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.

Electronically Filed
Jan 08 2021 03:19 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No.

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

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

(VOLUME 7 OF 7)

Dana A. Dwiggins (#7049)
Craig D. Friedel (#13873)
SOLOMON DWIGGINS & FREER, LTD.
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: (702) 853-5483
Facsimile: (702) 853-5485
ddwiggins@sdfnvlaw.com
cfriedel@sdfnvlaw.com

Attorneys for Petitioner

Daniel F. Polsenberg (#2376)
Abraham G. Smith (#13250)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Pkwy., Suite 600
Las Vegas, Nevada 89169
Telephone: (702) 474-2689
Facsimile: (702) 949-8398
dpolsenberg@lrrc.com
asmith@lrrc.com

Attorneys for Petitioner

CHRONOLOGICAL TABLE OF CONTENTS

CAMPBELL & WILLIAMS
DONALD J. CAMPBELL, ESQ. (1216)
djc@cwlawlv.com
J. COLBY WILLIAMS, ESQ. (5549)
jcw@cwlawlv.com
PHILIP R. ERWIN, ESQ. (11563)
pre@cwlawlv.com
700 South Seventh Street
Las Vegas, Nevada 89101
Telephone: (702) 382-5222
Facsimile: (702) 382-0540

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

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the THE SCOTT LYLE GRAVES CANARELLI IRREVOCABLE TRUST, dated February 24, 1998.	Case No. P-13-078912-T Dept. No. XXVI (VII) **APPENDIX OF EXHIBITS TO RESPONDENTS' REPLY IN SUPPORT OF MOTION TO DISQUALIFY THE HONORABLE GLORIA STURMAN AND OPPOSITION TO COUNTERMOTION FOR WAIVER OF THE ATTORNEY CLIENT PRIVILEGE** Hearing Date: July 28, 2020 Hearing Time: 9:00 a.m.

Lawrence and Heidi Canarelli ("Respondents"), by and through their undersigned Counsel, the law firm of Campbell & Williams, hereby submit this Appendix of Exhibits to Respondents' Reply in Support of Motion to Disqualify the Honorable Gloria Sturman and Opposition to Countermotion for Waiver of the Attorney Client Privilege filed concurrently herewith.

Exhibit No.	Description	Page Range
	Declaration of J. Colby Williams	
1.	Petitioner Scott Canarelli's Motion for Determination of Privilege Designation (7/13/18 and re-filed with redactions on 10/18/18)	1-5
2.	Petitioner Scott Canarelli's Reply in Support of Motion for Determination of Privilege Designation (dated 8/24/18 and re-filed with redaction on 10/18/18)	6-17
3.	Discovery Commissioner's Report and Recommendations ("DCRR") dated 12/6/18	18-31
4.	Petitioner's Objections to the DCRR dated 12/17/18	32-48
5.	Respondents' Opposition to Petitioner's Objections to the DCRR dated 1/14/19	49-58
6.	Petitioner's Reply in Support of Objections to the DCRR dated 3/21/19	59-73
7.	Hearing Transcript dated 4/11/19	74-82
8.	Order on the Parties' Objections to the DCRR dated 5/31/19	83-89
9.	Petitioner's Answer to Petition for Writ of Mandamus or Prohibition dated 7/15/19	90-95
10.	Email from C. Williams to D. Dwiggins dated 6/28/18	96-100
11.	Email from D. Dwiggins to C. Williams dated 6/28/18	101-103

DATED this 13th day of July, 2020.

CAMPBELL & WILLIAMS

By /s/ ***J. Colby Williams***
DONALD J. CAMPBELL, ESQ. (1216)
J. COLBY WILLIAMS, ESQ. (5549)
PHILIP R. ERWIN, ESQ. (11563)
700 South Seventh Street
Las Vegas, Nevada 89101

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

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of July, 2020, I caused a true and correct copy of the foregoing **Appendix of Exhibits to Reply In Support of Respondents' Motion to Disqualify the Honorable Gloria Sturman and Opposition to Countermotion for Waiver of the Attorney-Client Privilege** 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

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

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' Reply in Support of Motion to Disqualify the Honorable Gloria Sturman and Opposition to Countermotion for Waiver of the Attorney-Client Privilege.

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. True and correct excerpts of Petitioner Scott Canarelli's Motion for Determination of Privilege Designation (dated 7/13/18 and re-filed with redactions on 10/18/18) are attached hereto as Exhibit 1.

5. True and correct excerpts of Petitioner Scott Canarelli's Reply in Support of Motion for Determination of Privilege Designation (dated 8/24/18 and re-filed with redactions on 10/18/18) are attached hereto as Exhibit 2

6. A true and correct copy of the Discovery Commissioner's Report and Recommendations ("DCRR") dated 12/06/18 is attached hereto as Exhibit 3.

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

7. True and correct excerpts of Petitioner's Objections to the DCRR dated 12/17/18 are attached hereto as Exhibit 4.

8. True and correct excerpts of Respondents' Opposition to Petitioner's Objections to the DCRR dated 1/14/19 are attached hereto as Exhibit 5.

9. True and correct excerpts of Petitioner's Reply in Support of Objections to the DCRR dated 3/21/19 are attached hereto as Exhibit 6.

10. True and correct excerpts of the Hearing Transcript dated April 11, 2019 are attached hereto as Exhibit 7.

11. A true and correct copy of the Order on the Parties' Objections to the DCRR dated 5/31/19 is attached hereto as Exhibit 8.

12. True and correct excerpts of Petitioner's Answer to Petition for Writ of Mandamus or Prohibition dated 7/15/19 are attached hereto as Exhibit 9.

13. A true and correct copy of an Email from C. Williams to D. Dwiggins dated 6/28/18 is attached hereto as Exhibit 10.

14. A true and correct copy of an Email from D. Dwiggins to C. Williams dated 6/28/18 is attached hereto as Exhibit 11.

15. Petitioner's claim that the Former Trustees "admitted that no pre-production review was implemented" and, thus, somehow violated RPC 1.6(c) and, indirectly, the ESI Protocol is nonsense. When Scott improperly raised this argument the first time before Judge Sturman, the Former Trustees opposed it and explained the steps their counsel had taken in connection with the subject document productions. *See* Ex. 5 (submitted herewith). The Former Trustees have, moreover, addressed their document production procedures multiple times throughout the underlying litigation. *See, e.g.*, Status Reports dated 7/13/18; 7/16/18; and 9/25/18 (all on file). Suffice it to say, a purported "admission" about the lack of a pre-production review is nowhere to be found. In any event, the implementation of the ESI Protocol was specifically designed to

effectuate the provisions of RPC 1.6, not undermine them, by ensuring that if inadvertent productions of potentially protected information did occur despite reasonable efforts, there would be no waiver unless the protections never applied in the first place.

16. I declare under penalty of perjury that the foregoing is true and correct.

DATED this 13th day of July, 2020.

/s/ ***J. Colby Williams***
J. COLBY WILLIAMS

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

EXHIBIT 1

Electronically Filed
10/18/2018 4:45 PM
Steven D. Grierson
CLERK OF THE COURT

MOT
Dana A. Dwiggins (#7049)
Jeffrey P. Luszeck (#9619)
Tess E. Johnson (#13511)
SOLOMON DWIGGINS & FREER, LTD.
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: (702) 853-5483
Facsimile: (702) 853-5485
ddwiggins@sdfnvlaw.com
jluszeck@sdfnvlaw.com
tjohnson@sdfnvlaw.com
Attorneys for Scott Canarelli

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of THE SCOTT LYLE GRAVES CANARELLI IRREVOCABLE TRUST, dated February 24, 1998.	Case No.: P-13-078912-T Dept. No.: XXVI/Probate Hearing Date: Hearing Time: ***Before the Discovery Commissioner***

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

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

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

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

[redacted]

The bottom line is that if Petitioner's counsel was provided an opportunity to ask Lubbers questions on these issues during a deposition, the foregoing facts would not be subject to protection based upon the attorney client privilege or work product doctrine. [redacted]

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

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

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

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS

appeared in this matter on behalf of Lubbers.[27] The engagement letter with the firm also indicates that *only* Lubbers was the client. As Lubbers was the sole Family Trustee and Independent Trustee of the SCIT at such time, there was absolutely no reason for Larry or Evans to participate in such meeting. Not only did the Initial Petition not make allegations against either Respondent for wrongdoing but no claims were asserted in the Initial Petition. Rather, it was a simply straight forward petition that sought Lubbers to render an accounting, obtain a business valuation pursuant to the Purchase Agreement and to further disclose all documents relating to the sale. Neither Larry's nor Evans' participation was necessary in order for Lubbers to comply with [redacted] Therefore, Larry and Evans are "third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."[28] For this reason alone, the participation of Larry and Evans in communications Lubbers had with his counsel constitutes a waiver of the attorney client privilege. Accordingly, this Court should find that the Lubbers Notes are discoverable for all purposes in this litigation.

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

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

---

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

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

SOLOMON DWIGGINS & FREER TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

prepared at the request of an attorney. Under such circumstances, the Typed Memo is not privileged under NRCP(b)(3) and does not constitute work product.[39]

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

IV. CONCLUSION

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

DATED this 13 day of July, 2018.

SOLOMON DWIGGINS & FREER, LTD.

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

SOLOMON DWIGGINS & FREER
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
TRUST AND ESTATE ATTORNEYS

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

EXHIBIT 2

RPLY

Dana A. Dwiggins (#7049)
Jeffrey P. Luszeck (#9619)
Tess E. Johnson (#13511)
SOLOMON DWIGGINS & FREER, LTD.
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: (702) 853-5483
Facsimile: (702) 853-5485
ddwiggins@sdfnvlaw.com
jluszeck@sdfnvlaw.com
tjohnson@sdfnvlaw.com
Attorneys for Scott Canarelli

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of THE SCOTT LYLE GRAVES CANARELLI IRREVOCABLE TRUST, dated February 24, 1998.	Case No.: P-13-078912-T Dept. No.: XXVI/Probate Hearing Date: August 29, 2018 Hearing Time: 1:30 p.m. ***Before the Discovery Commissioner***

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

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

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS

Counsel was provided an opportunity to ask Lubbers questions on the issues contained within the Disputed Notes, or more importantly, the Typed Memo during a deposition, none of the subjects would be protected under "opinion work product." Indeed, even if Lubbers' purported "mental impressions" are protected under NRCP 26(b)(3), questions regarding opinions and legal conclusions (even for an attorney) do not apply to deposition testimony.[45] In other words, [redacted] topic areas identified in the Motion for Determination, which are herein incorporated by reference. Because Lubbers was a trustee of the SCIT at such time and has personal knowledge of such facts, Respondents cannot hide behind the privilege or work product doctrine.

