at *8-12. The Court further refused to recognize the so-called "fiduciary exception," and rejected Scott's contention that the notes were subject to the common-interest exception to the attorney-client privilege. *Id.* at *12-15. Accordingly, the *Canarelli* court plainly held that the notes containing Lubbers' "beliefs" about how the Court may view the case are inadmissible, attorney-client privileged documents.

---

[7] *See* Respondents' Objections in Part to DCRR on Mot. for Determination of Privilege Designation dated 12/17/18 at 5 n. 1 (on file). Petitioner vigorously opposed the Former Trustees'' suggestion that another judicial officer review the notes and even went so far as to claim it was "an insult" to Judge Sturman. *See* Petitioner's Opposition to Respondents' Objections in Part to DCRR on Mot. for Determination of Privilege Designation dated 1/14/19 at 24:19-26:9 (on file).

[8] *See, e.g.,* Hr'g Tr. dated Apr. 11, 2019 at 115:24-132:6 (analyzing and discussing the content of the Notes), true and correct excerpts of which are attached hereto as Exhibit 3; Notice of Entry of Order on the Parties' Objections to the Discovery Commissioner's Report and Recommendation on the Motion for Privilege Designation (dated 5/31/19), a true and correct copy of which is attached hereto as Exhibit 4.

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III. ARGUMENT

A. Legal Standard Governing Disqualification Of A District Court Judge.

"Nevada has two statutes governing disqualification of district court judges. NRS 1.230 lists substantive grounds for disqualification, and NRS 1.235 sets forth the procedure for disqualifying district court judges." *Towbin Dodge, LLC v. Eighth Judicial Dist. Ct.*, 121 Nev. 251, 255, 112 P.3d 1063, 1066 (2005). NRS 1.235, however, allows "only one window of opportunity in which to make a 'for cause' challenge; either twenty days before the date set for a trial or hearing of the case, or three days before the date set for the hearing of any pretrial matter, whichever occurs first." *Valladares v. Second Judicial Dist. Ct.*, 112 Nev. 79, 84, 910 P.2d 256, 260 (1996). Here, the Former Trustees cannot seek Judge Sturman's disqualification under NRS 1.230 and NRS 1.235 as she has heard numerous contested pretrial matters.

Nevertheless, the Nevada Supreme Court has recognized that "the Nevada Code of Judicial Conduct (NCJC) sets forth not only ethical requirements for judges, but can also provide a substantive basis for judicial disqualification." *Towbin Dodge*, 121 Nev. at 257, 112 P.3d at 1067. Specifically, Rule 2.11 (formerly Canon 3E) of the NCJC provides grounds for judicial disqualification, and states in pertinent part: "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned[.]"[9]

"Thus, if new grounds for a judge's disqualification are discovered after the time limits in NRS 1.235(1) have passed, then a party may file a motion to disqualify based on [Rule 2.11] as soon as possible after becoming aware of the new information." *Towbin Dodge*, 121 Nev. at 260, 112 P.3d at 1069. In seeking judicial disqualification under Rule 2.11, the moving party "must

[9] Rule 2.11(A)(1)-(6) enumerates six specific circumstances in which a judge's impartiality might reasonably be questioned. Comment 1 to Rule 2.11, however, makes clear that "a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions in paragraphs (A)(1) through (6) apply.

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set forth facts and reasons sufficient to cause a reasonable person to question the judge's impartiality, and the challenged judge may contradict the motion's allegations." *Id.* The "motion must be referred to another judge[,]" *id.*, and the standard for assessing disqualification under Rule 2.11 "is whether a reasonable person, knowing all the facts, would harbor reasonable doubts about a judge's impartiality." *In re Varain*, 114 Nev. 1271, 1278, 969 P.2d 305, 310 (1998). "If it is a close case, the balance tips in favor of recusal." *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008).[10]

B. A Reasonable Person Would Harbor Doubts About Judge Sturman's Impartiality Due To Her Review Of The Notes.

The Former Trustees begin by acknowledging that a district court is generally permitted to conduct an *in camera* review of allegedly privileged documents to determine whether the documents are, in fact, privileged. *See, e.g.*, *Las Vegas Sands v. Eighth Judicial Dist. Ct.*, 130 Nev. 643, 656, 331 P.3d 905, 914 (2014) ("[T]he district court should resolve any disputes regarding Sands' privilege log by conducting an in-camera review of the purportedly privileged documents to determine which documents are actually protected by a privilege."). The foregoing principle, however, normally applies when the district court is not sitting as the trier of fact. Where, as here, the district court is the ultimate decision-maker, the "examination of [privileged] evidence, even by the judge alone, in chambers might in some cases jeopardize the security which the privilege is meant to protect." *United States v. Zolin*, 491 U.S. 554, 570 (1989) (citing *United States v. Reynolds*, 345 U.S. 1 (1953)).

[10] The Nevada Supreme Court looked to federal law in determining the process by which a party may seek judicial disqualification under Rule 2.11 of the NCJC. *Towbin Dodge*, 121 Nev. at 258-59, 112 P.3d at 1068-69 (finding that 28 U.S.C. § 455 is "substantially similar" to Rule 2.11 and adopting federal procedure for enforcing Rule 2.11 when NRS 1.235 does not apply).

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For that reason, courts have recognized that "[i]f *in camera* review is needed, the trial judge [as the trier-of-fact] should consider whether another judicial officer should conduct the review in light of the possibility that a review of the privileged materials may be so prejudicial as to require the judge's recusal." *Lund v. Myers*, 305 P.3d 374, 377 (Ariz. 2013) (citing the Arizona analogue of Rule 2.11 of the NCJC); *see also In re Marriage of Decker*, 606 N.E.2d 1094, 1107 (Ill. 1992) ("Because of the inherent problem involved in a trial court's viewing information that may in fact be privileged, and then later ruling on an issue which the privileged information may affect, it would be prudent, where possible, to have another trial judge conduct the *in camera* inspection[.]"); *In re St. Johnsbury Trucking Co., Inc.*, 184 B.R. 446, 455 n. 17 (Bankr.D.Vt. 1995) (finding it would be improper for the court, as the ultimate decision maker in a sanctions proceeding, to review privileged materials and that *in camera* review would be assigned to a different judge); *Reilly by Reilly v. Se. Penn. Transp. Auth.*, 479 A.2d 973, 991 (Pa. Sup. Ct. 1984) (a judge's impartiality might reasonably be questioned where "the judge was exposed to prejudicial, inadmissible evidence, which, if the judge had been the trier-of-fact, could arguably have tainted the fact-finding process.").[11]

It is undeniable that Judge Sturman's review of the notes raises serious questions about her impartiality. Judge Sturman is the ultimate trier of fact in this dispute, *see* NRS 153.031, and reviewed Lubbers' notes that confide in his litigation counsel "beliefs" about how Judge Sturman may view the case in her capacity as the fact-finder. The notes also contain additional, quintessential attorney-client privileged communications about this litigation. The taint from Judge Sturman's review of the notes is further compounded by the fact that Lubbers is now

[11] *Cf. Scott v. State*, 8 So.3d 855, 859-861 (Miss. 2008) (holding that attorney's disclosure of privileged information to trial judge did not require recusal for lack of impartiality where the trial judge was not the trier-of-fact and the jury did not learn of attorney's disclosure).

deceased, and cannot testify about the events that precipitated Scott's filing of this action. In short, it is almost impossible to conceive of a scenario where a trial judge's review of privileged material could be more prejudicial and damaging to the fact-finding process than what occurred with respect to Lubbers' notes. Thus, pursuant to Rule 2.11 of the NCJC, Judge Sturman should be disqualified because a reasonable person, knowing all the facts undisputedly established in this case, would harbor reasonable doubts about her impartiality.

III. CONCLUSION

Based on the foregoing, the Canarellis respectfully request that the Court disqualify the Honorable Gloria Sturman and reassign this matter to a different district court judge.

DATED this 8th day of June, 2020.

CAMPBELL & WILLIAMS

By /s/ ***J. Colby Williams***
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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of June, 2020, I caused a true and correct copy of the foregoing **Respondents' Motion to Disqualify the Honorable Gloria Sturman** to be served through the Eighth Judicial District Court's electronic filing system, to the following parties:

Dana Dwiggins, Esq.
Craig Friedel, Esq.
SOLOMON DWIGGINS & FREER, LTD
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129

Counsel for Scott Canarelli

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

DECLARATION OF J. COLBY WILLIAMS

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DECLARATION OF J. COLBY WILLIAMS

J. COLBY WILLIAMS declares under penalty of perjury as follows:

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

2. I am a licensed attorney in the State of Nevada, Bar Number 5549, and a partner in the law firm Campbell & Williams. I am one of the attorneys representing Lawrence Canarelli ("Larry") and Heidi Canarelli ("Heidi") (collectively the "Canarellis") and Frank Martin, Special Administrator of the Estate of Edward C. Lubbers ("Lubbers"), who have been sued in their capacity as former Family Trustees of The Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998 (the "SCIT"). I submit this declaration in support of Respondents' Motion to Disqualify the Honorable Gloria Sturman.

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

4. A true and correct copy of the Nevada Supreme Court's recent opinion in this action, *Canarelli v. Eighth Judicial Dist. Ct.*, 136 Nev. Adv. Op. 29, --- P.3d --- (May 28, 2020), is attached hereto as Exhibit 1.

5. A true and correct copy of the letter from J. Colby Williams to the Honorable Gloria Sturman dated August 13, 2018 is attached hereto as Exhibit 2.

6. A true and correct copy of excerpts of the hearing transcript dated April 11, 2019 are attached hereto as Exhibit 3.

7. A true and correct copy of the Notice of Entry of Order on the Parties' Objections to the Discovery Commissioner's Report and Recommendation on the Motion for Privilege Designation dated May 31, 2019 is attached hereto as Exhibit 4.

8. I declare under penalty of perjury that the foregoing is true and correct.

DATED this 8th day of June, 2020.

/s/ J. Colby Williams
J. COLBY WILLIAMS

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EXHIBIT 1

136 Nev., Advance Opinion 29

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAWRENCE D. CANARELLI; HEIDI CANARELLI; AND FRANK MARTIN, SPECIAL ADMINISTRATOR FOR THE ESTATE OF EDWARD C. LUBBERS, FORMER TRUSTEES,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE GLORIA STURMAN, DISTRICT JUDGE,
Respondents,
and
SCOTT CANARELLI, BENEFICIARY OF THE SCOTT LYLE GRAVES CANARELLI IRREVOCABLE TRUST DATED FEBRUARY 24, 1998,
Real Party in Interest.

No. 78883

FILED
MAY 28 2020
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

Original petition for a writ of prohibition or mandamus challenging a district court order compelling the production of documents in a trust matter.

Petition granted.

Campbell & Williams and J. Colby Williams, Donald J. Campbell, and Philip R. Erwin, Las Vegas,
for Petitioners.

Marquis Aurbach Coffing and Liane K. Wakayama, Las Vegas,
for Petitioner Frank Martin, Special Administrator for the Estate of Edward C. Lubbers.

Solomon Dwiggins & Freer, Ltd., and Dana A. Dwiggins and Tess E. Johnson, Las Vegas,
for Real Party in Interest.

BEFORE THE COURT EN BANC.

OPINION

By the Court, STIGLICH, J.:

This court has not had the opportunity to address whether there is a fiduciary exception to the attorney-client privilege, whereby a fiduciary such as a trustee is prohibited from asserting the attorney-client privilege against a beneficiary on matters of trust administration. Because the Legislature created five specific exceptions to the attorney-client privilege, none of which are the fiduciary exception, we expressly decline to recognize the fiduciary exception in Nevada.

Petitioners are former trustees challenging a district court order compelling the production of allegedly privileged documents in a trust dispute with a beneficiary. The first group of documents at issue contains a former trustee's notes related to a phone call with counsel, and the second group of documents contains the former trustee's notes taken during a meeting with the other trustees, counsel, the opposing party, and an independent appraiser. Because the former trustee communicated the content of the first group of documents to counsel, we determine that these documents are protected by the attorney-client privilege and are therefore undiscoverable. Because the former trustee created the second group of documents in anticipation of litigation and the substantial-need exception to the work-product doctrine does not apply, we determine that these

documents are protected by the work-product doctrine and are therefore undiscoverable. Accordingly, the district court acted in excess of its jurisdiction in compelling the partial production of the disputed documents, and we therefore grant a writ of prohibition.

BACKGROUND

Underlying trust dispute

Real party in interest Scott Canarelli is the beneficiary of the Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998 (the Trust). Scott's parents, petitioners Lawrence and Heidi Canarelli, conveyed minority interests in their various business entities to Scott, which Scott in turn contributed to the Trust. Lawrence and Heidi served as the Trust's family trustees and, as such, made discretionary payments from the Trust to Scott for his health, education, support, and maintenance. In addition to the two family trustees, the Trust had one independent trustee, Edward Lubbers. Lubbers also served as Lawrence and Heidi's personal attorney; in this litigation, his interests are represented by petitioner Frank Martin as Special Administrator of the Estate of Edward C. Lubbers.

Scott alleges that the trustees unlawfully withheld Trust distributions. In 2012, Scott's attorney sent a letter to Lubbers stating that the trustees were demanding receipts from Scott's purchases in a manner that was per se bad faith. The letter also threatened a lawsuit to redress the trustees' discretionary payment decisions and remove them from their roles as trustees. After receiving the letter, Lubbers listed "Scott—lawsuit threatened" as a line item on one of Lawrence and Heidi's business entities' meeting agendas.

In May 2013, Lawrence and Heidi resigned from their roles as family trustees, and Lubbers became successor family trustee. A week after Lawrence and Heidi resigned, Lubbers entered into a purchase agreement exceeding $25 million on behalf of the Trust to sell off the Trust's ownership in Lawrence and Heidi's business entities.

Scott subsequently filed a petition asking the district court to compel Lubbers to provide all information related to the purchase agreement and an inventory and accounting for the Trust. Less than two weeks later, Lubbers retained attorneys David Lee and Carlene Renwick. According to billing records, Lee and Renwick spoke on the phone with Lubbers for approximately half an hour on October 14, 2013, about Lubbers' "responses to petition." Lee and Renwick continued to correspond with Lubbers via phone and email over the next two days, and Lubbers filed a response to Scott's petition on October 16, 2013. Scott filed a supplemental petition asserting new claims of breach of fiduciary duty against Lawrence, Heidi, and Lubbers. Lubbers resigned from his role as trustee in 2017 and died six months later.

Disputed documents

During discovery, Lawrence, Heidi, and Lubbers inadvertently disclosed documents containing Lubbers' notes. They attempted to claw back the documents, citing the attorney-client privilege and work-product doctrine.

The first group of disputed documents (Group 1 documents) contains Lubbers' notes related to his phone call with Lee and Renwick on October 14, 2013. One document contains Lubbers' typed notes composed in preparation of this conversation. The other documents contain Lubbers' handwritten notes contemporaneously memorializing the call. Lee and

Renwick confirmed in declarations that on their October 14, 2013, call with Lubbers, Lubbers asked about his potential response to Scott's petitions, of which there were three pending. They also verified that Lubbers stated "his views about several matters related to the petitions and potential strategies for defending against certain of the allegations contained therein."