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

---

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

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

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

SOLOMON DWIGGINS & FREER TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

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

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

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

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

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

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

SOLOMON DWIGGINS & FREER TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

client's lawyer [Lubbers' Counsel, LHLGB]" on one hand, "to a lawyer representing another [Larry] in a matter of common interest."[47] Here, it is undisputed that LHLGB never represented Larry[48] and Larry's Counsel (to the extent he had counsel on October 14, 2013) did not participate in the October 14, 2013 conference call. Consequently, NRS 49.095(3) cannot apply.[49]

Second, Respondents have provided no evidence that the October 14, 2013 conference was in the "course of an on-going and joint effort to set up a common defense strategy." Indeed, although Respondents' self-servingly state that all Respondents share a common legal interest they have failed to introduce any evidence that: (1) a common legal interest existed on October 14, 2013; and/or (2) that the October 14, 2013 telephone conference was made in an on-going and joint effort to set up a common defense strategy. Respondents' omission is significant because the Nevada Supreme Court has repeatedly rejected the invocation of NRS 49.095 when a party fails to introduce evidence of a joint defense.[50] In other words, NRS 49.095 does not

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS

---

[47] *See also FSP Stallion 1, LLC v. Luce*, 2010 WL 3895914, at *18 (D. Nev. Sept. 30, 2010) (recognizing that "the majority of courts apply the common interest doctrine where parties are represented by separate counsel but engaged in a common legal enterprise.").

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

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

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

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

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

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

---

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

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

SOLOMON DWIGGINS & FREER TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

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

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

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

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

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

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

Irrespective of the fact that the email potentially references a document other than the Lubbers' Notes, the fact of the matter is that the AWDI had boxes – plural – of Lubbers' hard file. Indeed, during multiple meet and confers in this matter, Respondents' Counsel has represented

---

[52] *See* Motion for Determination, Ex. 12 (Emphasis added).

SOLOMON DWIGGINS & FREER TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

that Lubbers' hard files consisted of at least 7 to 9 boxes. Respondents attempt to persuade this Court that the Lubbers' Notes were not contained within the boxes fails because Petitioner cannot prove the same. Petitioner, however, is not required to "prove" the same. It can be reasonably inferred that the boxes that were "returned" to AWDI did in fact contain Lubbers' Notes since it was produced in discovery within one (1) of Dickinson Wright returning said boxes. Indeed, Respondents never contend in the Opposition that Lubbers' Notes was not in the boxes.

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

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

The actual entity that was in possession of Lubbers' boxes was AWDI. Respondents' contention that it shares a common interest with AWDI is contrary to the procedural history in this matter and the representations made by Respondents and AWDI in other motions and at

---

[53] *Cotter*, 134 Nev. Adv. Op. 32, 416 P.3d at 232 (Emphasis Added).

[54] *Id.*

SOLOMON DWIGGINS & FREER TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

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

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

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

The Canarellis further contended:

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

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

---

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

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

SOLOMON DWIGGINS & FREER TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

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

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

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

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

---

[57] *See* Opposition to Motion to Compel AWDI at 3:2-4.

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

SOLOMON DWIGGINS & FREER TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

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

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

///

///

///

///

[59] *Wynn Resorts*, 399 P.3d at 341.

SOLOMON DWIGGINS & FREER TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

3. Petitioner's Counsel did not Violate the Confidentiality Agreement.

Finally, Petitioner's Counsel did not violate the Confidentiality Agreement because said agreement was intended to protect the Parties financial information as opposed to a Parties' typed and/or handwritten notes.[60] As such, Petitioner is not at fault for citing portions of a document that Respondents' inappropriately marked "Confidential" in its Supplement Surcharge Petition (or any other filing).

IV. CONCLUSION

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

DATED this 24th day of August, 2018.

SOLOMON DWIGGINS & FREER, LTD.

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

Attorneys for Scott Canarelli

SOLOMON DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

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

EXHIBIT 3

DCRR

J. Colby Williams, Esq. (5549)
Philip R. Erwin, Esq. (11563)
CAMPBELL & WILLIAMS
700 South Seventh Street
Las Vegas, Nevada 89107

Elizabeth Brickfield (#6236)
Joel Z. Schwarz (#9181)
DICKINSON WRIGHT, PLLC
8363 W. Sunset Road, Suite 200
Las Vegas, Nevada 89113

Counsel for Respondents Lawrence Canarelli, Heidi Canarelli and Edward Lubbers

DISTRICT COURT

CLARK COUNTY, NEVADA

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

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

Hearing Date: August 29, 2018
Hearing Time: ~~2:00~~ 1:30 p.m.

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

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

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

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

Jennifer L. Braster
Andrew J. Sharples

Attorney for the Special Administrator for the Estate of Edward C. Lubbers: Liane K. Wakayama[1]

I.
FINDINGS

A. Motion for Determination of Privilege Designation

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

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

1. Attorney/Client Privilege

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

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

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

---

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

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

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

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

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

2. Attorney Work Product

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

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

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

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

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

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

3. Documents Bates Numbers RESP0013284-13288

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

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

i. *RESP0013284*

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

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

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

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

ii. *RESP0013285*

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

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

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

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

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

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

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

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

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

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

iii. *RESP0013286 and RESP0013287*

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

iv. *RESP0013288*

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

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

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

4. No Waiver

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

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

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

5. Documents Bates Numbered RESP0078899-78900

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

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

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

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

B. Supplemental Briefing on Appreciation Damages.

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

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

THE COMMISSIONER FURTHER HEREBY FINDS that if the Court finds that there was a breach of fiduciary duty, then the amount of any distribution from the Purchased Entities[2] post March 31, 2013 to the Siblings' Trust is relevant and discoverable. *Id.* at 117:17-19, 138:5-12, 141:24-25, 142:3-5.

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

II.
RECOMMENDATIONS

A. Motion for Determination of Privilege Designation

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

IT IS FURTHER RECOMMENDED that with respect to RESP0013285:

---

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

(1) from the beginning of RESP0013285, including the handwritten notes, to the indented paragraph starting with the word "1st" shall be redacted, *id.* at 109:21-110:1;

(2) the indented paragraph starting with the word "1st" through and including the first sentence of the following paragraph that starts with "[w]hether" and ends with "happened" is subject to production, *id.* at 101:19-24, 103:20-22, 104:5-16, 110:5-16;

(3) the second sentence of the paragraph starting with "[w]hether" up through and including the paragraph starting with the word "annual" is subject to production, *id.* at 110:5-16;

(4) the final paragraph on RESP0013285 shall be redacted. *Id.* at 94:15.

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

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

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

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

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

B. Supplemental Briefing on Appreciation Damages.

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

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

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

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

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

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

DATED this 5 day of December, 2018.

DISCOVERY COMMISSIONER

Submitted by:

By: _____
J. Colby Williams, Esq. (5549)
Philip R. Erwin, Esq. (11563)
CAMPBELL & WILLIAMS
700 South Seventh Street
Las Vegas, Nevada 89107

Elizabeth Brickfield (#6236)
Joel Z. Schwarz (#9181)
DICKINSON WRIGHT, PLLC
8363 W. Sunset Road, Suite 200
Las Vegas, Nevada 89113

Counsel for Respondents Lawrence Canarelli, Heidi Canarelli and Edward Lubbers

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

Approved as to form and content by:

By: _____
Jennifer L. Braster (#9982)
Andrew J. Sharples (#12866)
NAYLOR & BRASTER
1050 Indigo Drive, Suite 200
Las Vegas, Nevada 89145

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

Approved as to form and content by:

By: _____
Dana A. Dwiggins (#7049)
Jeffrey P. Luszeck (#9619)
Tess E. Johnson (#13511)
SOLOMON DWIGGINS & FREER, LTD.
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129

Attorneys for Petitioner

NOTICE

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

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

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

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

Dana A. Dwiggins
Jeffrey P. Luszeck
Tess E. Johnson
Solomon Dwiggins & Freer, Ltd.
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129

Elizabeth Brickfield
Joel Z. Schwarz
Var E. Lordahl
Dickinson Wright, PLLC
8363 W. Sunset Road, Suite 200
Las Vegas, NV 89113

J. Colby Williams
Campbell & Williams
700 S. Seventh Street
Las Vegas, NV 89101

Jennifer L. Braster
Andrew J. Sharples
Naylor & Braster
1050 Indigo Drive, Suite 200
Las Vegas, Nevada 89145

_____ Placed in the folder of counsel in the Clerk's office on the ____ day of _____, 20____.

__✓__ Electronically served counsel on Dec 6, 2018, pursuant to N.E.F.C.R. Rule 9.

By Natalie Lee
Commissioner Designee

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

ORDER

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

____ The parties having waived the right to object thereto,

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

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

* * *

AND

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

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

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

Dated this _____ day of _____, 20_____.

_____
DISTRICT COURT JUDGE

EXHIBIT 4

ODCR
Dana A. Dwiggins (#7049)
Jeffrey P. Luszeck (#9619)
Tess E. Johnson (#13511)
SOLOMON DWIGGINS & FREER, LTD.
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: (702) 853-5483
Facsimile: (702) 853-5485
ddwiggins@sdfnvlaw.com
jluszeck@sdfnvlaw.com
tjohnson@sdfnvlaw.com
Attorneys for Petitioner Scott Canarelli

DISTRICT COURT

CLARK COUNTY, NEVADA

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

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

Petitioner Scott Canarelli ("Petitioner"), beneficiary of The Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998 (the "SCIT"), by and through his Counsel of Record, the law firm of Solomon Dwiggins & Freer, Ltd., hereby submits his 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 (the "Report and Recommendation").[1] Petitioner specifically objects to certain findings and recommendations made by the Discovery Commissioner in relation to those privileges that Respondents Lawrence ("Larry") and Heidi Canarelli ("Heidi) (collectively, the "Canarellis"), and Frank Martin, Special Administrator of the Estate of Edward C. Lubbers ("Lubbers") (collectively the "Respondents") claim apply to documents identified by Bates Nos. RESP013284 – RESP013288 (the "Group 1

[1] *See* Report and Recommendation attached hereto as **Exhibit 1**.

Canarellis are able to testify is of no consequence. Lubbers memorialized his personal knowledge on material facts in this case and such facts should be subject to disclosure. Petitioner has effectively been hamstringed in discovery as he can no longer depose Lubbers as to issues that were expressly discussed in the Disputed Documents. The factual statements made by Lubbers in the Typed Notes are **admissions by a party opponent** that demonstrate fraud and breach of fiduciary duties on the part of Respondents, or primarily the Canarellis. There is absolutely no other available means for Petitioner to obtain Lubbers' testimony of his personal knowledge of the factual circumstances surrounding the Purchase Agreement and/or any of the other facts relating to the issues set forth in the Surcharge Petition and Supplement thereto. Denying Petitioner the ability to use Lubbers' admissions will thwart his ability to prove fraud, conspiracy, fraudulent concealment, *etc.* and otherwise unfairly prejudice Petitioner. Consequently, Lubbers' death creates a "compelling need" for disclosure of the Disputed Documents, primarily the clear facts set forth in the Typed Notes.

Based on above, the Discovery Commissioner's findings that any portions of the Disputed Documents constitute work product[48] are clearly erroneous, however, to the extent any portion of the Disputed Documents is work product, this Court must find that it is ordinary work product and Petitioner has substantial need for disclosure of the same. Alternatively, if any portion of the Disputed Documents are found to be opinion work product, this Court must determine there is a compelling need for these records.

E. IF THERE WAS ANY APPLICABLE PRIVILEGE, LUBBERS WAIVED IT.

1. Privilege Waiver Generally.

In addition to proving that a privilege even applies to the Disputed Documents, Respondents further have the burden of demonstrating that they have not waived that privilege.[49]

///

---

[48] *See* **Exhibit 1,** at pp. 4:20-23, 5:7-10, 5:15-19, 5:25-6:4, 6:22-24.

[49] *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 25 (9th Cir. 1981) (Citations omitted).

SOLOMON DWIGGINS & FREER
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
TRUST AND ESTATE ATTORNEYS

2. AWDI's Possession of Lubbers' Boxes Demonstrate Waiver of the Privilege.

Lubbers waived any potential privilege associated with the Disputed Documents because said notes were in the possession of a non-party, AWDI. Specifically, the Disputed Notes were contained within Lubbers' hard file that, after being provided to Dickinson Wright, were returned to AWDI in November, 2017, not Lubbers personally. Contrary to Respondents' contention, the file was not provided to AWDI after Lubbers' death for "safekeeping."[50] The documents were provided to AWDI approximately six (6) months prior to Lubbers' passing.

Tina Goode, the Director of Corporate Administration with AWDI, confirmed in an email that she not only received the boxes from Ms. Brickfield's office but actually went through the boxes to recover missing records. *See supra* note 14. Irrespective of the fact that the email potentially references a document other than the Disputed Documents, the fact of the matter is that the AWDI had possession of Lubbers' hard file contained within multiple boxes and went through the same. Indeed, during multiple meet and confers in this matter, Respondents represented that Lubbers' hard files consisted of at least 7 to 9 boxes. It can be reasonably inferred – and Respondents have not disputed -- that the boxes returned to AWDI did in fact contain the Disputed Documents since the Group 1 Documents were produced the following month in December.[51]

"[T]he purpose of the attorney-client privilege is to protect confidential communications"[52] and, as previously stated, "[a] communication is 'confidential' if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." The purpose for the privilege ceases if the communications are disclosed

---

[50] *See* Opposition to Privilege Motion, at p. 25:19.

[51] The email Ms. Goode located on the deferral of principal payments (*see supra* note 14) was within 600 pages away from Group 1 Documents; thus, evidencing that the Disputed Documents were, in fact, contained within the boxes in AWDI's possession.

[52] *Cung Le*, 321 F.R.D. at 652 (citing Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *8 Federal Practice & Procedure: Civil* § 2024 at 531 (3d ed 1998)).

SOLOMON DWIGGINS & FREER
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
TRUST AND ESTATE ATTORNEYS

voluntarily to a third person. *Id.* Moreover, the work product doctrine "exists 'to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent.'"[53] Such a protection rightfully is waived where the voluntary disclosure "has substantially increased the opportunities for potential adversaries to obtain the information."[54]

There is no question, nor should there be, that AWDI is not a party in this action or encompassed within the Lubbers' relationship with his counsel at that time. Under no circumstances is it "reasonably necessary for the transmission of the communication"[55] that any AWDI employee be in possession of the Disputed Documents. To the extent the Disputed Documents, including the Typed Notes, can arguably be considered privileged, such privilege was waived when the Disputed Documents were turned over to a third party not encompassed within the attorney-client privilege. Accordingly, AWDI's possession of the Disputed Documents destroys any arguable confidentiality related to the same and warrants this Court's finding that the Disputed Documents are discoverable for all purposes in this litigation.

3. The Discovery Commissioner Erred by Finding a "Common Interest" Between Lubbers and AWDI.

In finding that Respondents had not waived the work product doctrine, the Discovery Commissioner improperly found a common interest between Lubbers and AWDI. The Discovery Commissioner, in clear error, made this finding simply because Lubbers was a co-party with the Canarellis as Trustees of the SCIT.

> Which is if you send the documents to America West, and this is where I think there -- there is a very -- American West, I'm sorry -- I think that there is a very -- this is a very complicated and difficult issue, because ***there is no question in my mind that Mr. Lubbers stood in relationship with the***

---

[53] *Cotter v. Eighth Judicial Dist. Court in & for Cnty. of Clark*, 134 Nev. Adv. Op. 32, 416 P.3d 228, 232 (2018) (quoting *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980) (Emphasis omitted).

[54] *Cung Le*, 321 F.R.D. at 651–52 (citing [illegible] (citing Charles A. Wright, Arthur R. Miller & Richard L. Marcus, 8 *Federal Practice & Procedure*: Civil 2d § 2024 (1994) at 369 & n.52)).

[55] *Wynn Resorts Ltd.*, 399 P.3d at 341.

SOLOMON DWIGGINS & FREER
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
TRUST AND ESTATE ATTORNEYS

> ***Canarellis and that they were on the same side for some of these particular issues.*** And frankly, that's in part why we have the petition.[56]

Such a finding is clearly erroneous because while Lubbers may have had a common interest with the Canarellis, that did not extend to AWDI or the American West Group overall.

The Nevada Supreme Court has adopted "the common interest rule" which "allows attorneys to share work product with third parties that have common interest in litigation without waiving the work-product privilege."[57] Although the common interest is not limited to co-parties and does not require a written agreement,[58] it is still "***a narrow exception to the rule of waiver***."[59] The Nevada Supreme Court described the rule's application as follows:

> For the common interest rule to apply, the "***transferor and transferee [must] anticipate litigation against a common adversary on the same issue or issues***" and "have strong common interests in sharing the fruit of the trial preparation efforts."[60]

The federal court has further noted that a common interest "'may be implied from conduct and situation, such as attorneys exchanging confidential communications from clients who are or potentially may be codefendants or have common interests in litigation.'"[61] For instance, in *Cotter*, the appeal related to a court order requiring a former CEO to produce emails between his counsel and shareholders' counsel that allegedly contained work product in a consolidated breach of

---

[56] *See* **Exhibit 7**, at p. 106:15-21. (Emphasis added).

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

[58] *Id.* at 232 (quoting *Am. Tel. & Tel. Co.*, 642 F.2d at 1299) (citing *United States v. Gonzalez*, 669 F.3d 974, 979 (9th Cir. 2012)).

[59] *Resilient Floor Covering Pension Fund v. Michael's Floor Covering, Inc.*, C11-5200 JSC, 2012 WL 3062294, at *6 (N.D. Cal. July 26, 2012) (quoting *Pecover v. Electronic Arts, Inc.*, 2011 WL 6020412, *2(N.D. Cal. Dec. 2, 2011) (Emphasis added).

[60] *Cotter*, 416 P.3d at 232 (quoting *Am. Tel. & Tel. Co.*, 642 F.2d at 1299) (Emphasis added).

[61] *Gonzalez*, 669 F.3d at 979.

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS

fiduciary duty action brought by the CEO and shareholders against members of the corporation's board of directors.[62]

The actual entity that was in possession of Lubbers' boxes was AWDI. Respondents' contention that it shares a common interest with AWDI is contrary to the procedural history in this matter and the representations made by Respondents and AWDI in other motions and at hearings. As this Court recalls, when Petitioner issued a subpoena to AWDI, it sought to reopen its bankruptcy proceeding to hold Petitioner and his Counsel in contempt. In connection with the briefing before the Bankruptcy Court and this Court, it was briefed at great length that Petitioner was not asserting a claim against AWDI. This Court not only additionally found the same, but Respondents have acknowledged it themselves.

Specifically, Respondents, the Purchased Entities, the Siblings Trusts, SJA Acquisitions, LLC ("SJA") and AWDI have adamantly and repeatedly argued that they are separate and distinct in all respects. Indeed, when Petitioner propounded requests for production seeking documentation relating to the Purchased Entities and other entities, the Canarellis asserted that the documents requested from entities cannot be produced by Canarellis in their capacities as trustees simply because Larry also serves as an officer of such entities.[63] The Canarellis further contended:

> **Here, Scott has not sued (and claims he cannot sue) any of the Purchased Entities, the Siblings' Trusts, SJA, or AWDI**. Nor has he sued Larry in his individual capacity. He has instead sued the Canarellis solely in their capacity as former trustees of the SCIT.[64]

---

62 *Cotter,* 416 P.3d at 231.