The second group of disputed documents (Group 2 documents) contains Lubbers' notes contemporaneously memorializing an in-person meeting he attended on December 19, 2013, with the other trustees, counsel, Scott, and an independent trust appraiser.

Procedural history

Scott moved for a determination of privilege. The discovery commissioner found that each of the disputed documents appeared to contain Lubbers' notes. The commissioner then concluded that a portion of the Group 1 documents were protected by the attorney-client privilege and the work-product doctrine, but that other portions were discoverable. For the discoverable portions, the commissioner found that Lubbers' notes contained factual statements or information unrelated to the Trust. Alternatively, to the extent the factual statements intertwined with attorney-client privileged communications or work product, discovery was nonetheless permitted because of the fiduciary and common-interest exceptions to the attorney-client privilege and the substantial-need exception to the work-product doctrine. The commissioner concluded that the Group 2 documents were discoverable because, even if they constituted work product and contained primarily factual information, the substantial-need exception to the work-product doctrine applied.

The district court generally adopted the commissioner's findings.[1] However, the district court concluded that the commissioner's findings as to the Group 1 document containing Lubbers' typed notes were based upon assumptions that the notes were communicated to counsel and therefore protected by the attorney-client privilege. Nevertheless, the district court agreed with the commissioner's conclusion that a portion of the document was discoverable.

Lawrence, Heidi, and Lubbers petition this court for a writ of prohibition preventing the district court from compelling production of the disputed documents and a writ of mandamus directing the district court to find the disputed documents undiscoverable and order their return or destruction.

DISCUSSION

This original proceeding asks us to determine whether the district court acted in excess of its jurisdiction in compelling the production of allegedly privileged material. Because the disclosure of privileged information is immediately harmful and this petition provides an opportunity to address a novel issue of law, we consider the petition. In doing so, we first consider whether the Group 1 documents are protected by the attorney-client privilege, thereby evaluating whether petitioners proved that the documents were communicated to counsel, whether the fiduciary exception to the attorney-client privilege exists in Nevada, and whether the common-interest exception to the attorney-client privilege applies. We then

---

[1]The commissioner and the district court disagreed as to one portion of one Group 1 document containing Lubbers' memorialization notes. Whereas the commissioner found that the document was discoverable in its entirety, the district court concluded that only a portion was discoverable because the other portions did not involve matters of trust administration.

decide whether the Group 2 documents are protected by the work-product doctrine and assess whether the substantial-need exception to the work-product doctrine is applicable.

Writ relief

"When the district court acts without or in excess of its jurisdiction, a writ of prohibition may issue to curb the extrajurisdictional act." *Toll v. Wilson*, 135 Nev. 430, 432, 453 P.3d 1215, 1217 (2019) (internal quotation marks omitted). "Therefore, even though discovery issues are traditionally subject to the district court's discretion and unreviewable by a writ petition, this court will intervene when the district court issues an order requiring disclosure of privileged information." *Id.* Writ relief is also appropriate when "an important issue of law needs clarification" and this court's invocation of its original jurisdiction serves public policy. *Diaz v. Eighth Judicial Dist. Court*, 116 Nev. 88, 93, 993 P.2d 50, 54 (2000) (internal quotation marks omitted). "One such instance is when a writ petition offers this court a unique opportunity to define the precise parameters of [a] privilege conferred by a statute that this court has never interpreted." *Id.* (alteration in original) (internal quotation marks omitted).

Because the district court order compels the disclosure of allegedly privileged information, we elect to entertain this petition for a writ of prohibition.[2] *See Las Vegas Dev. Assocs., LLC v. Eighth Judicial Dist. Court*, 130 Nev. 334, 338, 325 P.3d 1259, 1262 (2014) (establishing that a writ of prohibition, rather than a writ of mandamus, is the appropriate mechanism to correct an order that compels disclosure of privileged information). Our intervention will also clarify whether Nevada recognizes

[2]Therefore, the petition is denied insofar as it seeks a writ of mandamus.

the fiduciary exception to the attorney-client privilege and will serve public policy by helping trustees and attorneys understand the extent to which their communications are confidential.

Standard of review

"Discovery matters are within the district court's sound discretion, and we will not disturb a district court's ruling regarding discovery unless the court has clearly abused its discretion." *Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012). Findings of fact are given deference and will not be set aside unless they are clearly erroneous or not supported by substantial evidence. *Sowers v. Forest Hills Subdivision*, 129 Nev. 99, 105, 294 P.3d 427, 432 (2013). Conclusions of law, including the meaning and scope of statutes, are reviewed de novo. *Dewey v. Redev. Agency of Reno*, 119 Nev. 87, 93-94, 64 P.3d 1070, 1075 (2003).

The Group 1 documents are protected by the attorney-client privilege

Petitioners contend that the Group 1 documents are protected by the attorney-client privilege because the content of the documents was communicated to counsel. "The attorney-client privilege is a long-standing privilege at common law that protects communications between attorneys and clients." *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 133 Nev. 369, 374, 399 P.3d 334, 341 (2017). The purpose of the attorney-client privilege "is to encourage clients to make full disclosures to their attorneys in order to promote the broader public interests of recognizing the importance of fully informed advocacy in the administration of justice." *Id.*

The Legislature has codified the attorney-client privilege:

> A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential *communications*:

> 1. Between the client or the client's representative and the client's lawyer or the representative of the client's lawyer.
>
> . . . .
>
> 3. Made for the purpose of facilitating the rendition of professional legal services to the client, by the client or the client's lawyer to a lawyer representing another in a matter of common interest.

NRS 49.095 (emphasis added). "Mere facts are not privileged, but communications about facts in order to obtain legal advice are." *Wynn Resorts*, 133 Nev. at 374, 399 P.3d at 341. The party asserting the privilege has the burden to prove that the material is in fact privileged. *Ralls v. United States*, 52 F.3d 223, 225 (9th Cir. 1995).

"It is well settled that privileges, whether creatures of statute or the common law, should be interpreted and applied narrowly." *See Clark Cty. Sch. Dist. v. Las Vegas Review-Journal*, 134 Nev. 700, 705, 429 P.3d 313, 318 (2018) (internal quotation marks omitted). However, "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

We have not yet determined the extent to which an individual must deliver his or her notes to an attorney for the notes to constitute "communications" under NRS 49.095. Federal courts, however, have concluded that physical delivery is unnecessary for common-law attorney-client privilege to attach. *See United States v. DeFonte*, 441 F.3d 92, 96 (2d Cir. 2006) (reasoning that "[c]ertainly, an outline of what a client wishes to discuss with counsel—and which is subsequently discussed with one's counsel—would seem to fit squarely within our understanding of the scope

of the privilege"); *see also United States v. Jimenez*, 265 F. Supp. 3d 1348, 1351-53 (S.D. Ala. 2017) (determining that an individual's emails that served as an outline for future attorney-client conversations but were never delivered to his attorney were nonetheless privileged); *Cencast Servs., L.P. v. United States*, 91 Fed. Cl. 496, 505-06 (Fed. Cl. 2010) (reasoning that it should be sufficient to find an attorney-client privilege if a party created the notes to aid in a meeting with an attorney).

We agree and conclude that, under NRS 49.095, the physical delivery of notes is not required. NRS 49.095 clearly protects communications. *See* NRS 49.095 ("A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential *communications* . . . ." (emphasis added)). Thus, so long as the content of the notes was previously or is subsequently communicated between a client and counsel, the notes constitute communications subject to the attorney-client privilege. Holding otherwise would discourage a client from diligently preparing for a conversation with counsel and undermine a client's ability to confidently memorialize any legal advice received. *See Upjohn Co.*, 449 U.S. at 392 (construing the privilege to avoid discouraging a client from conveying relevant information to counsel). As a result, an attorney would be unable to provide fully informed advocacy. *See Wynn Resorts*, 133 Nev. at 374, 399 P.3d at 341 (holding that the purpose of the attorney-client privilege is to encourage clients to make full disclosures to their attorneys to promote fully informed advocacy). In order to give full force to the attorney-client privilege, notes that were communicated between a client and counsel must therefore be protected.