63 *See* Opposition to Motion to Compel Lawrence and Heidi Canarelli's Responses to Scott Canarelli's Request for Production of Documents, ("Opposition to Motion to Compel the Canarellis"), filed on May 29, 2018, p. 11:10-14; *see also* p. 16:20-24 ("A number of Scott's document requests demand the Canarellis to produce documents from various entities, including the Purchased Entities, the parties to the Purchase Agreement (the Siblings' Trusts and SJA), and AWDI - **none of which are parties to this action.**") (emphasis added).

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

SOLOMON DWIGGINS & FREER TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

Respondents' acknowledgment that Petitioner has not asserted a claim against AWDI, coupled with Respondents' acknowledgement that Respondents are only being sued in their capacity as Former Trustees, ***completely undermines any colorable contention that Respondents and AWDI share a common interest.*** Petitioner's claims against Respondents solely relate to their actions as the Former Trustees of the SCIT. The "issues" before this Court and set forth in the Surcharge Petition and supplement thereto are, in part, whether Respondents breached their fiduciary duties to Petitioner and otherwise committed fraud in selling the SCIT's interests. At no point during the SCIT's 20-year existence was AWDI a fiduciary or otherwise owed Petitioner a fiduciary duty in the context of the Purchase Agreement. Accordingly, it is a far fetch contention that Respondents and AWDI "anticipated litigation" by Petitioner on the "same issue or issues."

Similarly, the Purchased Entities and AWDI have repeatedly argued for about eight (8) months (until this Court ruled against them) that they should not be compelled to produce documentation under the premise that they are non-parties. Indeed, AWDI stated in its Opposition to Motion to Compel filed on July 31, 2018 that because they are a "nonparty" "there is no basis for [] intrusive discovery..." against it.[65] AWDI further stated:

> AWDI is a general contractor. . .. **AWDI was not one of the entities sold by the Purchase Agreement. AWDI was not one of the buyers or sellers of the Purchase Agreement.** . . AWDI was the general contractor who performed improvement work for certain of the sold entities.[66]

While AWDI's contentions have no bearing on whether Petitioner is entitled to obtain discovery from it, such contentions nonetheless demonstrate that there exist no common issues between it and Respondents. The "common legal interest" does not attach merely because Petitioner issued

---

[65] *See* Non-Party Opposition to American West Development, Inc.'s Motion to Compel American West Development, Inc.'s Responses to Subpoena Duces Tecum, filed August 6, 2018, p. 3:2-4.

[66] *Id.* at pp. 7:10, 12:12-15 (Emphasis added).

SOLOMON DWIGGINS & FREER TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

subpoenas *duces tecums* to AWDI and the Purchased Entities and Respondents have failed to cite any legal authority to the contrary.[67]

Indeed,throughout this litigation, the Canarellis have distanced their capacities as Former Trustee from their capacities with the American West Group.[68] Respondents' counsel even acknowledged in a prior hearing that they do not represent AWDI and essentially had no control of AWDI's actions.

> And[sic] entity that we don't represent, American West Development, Inc., represented they separate counsel, filed a motion to reopen its bankruptcy proceedings. ***We did not file that motion. We did not tell them to file the motion. We were told the motion was being filed***, was how it happened. They did that over there.[69]

Despite such contentions, Respondents seek to have it both ways. They cannot distance the actions by AWDI or the American West Group entities to avoid discovery, while at the same time claim that there is enough of a common interest to preclude disclosure. If they have such little control over AWDI or the American West entities as they previously claim, Respondents could not

---

[67] The fact that Larry is an executive of AWDI is of no consequence. Jeffrey Canarelli, Scott's brother, is also an executive of AWDI and participated in the "Friday meetings" during the relevant time period, wherein the Purchase Agreement and the SCIT were discussed. Jeffrey Canarellis purchased a portion of the SCIT's interests in the Purchased Entities vis-a-via- his irrevocable trust and his interest in SJA. If this Court were to adopt Respondents' contention that the Siblings Trusts share a common interest with AWG, then essentially this Court would be finding the Sellers and Buyers under the Purchase Agreement share a common interest with each other, along with each and every single entity subject to the sale and all other entities compromising the "American West Group."

[68] *See e.g.* Opposition to Motion to Compel Canarellis, at p. 17:24-25("The Canarellis properly objected to such Requests as any role Larry may occupy in those other entities is distinct from his capacity as a former trustee of the SCIT.").

[69] *See* March 29, 2018 hearing transcript attached hereto as **Exhibit ??**, p. 13:16-21 (Emphasis added). Despite this purported lack of control over AWDI, Respondents have also represented that "Larry and Mr. Evans are AWG executives." *See* Opposition to Privilege Motion, at p. 25:23-24.

SOLOMON DWIGGINS & FREER
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
TRUST AND ESTATE ATTORNEYS

guarantee that the entities would not disseminate information in their possession, thereby substantially increasing the opportunities for an adversary to obtain the information. [70]

Respondents thereafter flip their position to contend that AWDI is somehow part of the "legal team" tasked "to facilitate the rendition of legal advice" on behalf of Respondents, thereby protecting the Disputed Documents from disclosure. Assuming *arguendo* the validity of such contention, the Group 1 Documents are still subject to disclosure because Respondents have failed to show that the disclosures were only made to a "***limited*** group of persons who are necessary for the communication, and attempts [have been] made to keep the information confidential and not widely disclosed."[71] While certain individuals may have served as Lubbers' agent for limited purposes relating to Lubbers' administration of the SCIT, -- e.g. preparation of the accountings -- Lubbers entire file relating to matters above and beyond such limited purposes does not fall within the confines of the common interest doctrine. This is especially true since these same "agent(s)" also served as agents for the Siblings Trusts, the Purchased Entities and the entire American West Group.

Notwithstanding, Respondents argued before the Discovery Commissioner that "[i]t doesn't matter if I gave work product protected materials to everyone at AWDI, as long as they didn't turn it over to my adversary." *See* **Exhibit 7**, at p. 107:20-22. Respondents produce no evidence that the Lubbers' boxes were secured in any type of manner to protect the "sanctity" of the attorney client privilege and/or work product doctrine.

---

[70] *See Am. Tel. & Tel. Co.*, 642 F.2d at 1299–300 ("So long as transferor and transferee anticipate litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts. Moreover, with common interests on a particular issue against a common adversary, the transferee is not at all likely to disclose the work product material to the adversary. When the transfer to a party with such common interests is conducted under a guarantee of confidentiality, the case against waiver is even stronger.")..").

[71] *Wynn Resorts*, 399 P.3d at 341. The fact that Lubbers' boxes were stored at AWDI following the litigation makes it appear that the notes in question were widely disclosed and readily accessible to any and all employees as opposed to a "limited group of persons."

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS

Regardless of the number of times Respondents assert contradicting arguments to preclude the disclosure of the Disputed Documents, the fact of the matter is that there is no litigation anticipated against AWDI, AWG, the Purchased Entities or any other AWG entity. Nor is there any potential claim against anyone other than Respondents that relate to Respondents' actions as the Former Trustees of the SCIT. Consequently, there is clearly no "strong common interest in sharing the fruit of the trial preparation efforts."

Given the focus of Petitioner's claims (i.e. against Respondents in their fiduciary capacities), Respondents inattentive transfer of purportedly privileged documents to an uninterested non-party, as well as Respondents' ever-changing relationship with AWDI and the American West Group, this Court should overrule the Discovery Commissioner's finding as to common interest, *see* **Exhibit 1**, at p. 7:3-6, and make a new finding that there is no such relationship warranting an exception to the waiver of the work product doctrine.

4. Respondents' Handling of Production Has Been Reckless, and Constitutes Waiver.

The ESI Protocol that governs this matter precludes a Party from disputing an asserted privilege based upon "inadvertent production." *See supra* note 4, at Section 21. As demonstrated throughout this Objection, Respondents' failure to implement minimal safeguards to avoid dissemination of protected material does not constitute mere "inadvertence," but rather, sheer recklessness. For these reasons, in the event this Court finds that any portion of the Disputed Documents are protected by privilege, said privilege was waived as a result of Respondents' reckless, as opposed to inadvertent, disclosure of the same.

SOLOMON DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

Nevada case law has not discussed what constitutes "inadvertent disclosure."[72] However, prior to implementing a rule regarding inadvertent disclosures and waiver,[73] federal courts considered this issue at length (even in circumstances similar to this matter where a party discloses the same privileged material on several occasions). Specifically, said courts noted that while "inadvertent disclosures are, by definition, unintentional acts," there are instances where disclosures may occur "***of such extreme or gross negligence as to warrant deeming the act of disclosure to be intentional.***"[74] In determining whether disclosure was so extreme and/or severe, the courts applied the following balancing test:

> (1) the reasonableness of the precautions taken to prevent the disclosure, (2) the time taken to rectify the error, (3) the scope of the discovery, (4) the extent of the disclosure, and (5) the overriding issue of fairness.[75]

The party that is claiming a disclosure was inadvertent has the burden of proving it was such.[76] For example, in *irth Solutions, LLC v. Windstream Communications, LLC*, 2018 WL 575911 (S.D. Ohio 2018), several months after the defendants first produced purportedly privileged documents and while simultaneously arguing that the court should allow them to clawback the same, the

---

[72] Although the Nevada statute only provides for waiver as a result of a parties' voluntary disclosure, *see* 104 Nev. 508, 513, 761 P.2d 849, 852 (1988), *overruled on other grounds by Diaz v. Eighth Judicial Dist. Court ex rel. County of Clark*, 116 Nev. 88, 993 P.2d 50 (2000), *overruled on other grounds by Aspen Fin. Services, Inc. v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 129 Nev. 878, 313 P.3d 875 (2013)(citing ▨). In this case the Parties previously agreed that they "may only contest the asserted privileges on ground other than the inadvertent production of such document(s)." *See* ESI Protocol attached hereto as **Exhibit ??**, Section 21. When interpreting a contract or agreement, the contract will be enforced as written if the language is clear an unambiguous. *Am.* ▨*First Fed. Credit Union v. Soro* (citing ▨*Davis v. Beling,*128 Nev. 301, 321,)). 278 P.3d 501, 515 (2012)).

[73] *See* Fed.R.Evid. 502(b).

[74] *Fed. Deposit Ins. Corp. v. Marine Midland ss Realty Credit Corp.*, 138 F.R.D. 479, 482 (E.D. Va. 1991) (Emphasis added).

[75] *Sanner v. Bd. of Trade of City of Chicago*, 181 F.R.D. 374, 379 (N.D. Ill. 1998).

[76] *Harmony Gold U.S.A., Inc. v. FASA Corp.*, 169 F.R.D. 113, 116 (N.D. Ill. 1996) (citing *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., Inc,* 132 F.R.D. 204, 207 (N.D.Ind.1990).

SOLOMON DWIGGINS & FREER
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
TRUST AND ESTATE ATTORNEYS

defendant reproduced the privileged documents. *Id.* at *1. Although there was a clawback agreement, the plaintiff argued that the agreement did not apply "because he believed the disclosure resulted from more than mere inadvertence." *Id.* The court ultimately found that the clawback agreement "did not contain language that would have eliminated the duty of pre-production review or provided for non-waiver regardless of the care taken by the producing party;" however, even if it did, allowing attorneys to agree to a clawback irrespective of the care they took during production "***would undermine the lawyer's responsibility to protect the sanctity of the attorney-client privilege***." *Id.* at *12. Consequently, the court concluded that defense counsel had been "completely reckless" for failing to familiarize themselves with documents that "contain obviously privileged material on their face," and counsel "produced the exact same documents again—while simultaneously asking [the] Court to protect its privilege." *Id.* at *13-14.

Similarly, in *Eigenheim Bank v. Halpern*, 598 F. Supp. 988 (S.D.N.Y. 1984), a document was inadvertently produced and first identified as privileged in a prior and substantially similar suit again in another suit in response to a discovery request. *Id.* at 989-90. The court found that defendants' procedure for maintaining the document's confidentiality was "so lax, careless, inadequate or indifferent to consequences' as to constitute a waiver."[77] The court further noted that while the first production in the prior litigation may warrant a finding of inadvertence, "***[a] second bite of the apple, however, defendants cannot have***." *Id.*

Here, like in *irth* and *Eigenheim Bank*, ***Respondents' recklessly produced the Disputed Documents on two (2) separate occasions***, including reproducing the documents simultaneously when trying to "claw back" the first production. It is undisputed that Respondents produced the Group 1 Documents on December 15, 2017 in their initial NRCP 16.1 Disclosures. Notwithstanding, Respondents did not seek to claw back the Group 1 Documents for almost six (6) months, and even only then upon Petitioner using the document in briefing. Specifically, Petitioner

---

[77] *Id.* at 990 (quoting *Data Systems of New Jersey, Inc. v. Philips Business Systems, Inc.*, No. 78 Civ. 6015, slip op. (S.D.N.Y. Jan. 8, 1981) (*quoting National Helium Corp. v. United States*, No. 158-75, slip op. at 3-4 (U.S.Ct. Claims Feb. 2, 1979)). No. 158-75, slip op. at 3-4 (U.S.Ct. Claims Feb. 2, 1979)).

SOLOMON DWIGGINS & FREER
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
TRUST AND ESTATE ATTORNEYS

referenced and attached the Typed Notes as an exhibit to his Supplemental Petition that was filed on May 18, 2018; even so, it took Respondents nearly three (3) weeks, until June 5, 2018, to attempt to claw back said document.[78]

Despite Respondents' own assertions that the Group 1 Documents are "clearly" privileged, ***Respondents redisclosed the documents in their Second Supplemental Disclosures***, on June 5, 2018, the same day that Respondents initially sought to claw back the Group 1 Documents.[79] This blunder is even more conspicuous when only a week later, on June 12, 2018, Respondents reiterated their demand to claw back the Group 1 Documents asserting that the documents' privileged status was "self-evident." *See supra* note 11.

The multiple productions of the Group 1 Documents are not merely isolated incidents. On June 14, 2018, Petitioner again notified Respondents that they had disclosed documents that appeared to be counsel's notes.[80] The Parties came to realize that not only did Respondents produce over forty (40) pages of notes prepared by Respondents' Counsel, the pdf file was listed in their own database with the name "undated attorney notes." This production of RESP078884 – RESP078932 (spawning the Parties' dispute as to the Group 2 Documents herein) further illuminates the utter carelessness and lack of accountability by Respondents as to discovery.

In spite of privileged documents being produced on multiple occasions, Respondents still inexplicably did not undergo any apparent effort to reanalyze their prior disclosures. From June to November 2018, approximately five (5) months, Respondents did not submit a single request to

---

[78] Respondent's failure to claw back the Disputed Documents prior to June 5, 2018 is significant because it led Petitioner and his Counsel to reasonably conclude that Respondents were fully aware that they had disclosed the Disputed Documents and were not claiming privilege. Indeed, in February 2018 (3 months after the Disputed Documents were disclosed), Respondents' counsel sought to claw back certain disclosed documents from Petitioner that were Bates Numbered RESP013471-13473, which were only a couple of hundred pages away from the Group 1 Documents).

[79] *See* **Exhibits 2** and **5**.

[80] *See* June 14, 2018 email from Ms. Dwiggins attached hereto as **Exhibit 10**.

SOLOMON | DWIGGINS & FREER | TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

Petitioner to claw back any additional documents, thereby implying that either Respondents made no effort to review their disclosures or that they reviewed the same and there were no other records that would need to be pulled back to preserve privilege.

Respondents' failure is evidenced by the fact that **Petitioner again** informed Respondents on November 2, 2018, that it has reproduced the Typed Notes. During such conversation, Petitioner also encouraged Respondents to re-review their productions, including the document file contained the Typed Notes, to ensure that such file did not also contain other documents asserted to be privileged and to avoid this issue from continuing to arise in the future. Despite such an opportunity, Respondents elected to claw back **only** the Typed Notes, despite the fact that the Handwritten Notes were contained within the same document file.[81] To date, Respondents have not attempted to claw back the second production of the Handwritten Notes or any additional documents. Such conduct invariably implies that, regardless of the clear evidence that there was a substantial issue with their pre-disclosure review, Respondents have failed to reassess their productions, even after it was brought to their attention.

Notwithstanding the foregoing, Respondents have failed to introduce any evidence and/or explanation in the form of a declaration as to how and/or why the disclosure of the Disputed Documents (and other documents) constitutes mere "inadvertence" and/or what steps they have undertaken to ensure that other potentially privileged documents are not disclosed in the future. Rather, Respondents expect Petitioner to do their job for them (i.e. review Respondents' disclosures and advise them of potential privileged documents) and rely solely on the ESI Protocol. Indeed, during the August 29, 2018 hearing, the Discovery Commissioner herself noted that claw back provisions only work if a party acts promptly and if the parties "are constantly reviewing [their]

---

[81] *See supra* note 17 ("I am following up on our telephone conversation this afternoon wherein we discussed several topics, one of which was your notification to me that the Ed Lubbers' type-written notes originally produced as RESP0013285 have also been produced at Bates No. RESP0088955. As you know, we contend the notes are privileged and were inadvertently produced. Petitioner disagrees, and the parties are presently litigating the privilege dispute before the Court. In any event, for completeness, we hereby provide notice of our request to clawback Bates No. RESP0088955 pursuant to Paragraph 21 of the parties' ESI Protocol.").

SOLOMON DWIGGINS & FREER
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

materials" to claw back inadvertent productions. *See* **Exhibit 7**, at p. 61:14-18. The Discovery Commissioner further asked Respondents' counsel numerous questions such as "[w]hat safeguards were in place when you produced these documents to make sure once you did a production there wasn't an inadvertent disclosure," and "Respondents' counsel, what did you all do to ensure – did you just rely on the ESI protocol." Unfortunately, Respondents were unable to provide any substantive response to the Discovery Commissioner's numerous inquiries.

Respondents' repeated production of privileged documents is perplexing in light of their contentions that the documents are "clearly" privileged, *see supra* note 8, and such protections are "self-evident." *See supra* note 11. Respondents also delayed production of written discovery for months, claiming to need time to conduct a comprehensive review prior to disclosure.[82] Respondents even went so far as to accuse Petitioner of ethical violations for not bringing the Group 1 Documents to Respondents' attention sooner. *Id.*

Respondents conduct throughout this litigation confirms that not only did they fail to adequately review records prior to disclosure,[83] but they failed to re-review their disclosures after they discovered that they had disclosed, and clawed back, potentially privileged documents in February 2018. The fact that the Parties executed an ESI Protocol that contained a claw back provision was not a license for Respondents' counsel to simply disclose records without regard for their obligations to protect privileged information. In light of Respondents' conduct, this Court should not be satisfied by any hollow claims that their productions of privileged material were the result of mere "inadvertence."[84] For these reasons, Petitioner requests that, should this Court

---

[82] *See* February 9, 2018 letter from Mr. Schwarz attached hereto as **Exhibit 11** ("[Y]ou no doubt appreciate the amount of time and effort involved in reviewing over 75,000 pages of documents.").

[83] It is important to note that Respondents previously claimed that their review of voluminous records caused the delay and piecemeal disclosures. *Id.*

[84] *See Harmony Gold U.S.A., Inc.*, 169 F.R.D. at 116 ("Standing alone, Harmony Gold's self-serving declarations that their disclosures were inadvertent are insufficient to satisfy its burden.").).

SOLOMON DWIGGINS & FREER TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

entertain any argument that the Disputed Documents are privileged, it should find that such protections have been waived by the reckless manner that Respondents have handled discovery.

IV. CONCLUSION

For the above reasons, Petitioner respectfully requests that this Court grant the Objection. Petitioner further requests that this Court strike or amend portions of the Report and Recommendation so they are consistent with the following:

1. The Typed Notes contain facts and are not protected;

2. The Group 1 Documents are not protected by the attorney-client privilege; in the alternative, if the attorney-client privilege applied to any portion of the Group 1 Documents, that protection was waived by the voluntary disclosure to AWDI and/or the American West Group;

3. It is not supported by available evidence that Lubbers personally anticipated litigation in 2013;

4. The Disputed Documents are not protected by the work product doctrine;

5. To the extent any portion of the Disputed Documents is found to be work product, it is ordinary work product and Petitioner has substantial need for disclosure of the same; in the alternative, if any portion of the Disputed Documents is found to be opinion work product, this Court must determine there is a compelling need for these records;

6. That protection was waived by the voluntary disclosure to AWDI and/or the American West Group and is not subject to the common interest doctrine; and

7. Respondents waived any applicable privilege to the Disputed Documents as a result of their reckless production of the same.