After reviewing the Group 1 documents, we determine that the district court clearly abused its discretion in finding that petitioners did not prove that the notes were communicated to counsel. Petitioners presented Lee and Renwick's billing records, which indicated that Lee and Renwick spoke by phone with Lubbers on October 14, 2013, about Lubbers' response to Scott's petitions, one of which Scott filed just two weeks prior. Furthermore, Lee and Renwick attested that on the call, Lubbers stated his views about several matters related to Scott's petitions and potential strategies for defending against them. Based on the date and content of the Group 1 documents, it is clear that the content of both the preparation notes and the memorialization notes was communicated between Lubbers and counsel.

In so recognizing, we emphasize that the party asserting the privilege does not have to prove that the client spoke each and every word written in his or her notes to counsel verbatim. Such a requirement would lead to the unreasonable result of permitting the disclosure of confidential information that was not orally conveyed exactly as it was recorded on paper, or vice versa. *See City of Reno v. Bldg. & Constr. Trades Council of N. Nev.*, 127 Nev. 114, 121, 251 P.3d 718, 722-23 (2011) ("[T]his court will not read statutory language in a manner that produces absurd or unreasonable results." (internal quotation marks omitted)). Lee and Renwick's billing records, along with their declarations, are sufficient proof of communication.

We also hold that the district court clearly abused its discretion to the extent it found that the factual information contained in the Group 1 documents was not subject to the attorney-client privilege. Although we agree that the Group 1 documents contain factual information, facts

communicated in order to obtain legal advice do not fall outside the privilege's protections. *See Wynn Resorts*, 133 Nev. at 374, 399 P.3d at 341 (holding that while facts are not privileged, communications about facts in order to obtain legal advice are). Here, the factual information was relayed in order to obtain advice about how to respond to Scott's petitions. The Group 1 documents are therefore protected by the attorney-client privilege.

There is no applicable exception to the attorney-client privilege

Scott argues that even if the Group 1 documents are subject to the attorney-client privilege, they are nonetheless discoverable due to (1) the fiduciary exception and (2) the common-interest exception.

1.

Scott contends that this court should recognize the fiduciary exception to the attorney-client privilege and apply it to the Group 1 documents. The fiduciary exception, as adopted in other states, "provides that a fiduciary, such as a trustee of a trust, is disabled from asserting the attorney-client privilege against beneficiaries on matters of trust administration." *Murphy v. Gorman*, 271 F.R.D. 296, 305 (D.N.M. 2010). NRS 49.015 provides that privileges in Nevada are recognized only as "required by the Constitution of the United States or of the State of Nevada" or by a specific statute. NRS 49.115 expressly lists five exceptions to the attorney-client privilege, none of which are the fiduciary exception.

This court has recognized "the legislature's demonstrated ability to draft privilege statutes with very precise parameters." *Ashokan v. State, Dep't of Ins.*, 109 Nev. 662, 670, 856 P.2d 244, 249 (1993). "The maxim 'EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS', the expression of one thing is the exclusion of another, has been repeatedly confirmed in this State." *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967);

see also Ramsey v. City of N. Las Vegas, 133 Nev. 96, 102, 392 P.3d 614, 619 (2017); *Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. 484, 488, 327 P.3d 518, 521 (2014). Jurisdictions with statutory attorney-client privileges like Nevada have overwhelmingly refused to adopt a fiduciary exception by judicial decree. *See, e.g.*, *Wells Fargo Bank v. Super. Court*, 990 P.2d 591, 596 (Cal. 2000); *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 326 P.3d 1181, 1195 (Or. 2014); *Huie v. DeShazo*, 922 S.W.2d 920, 924-25 (Tex. 1996).

Because the Legislature adopted five specifically defined exceptions to the attorney-client privilege in NRS 49.115, we decline to create a sixth by judicial fiat. We therefore refuse to recognize the fiduciary exception.

2.

Scott also argues that the common-interest exception to the attorney-client privilege applies to the Group 1 documents. The common-interest exception is statutory in Nevada and provides that there is no attorney-client privilege "[a]s to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients." NRS 49.115(5).

We hold that the common-interest exception does not apply to the Group 1 documents. NRS 49.115(5) limits the common-interest exception to situations where (1) an attorney is retained or consulted in common and (2) the communication is relevant to a matter of common interest. *See Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010) (holding that where a statute is clear and unambiguous, this court gives

effect to the ordinary meaning of the plain language without turning to other rules of construction).

First, Lee and Renwick were not retained or consulted in common. The Legislature has made clear that an attorney representing a trustee as a fiduciary does not result in an attorney-client relationship between the attorney and the beneficiary. *See* NRS 162.310(1)[3] ("An attorney who represents a fiduciary does not, solely as a result of such attorney-client relationship, assume a corresponding duty of care or other fiduciary duty to a principal.").

Second, Lubbers' communication with Lee and Renwick was not relevant to a matter of common interest. Rather, Lubbers was adverse to Scott at the time he communicated with counsel. Scott's counsel sent Lubbers a letter alleging that the trustees acted in bad faith. Scott's petition, asking Lubbers to provide information about the purchase agreement he entered into on behalf of the Trust, contained adversarial allegations as a result of the falling out between Scott and his parents and led to Scott's eventual claims that Lubbers breached his fiduciary duties. It is therefore apparent that Lubbers consulted with Lee and Renwick for his own protection, not for a matter of common interest.

While a beneficiary is ordinarily able to inspect a trust's books and records, allowing a beneficiary to view communications between a trustee and his or her attorney when the trustee is adverse to the

---

[3]To the extent that the parties relied on *Charleson v. Hardesty*, 108 Nev. 878, 882-83, 839 P.2d 1303, 1306-07 (1992), for the proposition that an attorney for a trustee owes a fiduciary duty to the beneficiary, we note that this decision was superseded by NRS 162.310(1). *See* 2011 Nev. Stat., ch. 270, § 175, at 1465 (enacting NRS 162.310(1) in 2011, after *Charleson* was published).

beneficiary would discourage trustees from seeking legal advice. *See Huie*, 922 S.W.2d at 924-25 (reasoning that a trustee "must be able to consult freely with his or her attorney to obtain the best possible legal guidance"); 3 Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher, *Scott and Ascher on Trusts* § 17.5 (4th ed. 2007) ("[W]hen there is a conflict of interest between the trustee and the beneficiaries and the trustee procures an opinion of counsel for the trustee's own protection, the beneficiaries are generally not entitled to inspect it."). Moreover, individuals may be unwilling to serve as trustees if they fear that their communications with counsel will be used against them, and attorneys representing trustees may be reluctant to provide transparent advice. Therefore, we conclude that NRS 49.115(5), the common-interest exception, does not apply to the Group 1 documents. Because the Group 1 documents are protected by the attorney-client privilege and no exception applies, the district court clearly exceeded its authority when it allowed Scott to retain those documents.

The Group 2 documents are protected by the work-product doctrine

Petitioners argue that the Group 2 documents containing Lubbers' notes memorializing a meeting with the other trustees, counsel, Scott, and an independent appraiser are protected by the work-product doctrine. As codified in NRCP 26(b)(3)(A), the work-product doctrine prevents a party from discovering documents "that are prepared in anticipation of litigation . . . by or for another party. . . ." "[D]ocuments are prepared in anticipation of litigation when in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Wynn Resorts*, 133 Nev. at 384, 399 P.3d at 348 (internal

quotation marks and citation omitted). The court must consider the totality of the circumstances. *Id.* at 384-85, 399 P.3d at 348.