DATED this 17th day of December, 2018.

SOLOMON DWIGGINS & FREER, LTD.

BY: _____
Dana A. Dwiggins (#7049)
Jeffrey P. Luszeck (#9619)
Tess E. Johnson (#13511)
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129
Attorneys for Petitioner Scott Canarelli

SOLOMON DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

EXHIBIT 5

ORO
J. Colby Williams (NSB#5549)
CAMPBELL & WILLIAMS
700 S. Seventh Street
Las Vegas, NV 89101
Telephone: (702) 382-5222
Facsimile: (702) 382-0540
jcw@campbellandwilliams.com

and

Elizabeth Brickfield, Esq. (NSB #6236)
Joel Z. Schwarz, Esq. (NSB #9181)
DICKINSON WRIGHT PLLC
8363 W. Sunset Road, Suite 200
Las Vegas, Nevada 89113
Telephone: (702) 550-4400
Facsimile: (844) 670-6009
ebrickfield@dickinsonwright.com
jschwarz@dickinsonwright.com

Counsel for Respondents

DISTRICT COURT

CLARK COUNTY, NEVADA

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

RESPONDENTS' OPPOSITION TO 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

Respondents Lawrence and Heidi Canarelli (the "Canarellis") and Frank Martin, Special Administrator of The Estate of Edward C. Lubbers, as former family trustees of the Scott Canarelli Irrevocable Trust (the "Trust"), ("Lubbers" and together with the Canarellis, "Respondents"), by and through their counsel, the law firms of Campbell & Williams and Dickinson Wright PLLC, hereby file their Opposition to Petitioner Scott Canarelli's ("Petitioner") Objections to the Discovery Commissioner's Report and Recommendations on the Motion for Determination of Privilege Designation.

defense to Petitioner's excessively broad discovery requests and the assertion of the common interest doctrine.

Finally, Petitioner states that "Respondents produce no evidence that the Lubbers' boxes were secured in any type of manner to protect the 'sanctity' of the attorney client privilege and/or work product doctrine." (Petitioner's Objection at 33.) Although Respondents believe such evidence is unnecessary in light of all of the above arguments, if the Court has any lingering concerns, Respondents would gladly present evidence the materials have been securely stored at all times.

2. Respondents' Inadvertent Disclosure Does Not Constitute Waiver

In its last effort to challenge the DCRR, Petitioner argues that Respondents' production of documents was reckless and somehow constitutes waiver. (Petitioner's Objection at 34.) The Court should summarily reject Petitioner's argument because it was never presented to the Discovery Commissioner, it is being raised for the first time in his Objection, it is made in violation of the parties' ESI Protocol, and there is no evidence that Respondents acted recklessly. As the Court is aware, Respondents' discovery and document production in this case has been a massive effort and was required to be done in connection with substantial litigation in this highly contentious case. Respondents' document productions, and in particular the production of Lubbers' files, occurred during the period of time in which Lubbers was suffering from cancer and cancer treatments, which certainly impacted Lubbers' involvement in such productions. Given the extensive work that Respondents have done, the inadvertent disclosure of the limited pages of privileged/protected notes at issue in this case does not evidence waiver.

As a threshold matter, Petitioner's argument regarding recklessness was never raised in his briefing on the underlying Privilege Motion or decided by the Discovery Commissioner. The Nevada Supreme Court has made it clear that district courts will not consider a new argument that was not first decided by the Discovery Commissioner. *Valley Health Sys., LLC*, 127 Nev. at 172, 252 P.3d at 679. "All arguments, issues, and evidence should be presented at the first

DICKINSON WRIGHT PLLC
8363 West Sunset Road, Suite 200
Las Vegas, Nevada 89113-2210

opportunity and not held in reserve to be raised after the commissioner issues his or her recommendation." *Id.* Any other conclusion would "'frustrate the purpose" of having discovery commissioners." *Id.* Because Petitioner is raising this argument for the first time in his Objection, this Court is precluded from considering the issue and it must be summarily rejected by the Court. *See id.*

Second, Petitioner should be barred from making his waiver argument because he expressly agreed not to argue that any waiver occurred through the inadvertent production of privileged or protected materials. On or about December 15, 2017, the parties entered into an ESI Protocol, a binding contract. (Exhibit 3 to the Privilege Mot.) In the ESI Protocol, Petitioner agreed, among other things, as follows:

> The parties agree that the Producing Party is not waiving, and the Requesting Party will not argue that the Producing Party has waived, any claims of attorney-client privilege, attorney work product protection, or any other privilege or protection, including protections enumerated in the Stipulated Confidentiality Agreement and Protective Order, by making documents available for examination.

Id. at 2-3. In addition, Petitioner agreed that in any motion brought to resolve a claim of privilege, the parties "may only contest the asserted privileges on ground other than the inadvertent production of such document(s)." *Id.* at 9. Finally, Petitioner agreed that "[t]he failure of any party to provide notice or instruction under this Paragraph shall not constitute a waiver of, or estoppel as to, any claim of attorney-client privilege, attorney work product, or other ground for withholding production as to which the Disclosing or Producing Party would be entitled in this action." *Id.* Thus, by the plain language of the ESI Protocol, the parties intended to foreclose any argument that the unintended disclosure of privileged information constitutes waiver.[16]

[16] Petitioner's counsel acknowledged the applicability of these provisions below. *See* Hr'g Tr. dated Aug. 29, 2018 at 67:10-11 ("I have not argued that [*i.e.*, that waiver can be caused by inadvertent production despite terms of ESI Protocol].").

DICKINSON WRIGHT PLLC
8363 West Sunset Road, Suite 200
Las Vegas, Nevada 89113-2210

Despite Petitioner's express agreement that no waiver would occur from the disclosure or production of privileged or protected materials and Petitioner's agreement that he would not make such an argument, Petitioner now claims that Lubbers waived the privilege through his inadvertent disclosure. Because the parties entered into a valid and definite contract and any other remedy would be inadequate, the Court should order Petitioner to specifically perform the terms of the contract, which would preclude Petitioner from raising such an argument. *See Mayfield v. Koroghli*, 124 Nev. 343, 351, 184 P.3d 362, 367 (2008) (stating the elements for the remedy of specific performance).

Nevertheless, Petitioner attempts to avoid breaching the ESI Protocol by making a distinction that does not exist in the ESI Protocol itself or in Nevada law. Specifically, Petitioner attempts to distinguish a "reckless" disclosure from an "inadvertent" disclosure. (Petitioner's Objection at 34-40.) Contrary to Petitioner's argument, reckless[17] conduct falls within the scope of inadvertent conduct and is governed by the ESI Protocol.

The word "inadvertent" is defined as inattentive or unintentional. https://www.merriam-webster.com/dictionary/inadvertent (last visited January 14, 2019); Black's Law Dictionary 827 (9th ed. 2009) (defining "inadvertence" as "[a]n accidental oversight; a result of carelessness."). The word "reckless," on the other hand, is "marked by lack of proper caution: careless of consequences." https://www.merriam-webster.com/dictionary/reckless (lasted visited January 14, 2019). In other words, reckless conduct is still inadvertent because it is unintentional. Thus, recklessness is a subset of inadvertence and indisputably falls within the scope of the ESI Protocol.

This argument is further supported by Petitioner's own case law. In support of his argument that inadvertent disclosures can still constitute a waiver, Petitioner relies, in part, on *Fed. Deposit Ins. Corp. v. Marine Midland Realty Credit Corp.*, 138 F.R.D. 479, 480 (E.D. Va. 1991). In that case, the Eastern District of Virginia distinguished between the inadvertent

[17] As discussed further below, Respondents vehemently dispute that they acted with recklessness.

DICKINSON WRIGHT PLLC
8363 West Sunset Road, Suite 200
Las Vegas, Nevada 89113-2210

disclosure of privileged information based on negligence (which the court concluded does not constitute waiver) and the inadvertent disclosure of privileged information based on gross negligence or recklessness (which the court concluded may rise to the level of waiver). *Id.* at 481. In either case, the court recognized that the conduct, whether negligent or reckless, was inadvertent. *Id.*

In this case, it is undisputed that the disclosure of the Group 1 and Group 2 Notes was unintentional. As such, Petitioner's entire argument is immaterial because Respondents' unintentional disclosure is directly within the scope and intent of the ESI Protocol.

Petitioner's citation to *irth Sols., LLC v. Windstream Commc'ns, LLC*, 2018 WL 575911, at *1 (S.D. Ohio Jan. 26, 2018), does not impact or alter this analysis in any way. In *irth Sols., LLC*, the defendant produced 2,200 pages of documents, which included 43 documents (146 pages) that were later recognized as privileged.[18] *Id.* at 1. In seeking to claw back such documents, defendant relied upon an e-mail exchange in which the parties agreed that inadvertent production would not operate as a waiver of the privilege. *Id.* at *4. Thus, the defendant argued that the parties had no duty to prevent inadvertent disclosure. *Id.*

The federal district court rejected this argument because Federal Rule of Evidence 502(b)(2) expressly requires the holder of the privilege to take "reasonable steps to prevent disclosure." *Id.* at *5; Fed. R. Evid. 502(b)(2). The court found that if a party wishes to remove the safeguards of Rule 502(b)(2), then the parties' agreement must reflect such an understanding. *Id.* However, the parties' e-mail agreement did not contain any language that there would be no pre-production review. *Id.*

irth Sols., LLC is distinguishable for numerous reasons, including the fact that Nevada has not adopted Federal Rule of Evidence 502 or any similar rule. Thus, contrary to the

[18] Notably, the magistrate judge found that waiver occurred, in part, because "the privileged documents were not a needle-in-the-haystack but comprised 'more than 10% of the entire production.'" *irth Sols., LLC*, 2018 WL 575911, at *3. In contrast, the privileged documents at issue in this case consist of a handful of pages out of more than two hundred thousand (200,000) pages of documents.

DICKINSON WRIGHT PLLC
8363 West Sunset Road, Suite 200
Las Vegas, Nevada 89113-2210

governing law in that case, there is no requirement in Nevada for the parties to include any specific language in the ESI Protocol other than what is contained in that document. Moreover, contrary to the position taken by the defendant in *irth Sols., LLC*, Respondents have never argued that they had no duty of care. Instead, as demonstrated below, Respondents took reasonable precautions to protect their privileged information.

Indeed, even setting aside the ESI Protocol, the Nevada Supreme Court has never addressed the circumstances under which an inadvertent disclosure might amount to waiver. And, courts across the country are split on the appropriate standard. 8 Fed. Prac. & Proc. Civ. § 2016.3 (3d ed.) (describing the different approaches courts have taken). The Restatement (Third) of the Law Governing Lawyers § 79 (2000) provides that "[w]aiver does not result if the client or other disclosing person took precautions reasonable in the circumstances to guard against such disclosure." *See also* Fed. R. Evid. 502(b). And, federal courts have held that the inadvertent disclosure of a few privileged documents does not waive the privilege when a large number of documents are involved and reasonable precautions were taken. *Transamerica Computer Co. v. International Business Mach. Corp.*, 573 F.2d 646, 652 (9th Cir. 1978); *Kansas-Nebraska Nat. Gas Co. v. Marathon Oil Co.*, 109 F.R.D. 12, 21 (D. Neb. 1983) (no waiver when one document among 75,000 produced "slipped through the cracks" of otherwise careful screening procedure).

As previously described to the Court in this case, Respondents have undergone an extraordinary effort to locate, review and produce hundreds of thousands of pages of documents.[19] *See* Fed. R. Evid. 502 advisory committee notes (Revised 11/28/2007) (stating that in evaluating the reasonableness of a party's efforts, the Court should consider "the number of documents to be reviewed and the time constraints for production."). Specifically, over the course of approximately one year, Respondents have made at least sixteen separate document

[19] For example, on July 13, 2018, Respondents Submitted a Status Report describing their compliance with e-discovery in this matter. Rather than fully describing such discovery efforts here, Respondents incorporate their Status Report herein by this reference.

DICKINSON WRIGHT PLLC
8363 West Sunset Road, Suite 200
Las Vegas, Nevada 89113-2210

disclosures. In total, these materials consist of nearly two hundred thousand pages of documents, and at least fourteen thousand five hundred and thirty-nine (14,539) individual documents.

At the time this massive discovery effort was underway, Respondents also had to litigate numerous substantial issues in this case, including multiple discovery motions, Petitioner's incessant requests for sanctions, and whether Petitioner's Supplemental Surcharge Petition fails to state a claim for relief, just to name a few. From September 30, 2017 through April 6, 2018, there were four hearings and ten filings by Respondents of responsive documents to motions or objections filed by Petitioner, all while Respondents were reviewing and producing a massive number of documents. Multiple professionals, with differing knowledge of the matters and issues, were involved in the review and production of documents. Petitioner's present Objection is a representative sample of the ongoing litigation in this case as it is forty pages long and presents numerous issues, which required substantial time to oppose.

Nevertheless, during all of this litigation, Respondents took reasonable steps to protect their privileged and protected information while still producing such documents within a reasonable time frame. First, Respondents entered into the ESI Protocol itself. As discussed above, in the ESI Protocol, the parties specifically agreed that no waiver of privileged or protected information would occur based on the disclosure of the same. (Exhibit 3 to the Privilege Mot.) Thus, Respondents were proactive about protecting their privilege in the event of unintentional disclosure.

Second, Respondents' counsel utilized Relativity, an electronic database to review and analyze documents, code documents, remove duplicate documents, identify near duplicate documents, and protect attorney-client and work-product documents. During this process, Dickinson Wright utilized numerous attorneys to review all documents prior to the time they were produced, including several attorneys who had not previously been involved in the case.[20]

[20] It should be noted that Petitioner also misconstrues Respondents' efforts to claw back all privileged materials. *See* (Petitioner's Objection at 37-39.) Contrary to Petitioner's assertions, Respondents did not fail to claw back any disputed documents. *See id.* Instead, during the parties' November 2, 2018, telephone call, the only document that was specifically discussed

DICKINSON WRIGHT PLLC
8363 West Sunset Road, Suite 200
Las Vegas, Nevada 89113-2210

Respondents' diligence is in stark contrast to the circumstances presented in *Eigenheim Bank v. Halpern*, 598 F. Supp. 988 (S.D.N.Y. 1984), which Petitioner relies upon in his Objection. (Petitioner's Objection at 36.) In *Eigenheim Bank*, the court found that a party waived its privilege by disclosing the document at issue in connection with two separate cases. *Id.* at 989-90. In that case, the document was not part of a voluminous production. *Id.* at 991. Moreover, the "document was *specifically* requested as one of only thirty documents." *Id.* And, despite the fact that it was previously produced in other litigation and the privilege was asserted, it was again produced. *Id.* Finally, the producing party did nothing more than simply claim the production was inadvertent. *Id.*

In contrast to *Eigenheim Bank*, Respondents exercised diligence and precautions in connection with a massive document production. Nevertheless, a handful of documents were inadvertently produced. Given the huge number of documents that were reviewed, the precautions Respondents took to protect privileged and protected information, the time constraints involved, and the continuing ongoing litigation, there is no good faith argument that Respondents have somehow waived either the attorney-client privilege or the work-product doctrine.[21]

Petitioner is simply trying to obtain an advantage in litigation by mischaracterizing a privileged document because Petitioner has no actual evidence to support his claims. Petitioner's

---

was the typed notes (Bates No. RESP0013285), which is why that document was specifically clawed back. (Nov. 2, 2018, E-mail from Colby Williams to Dana Dwiggins, **Exhibit 1.**) Nevertheless, the parties expressly agreed that the issue of privilege was being presently litigated before the Court. *Id.* Because the issues was already being litigated, there was no need to specifically claw back other documents as the decision was in the hands of the Court.

[21] It should be noted that contrary to Petitioner's argument, Respondents continued to review their production as needed by the demands of the case. *See* (Petitioner's Objection at 37-38.) However, the federal court rule Petitioner is advocating for "does not require a producing party to engage in post-production review to determine whether any protected communication or information has been produced by mistake." *See* Fed. R. Evid. 502 advisory committee notes (Revised 11/28/2007).

DICKINSON WRIGHT PLLC
8363 West Sunset Road, Suite 200
Las Vegas, Nevada 89113-2210

unsupported speculation that Respondents failed to take reasonable steps is contrary to the facts of this case and his new argument must be rejected.

V. CONCLUSION

The Discovery Commissioner carefully considered the parties' arguments, reviewed the evidence, and conducted a lengthy hearing before issuing her report and recommendation. There is no question that the Discovery Commissioner's factual findings are supported by the evidence. Furthermore, the Discovery Commissioner's legal conclusions that Lubbers' Notes are protected, at least in part, by the attorney-client privilege and the work-product doctrine is not clearly erroneous. As such, Petitioner's Objections should be overruled in their entirety.

DATED this 14th day of January, 2019.

CAMPBELL & WILLIAMS
J. Colby Williams (NSB#5549)
700 S. Seventh Street
Las Vegas, NV 89101
Telephone: (702) 382-5222
Facsimile: (702) 382-0540
Jcw@campbellandwilliams.com

and

DICKINSON WRIGHT, PLLC

Elizabeth Brickfield, Esq. (NSB #6236)
Joel Z. Schwarz, Esq. (NSB #9181)
8363 W. Sunset Road, Suite 200
Las Vegas, Nevada 89113
Tel.: (702) 550-4400 Fax: (844) 670-6009

Counsel for Respondents

EXHIBIT 6

RPLY

Dana A. Dwiggins (#7049)
Jeffrey P. Luszeck (#9619)
Tess E. Johnson (#13511)
SOLOMON DWIGGINS & FREER, LTD.
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: (702) 853-5483
Facsimile: (702) 853-5485
ddwiggins@sdfnvlaw.com
jluszeck@sdfnvlaw.com
tjohnson@sdfnvlaw.com

Attorneys for Petitioner Scott Canarelli

DISTRICT COURT

CLARK COUNTY, NEVADA

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

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

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

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

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

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

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

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

---

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

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

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

SOLOMON DWIGGINS & FREER
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
TRUST AND ESTATE ATTORNEYS

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

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

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

---

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

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

SOLOMON DWIGGINS & FREER
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
TRUST AND ESTATE ATTORNEYS

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

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

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

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

---

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

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

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

SOLOMON DWIGGINS & FREER
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

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

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

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

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

---

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

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

SOLOMON DWIGGINS & FREER
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
TRUST AND ESTATE ATTORNEYS

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

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

F. RESPONDENTS' RECKLESS DISCLOSURE OF PURPORTEDLY PROTECTED DOCUMENTS.

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

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

---

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

SOLOMON DWIGGINS & FREER TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

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

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

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

---

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

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

SOLOMON DWIGGINS & FREER
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

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

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

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

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

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

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

---

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

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE [702] 853-5483
FACSIMILE [702] 853-5485
WWW.SDFNVLAW.COM
SOLOMON DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS

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

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

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

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

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

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

---

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

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

SOLOMON DWIGGINS & FREER
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
TRUST AND ESTATE ATTORNEYS

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

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

---

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

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

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

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

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

SOLOMON DWIGGINS & FREER TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

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

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

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

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

---

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

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

SOLOMON DWIGGINS & FREER TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

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

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

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

---

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

SOLOMON DWIGGINS & FREER
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

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

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

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

---

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

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

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

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

SOLOMON DWIGGINS & FREER TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

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

III. CONCLUSION

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

DATED this 21st day of March, 2019.

SOLOMON DWIGGINS & FREER, LTD.

By: _____
Dana A. Dwiggins (#7049)
Jeffrey P. Luszeck (#9619)
Tess E. Johnson (#13511)
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129
Attorneys for Petitioner Scott Canarelli

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

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

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS

EXHIBIT 7

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

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?