For protected work product to become discoverable, a party must show "that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." NRCP 26(b)(3)(A)(ii). The party seeking discovery bears the burden, and "[a] mere assertion of the need will not suffice." *Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 358, 891 P.2d 1180, 1188 (1995).

We determine that the district court clearly abused its discretion in finding that the Group 2 documents were not protected by the work-product doctrine. First, considering the totality of the circumstances, we conclude that the Group 2 documents were prepared by Lubbers in anticipation of litigation. Scott's counsel sent Lubbers a letter alleging that the trustees acted in bad faith, upon which Lubbers added the line item "Scott—lawsuit threatened" to Lawrence and Heidi's business entities' meeting agenda. Additionally, Scott's petition asking Lubbers to provide information about the purchase agreement he entered into on behalf of the Trust contained adversarial allegations and required a response with legal implications. At the time Lubbers wrote the notes contained in the Group 2 documents, he anticipated adversarial litigation.

Second, we determine that the district court abused its discretion to the extent it found that the substantial-need exception applied. Our review of the Group 2 documents confirms that Lubbers' notes memorialized his meeting with the other trustees, counsel, Scott, and an independent appraiser. Although Lubbers has since died, Scott was at the meeting and therefore does not have a substantial need for the Group 2 documents. Moreover, Scott can access any pertinent information he may

have missed without undue hardship by deposing one of the other attendees. Because the Group 2 documents are protected by the work-product doctrine and the substantial-need exception does not apply, the district court lacked authority to allow Scott to retain the Group 2 documents.

CONCLUSION

Because petitioners showed that Lubbers communicated the content of the Group 1 documents to counsel, we determine that these documents are protected by the attorney-client privilege and are therefore undiscoverable. In doing so, we explicitly refuse to recognize by judicial decree the fiduciary exception to the attorney-client privilege and conclude that the common-interest exception to the attorney-client privilege does not apply to this case. Because Lubbers took the notes contained in the Group 2 documents in anticipation of litigation and the substantial-need exception to the work-product doctrine is inapplicable, we determine that the Group 2 documents are protected by the work-product doctrine and are therefore undiscoverable. Accordingly, the district court acted in excess of its jurisdiction in compelling the partial production of the disputed documents.

We therefore grant this petition and direct the clerk of this court to issue a writ of prohibition prohibiting the district court from compelling or allowing the production of the disputed documents.

Stiglich, J.
Stiglich

We concur:

Pickering, C.J.
Pickering

Gibbons, J.
Gibbons

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Cadish, J.
Cadish

Silver, J.
Silver

EXHIBIT 2

CAMPBELL
& WILLIAMS
ATTORNEYS AT LAW

VIA FACSIMILE August 13, 2018

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

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

Dear Judge Sturman:

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

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

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

> [T]he trial court must determine whether the [disputed] documents are indeed privileged. To that end, the court properly ordered JS & S to produce a privilege log and Miller and Bradford to file a response.
>
> The trial court, however, erred by ruling that it would review all the documents to determine whether they are privileged. The court should have awaited the

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> responses to the privilege log and considered the parties' arguments regarding privilege and waiver to determine whether in camera review was warranted for particular documents before reviewing them.
>
> ***If in camera review is needed, the trial judge should consider whether another judicial officer should conduct the review in light of the possibility that a review of privileged materials may be so prejudicial as to require the judge's recusal. If the trial judge conducts an in camera review and upholds the privilege claim, the judge should consider whether recusal is then necessary.***

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

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

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

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

Respectfully submitted,

CAMPBELL & WILLIAMS

J. Colby Williams, Esq.

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

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

Bradford D. **LUND**, an individual; William S. **Lund**, and Sherry L. **Lund**, husband and wife, Petitioners,
v.
The Honorable Robert D. MYERS, Judge of the Superior Court of the State of Arizona, in and for the County of Maricopa, Respondent Judge, Michelle A. **Lund**, Diane Disney Miller, Kristen **Lund** Olson, and Karen **Lund** Page, Real Parties in Interest, Jennings, Strouss & Salmon, P.L.C., Intervenor.

No. CV–12–0349–PR.
|
July 16, 2013.

Synopsis

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

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

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

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

Vacated and remanded.

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

West Headnotes (4)

[1] **Pretrial Procedure**
Use of items obtained

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

Cases that cite this headnote

[2] **Pretrial Procedure**
Determination

Privileged Communications and Confidentiality
In camera review

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

1 Cases that cite this headnote

[3] **Pretrial Procedure**
Use of items obtained

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

Cases that cite this headnote

[4] **Pretrial Procedure**
Determination

Privileged Communications and Confidentiality
In camera review

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

1 Cases that cite this headnote

Attorneys and Law Firms

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

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

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

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

OPINION

BRUTINEL, Justice.

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

I.

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

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

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

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

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

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

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

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

¶ 9 The court of appeals accepted jurisdiction and granted a stay. Lund v. Myers ex rel. Cnty. of Maricopa, 230 Ariz. 445, 449 ¶ 12, 286 P.3d 789, 793 (App.2012). The court ultimately held that although the plain language of Rule 26.1(f)(2) seemingly placed no limitations on the receiving party's right to present the inadvertently disclosed documents to the court under seal or on the court's ordering the disclosing party to do the same, such a broad reading would conflict with the receiving party's duty under that rule to "return, sequester, or destroy" the privileged documents and with Arizona Rule of Civil Procedure 26(g). Id. at 453 ¶¶ 25–26, 286 P.3d at 797. The court reasoned that the receiving party did not have "an unqualified right to file privileged information with the court," but could obtain in camera review only after complying with procedural rules and showing that (a) "specific documents are likely not privileged" or (b) "the privilege has been waived." Id. ¶ 27. Finally, the court concluded that if Miller met this threshold, a judicial officer not permanently assigned to the case should conduct the in camera review given the "unique circumstances" of the case. Id. at 456 ¶ 38, 286 P.3d at 800.

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

II.

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

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

claim has been resolved either through agreement or court ruling.

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

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

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

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

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

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

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

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

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

III.

¶ 21 For the foregoing reasons, we vacate the court of appeals' opinion and the trial court's January 13, 2012 order and remand to the trial court for proceedings consistent with this opinion.

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

All Citations

232 Ariz. 309, 305 P.3d 374

Footnotes

1 For ease of reference, we refer to all documents at issue in this case as "privileged" even though some documents are claimed only to be protected trial-preparation material.

2 Arizona Rule of Civil Procedure 45(c)(5)(C)(ii) provides the same procedure for a person who has inadvertently produced privileged documents in response to a subpoena. While A.R.S. § 12–2234 states that "an attorney shall not, without the consent of his client, be examined as to any communication made by the client to him," the statute does not address inadvertent document disclosure.

End of Document

EXHIBIT 3

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#: P-13-078912-T DEPT. XXVI

BEFORE THE HONORABLE GLORIA STURMAN,
DISTRICT COURT JUDGE
THURSDAY, APRIL 11,2019

RECORDER'S TRANSCRIPT OF PENDING MOTIONS

APPEARANCES:

For the Petitioner:	CRAIG D. FRIEDEL, ESQ. DANA A. DWIGGINS, ESQ. TESS E. JOHNSON, ESQ.
For Respondent:	JON C. WILLIAMS, ESQ. PHILIP R. ERWIN, ESQ.
For Other:	JENNIFER L. BASTER, ESQ.
For Special Administrator:	LIANE K. WAKAYAMA, ESQ.

RECORDED BY: KERRY ESPARZA, COURT RECORDER

declarations, and the billing records back up, that they talked to Mr. Lubbers on multiple occasions about topics that are entirely consistent with what are in those notes.

So, when we talk about what the circumstantial evidence is, that he conveyed this to the lawyers, that's a big part of it, Judge. And with respect to when he created the notes, and this issue of what I've said in my declaration, and somehow I'm now being inconsistent, I didn't take the definitive position in our briefing in opposition to my declaration by saying, I first said they were prepared in anticipation of the meeting, but now I'm saying they were prepared after the meeting. No.

What they're saying -- and they're saying it here -- is, we don't know when they were created. What I'm saying is it doesn't matter. It doesn't matter. If you prepared it as an outline prior to the meeting and you shared the contents of the notes with the lawyers, protected. If he prepared -- if he was on a computer typing that up during the call -- and I'm not suggesting he is -- but if he was, that too would be protected. If he prepared it as a summary of what he and the lawyers discussed after the call, that too would be protected. That's the point I'm making. I'm not being inconsistent. It's that they would be protected as long as there is evidence that the contents of the notes were actually shared with the lawyers. And I submit there is more than substantial evidence that it was. Unless the Court has any more questions, for me, I'll sit down.

THE COURT: Thank you. With respect to both the petitions, I -- I do not see a lot to disagree with the Commissioner about. But I

guess we -- we have to start with the -- the typed page. It has the handwritten date on it, and then the Commissioner makes an assumption that that handwritten date was written by Mr. Lubbers. I -- and I guess my question is, how do we know that the handwritten date was written for anything other than just a reminder to him that this -- this should be filed along with the notes from that telephone conversation?

I mean, why are we assuming that? It says it's an analysis, which to me seems to be that this is the trustee analyzing a petition that he has received. Did he do it before or after? I don't know. And I think I probably agree with Mr. Williams that I don't know that it matters. But I don't know why we're assuming that it's part of an attorney-client communication at all. There was nothing to indicate that it is. I mean, it doesn't say, here are my things I want to talk to the attorneys about, or, here's what I talked to the attorneys about. It doesn't say any of that. It just says it's an analysis.

And so, for that reason, that's why I'm struggling to say whether I think the fiduciary privilege applies or not, because I just -- I think this is just the trustee's work product. And he's not doing this work product as an attorney; he's doing this as a trustee, who, in his role as trustee, is just to receive service of a petition. And he's trying to figure out what he needs to do next.

I'm -- so I'm not sure we should assume it is part of an attorney-client communication. That's an assumption we're making. And nobody can tell us that, because Mr. Lubbers isn't here to say, yes, I wrote that down so that I would have a checklist of things I wanted to ask

the attorneys, or, I wrote that down afterwards because, based on what they said to me, I then analyzed the petition, and here's what I came up. We don't have that.

So, we're starting from an assumption that I don't know that we can make. And that -- so that's my problem with the report and recommendations to start with, is that I view the handwritten notes and the typewritten very differently.

I understand the Commissioner's analysis of the handwritten notes. I don't take issue with -- with her analysis of the handwritten notes because of the fiduciary exception where she's talking about the need to provide an accounting for the SKIT. So, she -- the first page in the notes, that's page 13284, and the last page of the notes, that's page 13288, again, at 13288, it's unclear what it -- when it was produced. If it was part of the whole thing, I mean, it -- it's just not clear when -- when all these notes were actually created. But that one is very -- that page is very clearly talking about just fiduciary administration things.

So, 13288, I understand why she said that should be produced, because it is purely factual, and it's produced strictly with the trustee's administration of the trust and would be discoverable to a beneficiary for that reason. So, I get that one.

I understand her point about 13286 and 13287 being unrelated to the petition. So, she was going to protect those. I won't disturb her determination with respect to that.

I am -- it's a little less clear to me that it's about fiduciary administration. The last sentence, the last line of that page, that's -- the

page is dated at the top 213 -- 2013 on lined paper, and the last two words are -- the last line of that has to do with typical fiduciary activities.

So, as to whether the rest of that page should be produced or not, that doesn't appear to me to be related to the -- to anything other than the attorney-client relationship, because that would -- that -- the rest of that page seems to me to be related to what information's going to be provided to the attorneys, who the attorneys are, that appears to be related to the attorney-client relationship between Mr. Lubbers and his attorneys. And really the only thing on there is -- actually, it's a question, and that question is related to fiduciary administration matters.

So, the Commissioner seems to have found the whole page discoverable for that reason. I'm -- I'm not convinced on that. It seems to me that really the only relevant information on there that -- that could arguably be said to have to do with fiduciary administration would be -- I guess I could -- would start with the date, and the question of -- that's at the last line, starting with "when."

MS. DWIGGINS: And you're on 13284, correct?

THE COURT: 13284.

MS. DWIGGINS: Okay.

THE COURT: Right. So, to me, I -- to me, that page, unlike the last page, is not clearly related to fiduciary activities. It's not. So that -- that's my problem with -- on page 13284. I would just analyze it differently than she did. I don't necessarily think she's wrong in her analysis. There is specific reference to fiduciary activity on that page that are just purely administrative that would clearly fall within, for lack

of a better term, what's called the fiduciary exception. But really the only -- there's only the one line that has anything to do with it.

So, if that's her analysis, then I'm not understanding why the rest of the information was disclosed. So that would be my only comment with respect to where I think the Respondent's request to have that page clawed back or information on that page clawed back would be supportable.

I -- I just view this page, 13284 -- 285 totally different from really how everybody else does. It's just -- to me, there's just a lot of assumptions being made here that I don't think there's any evidence for. I have -- there's nothing that tells me this -- why this would be privileged at all. So, I guess that's -- starting from that, I don't think she's wrong in her analysis that would protect starting from the word "Scott." It seems to be related to attorney-client communications. I understand that. But it doesn't seem to be adversarial.

The one thing that leads me to think it might be questions he wrote before a conversation with an attorney is that he asks a rhetorical question starting with the line "could" and ending with "filed question mark." That has a handwritten notation next to it, the word being response. That to me seems to indicate he had a question that somebody answered for him and told him how -- gave him an answer to that question. But that's how you would deal with his question.

So, that seems to be an indication that these notes were more likely prepared in advance of a conversation with an attorney. And whether he asked them of the attorneys or not or just gathered the

information somehow, he seems to have gotten an answer to that question. Then he's got another handwritten annotation in here that seems to be more in the nature of establishing a timeline. It's -- it's not really -- it's factual.

So, for that reason, I'm kind of wondering why, since that's purely factual, she didn't find that handwritten notation to be discoverable, and instead started with "first." I don't know. It's a very -- you know, we can't ask her. She's not there to send this back and ask her anymore. So just dealing with this myself, because I am not taking issue with her analysis, and I'm willing to accept it and I think there is sufficient information here to understand why she reached those conclusions, I'm not going to overturn that. Although, I -- I do believe that that handwritten notation, starting with the word "Larry" is a fact.

And if she thinks facts are discoverable, I'm not understanding why that fact -- she didn't include that in the facts that could be discoverable. I just -- I don't understand that. I mean, if that -- unless her issue was the facts that Mr. Lubbers would have been operating with. Why -- yeah, I'm not understanding why that -- why she didn't include that as a fact. But anyway, so with respect to her analysis on page 13285 and the reports and recommendations where she -- 13285 -- where she states that she finds --

> "Typed document with handwritten notes. The handwritten date is consistent with the date he consulted the attorneys, and the notes reflect the type of things one would discuss with his or her attorneys. They therefore appear to be

attorney-client communications."

I don't know how she gets there. I mean, I -- the only thing that seems to me to indicate is it seems he got an answer to a question he asks. Anyway, and that she further finds that the handwritten portions were authored by Mr. Lubbers, although she's not -- can't be completely sure that he typed the typed portion, But they do appear to be consistent with the kind of questions a trustee would ask him or herself upon reviewing these petitions.

So, her finding is that from the beginning of 13285, including the handwritten notes to the indented paragraph start with the word "first" is work product and protected under the attorney-client privilege without an applicable exception.

Okay. So, her -- her ultimate finding on 13285 is that that portion -- I don't understand why she left out Larry. I don't get it. Anyway, her view of what is factual in this particular document -- whether it happened is factual. Okay. And I understand and I agree that -- that starting with "whether" and ending with "happen," totally factual. And then she goes on to state that, "Certain portions are intertwined with opinion." But again, here's my problem with saying this is opinion work product, because Mr. Lubbers should not and cannot be considered to be a then operating -- there is no trustee work product. You don't get a work product if you're a trustee. You're just a trustee.

MR. WILLIAMS: Your Honor, most respectfully on that point, and I don't want to interrupt your train of thought, the argument that was made below, and -- and that I would just quickly present here is that Ed

Lubbers as the trustee is a party, and parties undisputedly can create work product without the involvement of an attorney. And that was --

THE COURT: Okay.

MR. WILLIAMS: -- briefed at length below. So, I think that --

THE COURT: Okay. Well, that's --

MR. WILLIAMS: That's all I'm saying.

THE COURT: -- what she's basing it on. Then she -- then, "in creating the work product for your attorney" -- but again, here's -- here's the problem I think that Ms. Dwiggins raised, which is we do not know that the attorneys were ever given this. I understand and I agree that a client can create something and give it to their attorney for their attorney to create -- create a legal pleading from. But we don't know if that ever happened.

So, she concludes that everything is -- is otherwise factual in nature. So, the second sentence starting with "whether" and ending with "annual" are subject to disclosure, and this is substantially for -- so I can't disagree with her of -- on the idea that these -- these are factual and that we cannot presume that these were exclusively attorney-client privilege, so. They're administrative in nature. There's no denying that. And her -- her final conclusion, again, I can't disagree with her that the final paragraph of this page, 13285, is totally unrelated.

As far as we can tell, I don't know what he's talking about. It seems to be a different trust. And her -- her view is that, to the extent that there is a fiduciary exception, Mr. Lubbers, in seeking legal advice as the trustee being name by a beneficiary, he's entitled to seek legal

advice. Not necessarily to defend himself, but to find out what his obligations are as a trustee in response to this petition. Perfectly reasonable, but it ultimate benefits his beneficiary.

So, the beneficiary's entitled to the facts that are related to that. And those facts would be, as I indicated on page 13284, the line starting with "when" and ending with "due question mark." And on 13285, I -- I guess that if she thinks the line starts with "Larry" is related to the last line on the page, which is a different trust, that might be why she didn't include it. I mean, as I read it, I -- it appears that that's the same -- referencing the same trust that she found to be unrelated, and therefore not discoverable. It's factual. It's part of the timeline. And it's just a fact, but it does appear to be related to that other trust, which she said was not discoverable.

So, okay. I -- as I said, I cannot see disturbing her findings. I think she analyzed it pretty carefully. As I said, I might have looked at this differently, but I can't say that I think she's wrong. I just am not convinced that the analysis should start from, the typewritten page is an attorney client communication, because it was somehow prepared to be produced to the attorneys for their, I guess, response to the petition. I mean, the only thing that leads me to think that may be correct is he -- that rhetorical question starting with "could" in the middle of the page that has a handwritten notation next to it appears to be a question that he had answered.

So, to that extent, if he is asking a question and he gets an answer, I see how she concluded that that was an attorney-client

communication. It still seems to me that it's related to the accounting issue. I don't know. I'm just -- I'm just still struggling with why she's -- why she kept that out. But --

MS. DWIGGINS: Your Honor, if I may, I'm just a little confused --

THE COURT: Yeah.

MS. DWIGGINS: -- and I'm not sure if Mr. Williams got all that. The way I understood your ruling as to 13285 is that it's -- initially I thought you said you looked at it differently and you don't believe it to be protected because it's based upon assumptions that you don't think there's adequate evidence for.

THE COURT: Right. That this was --

MS. DWIGGINS: And that the handwritten --

THE COURT: -- an attorney-client communication.

MS. DWIGGINS: -- notes are very different than the typed notes, and that Scott's analysis to you indicates that the trustee was analyzing the petition he received in his capacity as a trustee.

THE COURT: Right.

MS. DWIGGINS: So, I guess to that extent, aren't you overruling her findings? But then I guess if --

THE COURT: Well --

MS. DWIGGINS: -- for some reason it is privileged, you agree with part of her findings? I guess that's what I'm a little --

THE COURT: Yeah. I'm trying to figure --

MS. DWIGGINS: -- confused on.

THE COURT: Yeah. I'm trying to figure out why -- why she found certain things were discoverable and not. Because I just -- I don't -- I understand Mr. Williams' point, that a client can create work product. So, if it's work product, then how is it protect -- what part of it is protected? That -- so I guess that's -- that's probably what I should have stated. Because I -- I'm otherwise not sure I agree with her in her analysis that it's -- that this is protected by the fiduciary exception because it doesn't really seem to be related to -- I don't know. It's -- it's so -- it's such an odd memo. It's -- it is just sort of free form. And I'm -- and I -- so I guess my concern here is there's no way to tell if he ever actually talked to an attorney about any of this.

I understand that some of this may be -- I can see why she could say maybe she -- he did talk to an attorney about some of this, because the sentence in the middle of the page that says "could" seems to have a word written next to it that indicates that question was answered. And that's how -- that was the response that was deemed appropriate to the petition.

MS. DWIGGINS: But I guess making assumptions, he could have easily answered it himself, too.

THE COURT: Right. Exactly. So, we don't know. Then there's another handwritten line in there which seems to me to be purely factual. And I wasn't sure why she didn't order that produced. But on the other hand, it does relate to the last sentence of this memo, which is related to a different trust, which she said you can't look at. Okay. Fine.

So, if her view is anything related to that other trust isn't

discoverable because it's unrelated to the petition at hand, then I understand why she would say that's not discoverable. Because to the extent he was making notes about something, talking to an attorney about something, it may have been something unrelated to this litigation, because she specifically found that with respect to the -- the other two pages, 13286 and 13287.

So, if she -- if she's still following that same analysis, then I understand that, and I can see why those particular lines of this document would be excluded no matter what. So, then I have to go back to, you know, why was she excluding the rest of it? What is there about this that makes her think this was an attorney-client communication? The Larry and final -- the Larry handwritten line and the final line related to the other trust excluded because they're unrelated to the petition that Scott had brought and arguably would be subject to the fiduciary exception.

So those two things, okay, fine. The line beginning with "could" appears to be a very specific legal question that he seems to have gotten an answer to. So, I can see how that's very specifically related to his attorney-client relationship; what should I do with this petition that I got? So, I can see why she excluded that.

I'm just -- in looking at the other lines of that -- above that, starting with "Scott" and ending with "orally," she clearly views those as not factual and more asking for legal advice, which I -- arguably I guess you could say was obtained in that handwritten note, the little one-word note; that that answer's not just for the line starting with "could" but

would also apply to all the -- to the two paragraphs above it. Okay. Fine. So, there's a reason to exclude those -- actually, it's for those eight lines.

I don't like disagree with her at all on her analysis of the rest of it to the extent that she says, "I believe this is factual." I believe that is factual. And similarly, I guess -- what did she do with -- what did she do with the line that starts with "annual" and ends with "do so"?

MR. WILLIAMS: She allowed that to be produced, Your Honor.

THE COURT: Yeah. I -- I thought so. So, I'm okay with that. Okay. Then I'm okay with that as well. I just -- huh. Wow. All right. So, at this point then, I'm -- I am not going to change her analysis starting with the word "Scott" down to "first" because the -- the one handwritten word there could -- I believe could be interpreted as meaning that Mr. Lubbers did discuss this with counsel and obtained an answer to essentially that whole question which is purely procedurally as trustee, how do I respond procedurally to what's -- to having been served with this.

It doesn't get into the accounting and the duty that are owed -- that's owed to Scott. Anything that was related to the accounting and the duties owed to Scott, she said under the fiduciary exception absolutely should be produced. So, in rereading this upper portion of the typewritten portion, I -- I think that, for no other reason, then that appears to be the kinds of questions that a trustee would ask upon being served with a petition, and it appears he got an answer to those questions. That for that reason then, it would be protected, because that

appears to be attorney-client communication directed at the trustee, how does the trustee as a trustee respond to the petition that he received?

So, in the end, other than, as I said, I think I slightly disagree with her on that first page, I don't otherwise disagree with her.

MR. WILLIAMS: Okay.

THE COURT: So, I -- I think for different reasons than she did maybe, but I think she ended up in the right place ultimately.

MS. DWIGGINS: So, I guess if I understand you, going back to what you initially said, they -- there's assumptions made this is even privileged.

THE COURT: Correct.

MS. DWIGGINS: But if it is privileged, you agree with her analysis on the typed notes?

THE COURT: Correct. Yes. Because I can -- I can see how she would interpret that first -- everything above "first" as being essentially, as a trustee, how do I respond to the petition I was just served with? And if you look at that one handwritten note, that's the kind of thing that if you got an answer from your attorney, that would be the answer, because it answers all of his questions.

So, for that reason, that appears to be his attorney-client communication with his attorneys and would not be subject to the exception because it has nothing to do with what his obligations are to Scott. His obligations are to Scott, I believe Scott's entitled to know. So, anything having to do with the accounting, I agree with her; Scott's entitled to all of that. He's also entitled to the facts as the trustee who

was dealing with him.

So, for that reason, I -- I think that only with the respect to that typewritten note, I -- I would deny the objection because, although I might come to the same conclusion for a different reason, I think I come to the same conclusion she does. And that is that I believe that at least a portion of that can be interpreted as, I'm a trustee. I've been served with a petition. You're my attorney. How do I respond to it? And you get an answer. So that would be privileged. The rest of it would not be, other than the information that's unrelated.

So, yeah, I come to it -- I come to it from a different direction, but I don't believe in the end I disagree with her conclusion. I think we end up in the same place, just for different reasons.

MR. WILLIAMS: So then for clarification, Your Honor, with the exception of the slight modifications you made to 13284 --

THE COURT: Correct.

MR. WILLIAMS: -- then you're otherwise affirming or overruling the -- whatever the terminology is?

THE COURT: Yeah. I going to deny the objection. Because although I believe I would have come to it from a -- for a different reason, I concur in her conclusion ultimately. I think we would -- we would agree in the end, our conclusions are -- are similar with respect to what's privileged and what's not --

MR. WILLIAMS: I understand.

THE COURT: -- for different reasons.

MR. WILLIAMS: Okay.

THE COURT: But I believe it's because you can interpret that handwritten note. Like I said, there's nothing that tells you, I talked to my attorneys about this, this is what I'm going to ask my attorneys. It doesn't say that. But if you read it, it appears to be questions, and there's an answer --

MR. WILLIAMS: Understood.

THE COURT: -- the handwritten note is an answer.

MS. DWIGGINS: So, I guess just for clarification for the record, could we put what -- I guess basically what you just said, that you come to the same conclusion for a different reason?

THE COURT: Right. That I -- that I believe that of this typewritten note -- because we can't tell that this is really discussed --

MS. DWIGGINS: That the assumptions --

THE COURT: -- with counsel --

MS. DWIGGINS: -- but even if --

THE COURT: But --

MS. DWIGGINS: I gotcha.

THE COURT: But those first like eight lines down to the as colon appear to be questions that an -- reasonably questions -- can reasonably interpreted to be questions a trustee, upon being served with this petition, would ask of an attorney. And it appears he got an answer. The handwritten-in line there starting with "Larry," I'm assuming the reason she excluded that is the same reason she excluded the last two lines. It's unrelated.

So, I concur with her on that. But I -- I agree. The rest of it is

-- is purely factual and would otherwise -- and should come in. And then, as I said, similar to the other -- the other two pages, I agree with her 100 percent on anything related to the accounting, because that's the trustee's obligation to -- to his -- to the beneficiary. And that is the fiduciary exception.

MS. DWIGGINS: I guess just for clarification, too, where the "Larry" is handwritten, do you think that one word before trust is NAP that you keep referencing that -- in the last paragraph?

THE COURT: I think it is.

MS. DWIGGINS: Okay.

THE COURT: And I think --

MS. DWIGGINS: It's hard to -- I don't know what it says.

THE COURT: -- it's -- you know, I have horrible handwriting. So, I could read pretty much anything. That's the only thing I can understand that to say. And while it appears to be purely factual and just part of a timeline, and therefore I was like why is she not allowing that information in, the only thing I can conclude is if we start from the assumption that the final two lines should not be disclosed because they are totally unrelated to this particular petition, why it's written in that location, I don't know why you put it there, but it appears to be related to those last two lines.

And so, for that reason, I'll -- I'm not going to overturn her finding that it should be excluded. But the -- so I just think that -- your point being, she made some assumptions. I don't necessarily agree with all of her assumptions. But from what I can see, there's a rational reason

to say a portion of this is purely his attorney-client communication with his attorneys. The rest of it's not, because there's no way to say that it was ever produced or given to them. There's nothing else on that page that would indicate any of the rest of this was ever produced or given or discussed with counsel such that you could say it's protected by work product or anything else. It just doesn't.

MR. WILLIAMS: So, I obviously disagree with that last part, Judge.

THE COURT: Right.

MR. WILLIAMS: But that's not why I'm standing up.

THE COURT: I will return this so --

MR. WILLIAMS: May I approach? I'll give it back --

THE COURT: -- it's not --

MR. WILLIAMS: -- counsel.

THE COURT: -- floating around. And the rest of it, we'll just shred the documents.

MR. WILLIAMS: So, Your Honor -- and I don't want to prolong this. I want everybody one to be able to get out of here and go home. But I have a question for you sort of how to proceed next, because --

THE COURT: Right. Because --

MR. WILLIAMS: -- since this does deal with privilege --

THE COURT: Essentially, I would be denying your objection to report and recommendation except as to I do believe that some of the language in that first handwritten page should not be produced.

MR. WILLIAMS: See you. Thank you.

MR. IRWIN: Thank you.

[Proceedings concluded at 5:14 p.m.]

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

_____

Maukele Transcribers, LLC
Jessica B. Cahill, Transcriber, CER/CET-708

EXHIBIT 4

NEOJ

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DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of:

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

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

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

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

DATED: May 31, 2019.

CAMPBELL & WILLIAMS

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CERTIFICATE OF SERVICE

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

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DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of: SCOTT LYLE GRAVES CANARELLI IRREVOCABLE TRUST, dated February 24, 1998.	Case No: P-13-078912-T Dept. No: XXVI Date of Hearing: April 11, 2019 Time of Hearing: 1:30 pm

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

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

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

A. RESP013284

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

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

B. RESP013285

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

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

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

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

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

C. RESP013286-RESP013287

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

D. RESP013288

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

NOW, THEREFORE, IT IS HEREBY ORDERED:

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

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

3. The remainder of Respondents' Objections are DENIED.

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

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

DATED this 31st day of May, 2019.

DISTRICT COURT JUDGE

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