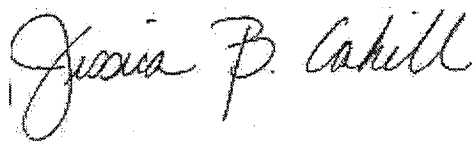
MR. WILLIAMS: I'm actually talking about both, but it's the same point. With -- I'll talk to you briefly about the December notes just so you know what they are. They're -- they're a little different. Those notes were taken at a meeting that Ed Lubbers attended. I was actually there. Scott was there.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

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 8

NEOJ

J. Colby Williams, Esq. (NSB #5549)
CAMPBELL & WILLIAMS
700 South Seventh Street
Las Vegas, Nevada 89101
Telephone: (702) 382-5222
Facsimile: (702) 382-0540
jcw@cwlawlv.com

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

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

By: /s/ ***J. Colby Williams***
J. COLBY WILLIAMS, ESQ. (5549)
jcw@cwlawlv.com
700 South Seventh Street
Las Vegas, Nevada 89101
(702) 382-5222 phone

Counsel for Respondents

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

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*:

Mark A. Solomon, Esq. (NSB 418)
Dana A. Dwiggins, Esq. (NSB 7049)
SOLOMON DWIGGINS & FREER, LTD
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: (702) 853-5483
Facsimile: (702) 853-5495

Counsel for Petitioner

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

ORDR
CAMPBELL & WILLIAMS
J. Colby Williams, Esq. (5549)
jcw@cwlawlv.com
Philip R. Erwin, Esq. (11563)
pre@cwlawlv.com
700 South Seventh Street
Las Vegas, Nevada 89101
Telephone: (702) 382-5222
Facsimile: (702) 382-0540

DICKINSON WRIGHT, PLLC
Joel Z. Schwarz, Esq. (9181)
jschwarz@dickinsonwright.com
8363 West Sunset Road, Suite 200
Las Vegas, Nevada 89113
Telephone: (702) 550-4400
Facsimile: (844) 670-6009

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

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of: 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:

CAMPBELL & WILLIAMS

J. Colby Williams, Esq. (5549)
Philip R. Erwin, Esq. (11563)
700 South Seventh Street
Las Vegas, Nevada 89101
Telephone: (702) 382-5222
Facsimile: (702) 382-0540

-and-

DICKINSON WRIGHT, PLLC
Joel Z. Schwarz, Esq. (NSB #9181)
8363 W. Sunset Road, Suite 200
Las Vegas, Nevada 89113
Tel: (702) 550-4400

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

Agreed as to Form:

SOLOMON DWIGGINS & FREER, LTD.

Dana A. Dwiggins, Esq., (7049)
Tess E. Johnson, Esq., (13511)
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: (702) 853-5483
ddwiggins@sdfnvlaw.com
tjohnson@sdfnvlaw.com

Attorneys for Petitioner Scott Canarelli

EXHIBIT 9

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

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

Petitioners,

v.

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

Respondent,

and

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

Real Party in Interest.

Electronically Filed
Jul 15 2019 04:05 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No. 78883

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

ANSWER TO PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

Dana A. Dwiggins (#7049)
Tess E. Johnson (#13511)
SOLOMON DWIGGINS & FREER, LTD.
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: (702) 853-5483
Facsimile: (702) 853-5485
ddwiggins@sdfnvlaw.com
tjohnson@sdfnvlaw.com

Attorneys for Real Party in Interest Scott Canarelli

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

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

---

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

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

44 1 PA 182-184.

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

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

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

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

///

---

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

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

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

CONCLUSION

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

---

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

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

Dated this 15th day of July, 2019.

By: _____

Dana A. Dwiggins (#7049)
Tess E. Johnson (#13511)
SOLOMON DWIGGINS & FREER, LTD.
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: (702) 853-5483
Facsimile: (702) 853-5485
ddwiggins@sdfnvlaw.com
tjohnson@sdfnvlaw.com

Attorneys for Real Party in Interest
Scott Canarelli

EXHIBIT 10

Subject: Re: Scott Lyle Graves Canarelli Irrevocable Trust
Date: Thursday, June 28, 2018 at 9:02:43 AM Pacific Daylight Time
From: Colby Williams
To: Dana Dwiggins, Allie Carnival, Phil Erwin
CC: Erin L. Hansen, Tess E. Johnson, Craig Friedel, Jeffrey P. Luszeck, 'Elizabeth Brickfield', Joel Z. Schwarz
Attachments: image001.jpg, image002.jpg, image003.jpg

Dana,

I am following up on your two letters from June 25, 2018 as well as your e-mail dated June 14, 2018 wherein you raised the issue of the time period to be covered by privilege logs in this case.

With respect to Ed Lubbers' notes taken at the December 2013 meeting, we stand on our position that these are protected by the work product doctrine as they reflect Ed's mental impressions of what was important at the meeting, which were then shared with his counsel. Regardless of whether Nicolatus is deemed to be a neutral valuator or not, I do not believe that issue is necessarily related to, let alone dispositive of, when litigation commenced or when litigation was anticipated by our clients. Indeed, we believe our clients reasonably anticipated litigation in 2012. It is further our position that litigation was commenced in this action with the filing of Scott's first petition in September 2013. While part of the relief sought in that petition was to have the valuation performed, which required the parties and their counsel to work together on that issue, a number of the allegations in that Petition and elsewhere make clear the adversarial nature of the relationship between the parties by that point in time. We, of course, agree that pre-litigation communications and materials claimed to be attorney-client privileged and/or work product protected should be identified on an appropriate privilege log. Our position is that the privilege log in this action should be for communications and materials that pre-date the filing of Scott's petition in 2013. As it relates to your claim of a substantial need for Mr. Lubbers' notes from the December 2013 meeting, we believe you can obtain substantially equivalent information of what was communicated at the meeting by first deposing others who were present at the meeting, including Mr. Nicolatus and Mr. Evans, or by speaking with your client who was also present.

Turning to your other letter wherein you requested that our firm re-review the inadvertently produced documents identified in Elizabeth's letter from June 22, I have now had an opportunity to do so. As it relates to the first batch of documents identified in the second paragraph, I can confirm that all of them are non-responsive, privileged, or both as none of the documents have anything to do with Scott, the SCIT, or any of the other issues raised herein. As to the second batch of documents identified in the third paragraph of the letter, I can likewise confirm that the subject documents comprise attorney-client privileged and/or work product protected material with one exception. Bates Nos. RESP0087604-87626 is an aggregate document that contains several documents within it. One document is styled "Answers to Questions" and is dated September 2014. This document was prepared by Bob Evans and was provided to Nicolatus, Houlihan, and (I believe) your firm. Thus, while this particular document was contained within other documents that are privileged, it is not privileged and will be produced. Indeed, Phil advises me the document is already in the queue to be produced as part of the ESI review he is performing.

Lastly, there is one document I am still researching. It is a draft release agreement prepared by Ed in February 2016. The document can be found in the inadvertently produced documents at Bates Nos. RESP0084310-84313. I note, however, that the document was also produced at Bates Nos. RESP0084306-84309 and RESP0084314-84317. The document was produced with a "Confidential" designation as it concerned settlement negotiations. I have thus far found no record that this draft document was ever provided to Scott.

If that is the case, it would constitute work product. Nevertheless, we are awaiting Liane Wakyama's review of Ed's ESI to help determine the answer to this question. In the meantime, we are not presently seeking to clawback this document, but reserve the right to do so should we confirm that Ed never shared this with Scott and/or his counsel.

We can discuss more later today, but I wanted to get you our thoughts ahead of time. For the call, we can use our office conference line: 702-802-3600; Passcode 5222#.

Thanks,
Colby

J. Colby Williams, Esq.
Campbell & Williams
700 South Seventh Street
Las Vegas, Nevada 89101
T: 702.382.5222
F: 702.382.0540
E: jcw@cwlawlv.com

From: Dana Dwiggins <ddwiggins@sdfnvlaw.com>
Date: Tuesday, June 26, 2018 at 5:39 PM
To: Colby Williams <jcw@cwlawlv.com>, Allie Carnival <acarnival@sdfnvlaw.com>, Phil Erwin <pre@cwlawlv.com>
Cc: "Erin L. Hansen" <ehansen@sdfnvlaw.com>, "Tess E. Johnson" <tjohnson@sdfnvlaw.com>, Craig Friedel <cfriedel@sdfnvlaw.com>, "Jeffrey P. Luszeck" <jluszeck@sdfnvlaw.com>, 'Elizabeth Brickfield' <EBrickfield@dickinson-wright.com>, "Joel Z. Schwarz" <JSchwarz@dickinson-wright.com>
Subject: RE: Scott Lyle Graves Canarelli Irrevocable Trust

Colby,

I am able to speak following the conference call on Thursday.

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

From: Colby Williams [mailto:jcw@cwlawlv.com]
Sent: Tuesday, June 26, 2018 2:50 PM
To: Allie Carnival <acarnival@sdfnvlaw.com>; Phil Erwin <pre@cwlawlv.com>
Cc: Dana Dwiggins <ddwiggins@sdfnvlaw.com>; Erin L. Hansen <ehansen@sdfnvlaw.com>; Tess E. Johnson <tjohnson@sdfnvlaw.com>; Craig Friedel <cfriedel@sdfnvlaw.com>; Jeffrey P. Luszeck <jluszeck@sdfnvlaw.com>; 'Elizabeth Brickfield' <EBrickfield@dickinson-wright.com>; Joel Z. Schwarz <JSchwarz@dickinson-wright.com>
Subject: Re: Scott Lyle Graves Canarelli Irrevocable Trust

Dana,

I received your two letters from yesterday afternoon. I am actually out of the office this week, but have some periodic availability to address work matters remotely. As you are aware, Phil is literally working around the clock to comply with the various ESI-related deadlines imposed by the Discovery Commissioner. The bottom line is that we have not had a chance to connect on the matters raised in your e-mails. We will do so, and I will get you a substantive response on both letters. In the meantime, let me know how you look for a meet and confer on Thursday, 6/28 either before or after the 11:00 a.m. call with the Discovery Commissioner.

Thanks,
Colby

J. Colby Williams, Esq.
Campbell & Williams
700 South Seventh Street
Las Vegas, Nevada 89101
T: 702.382.5222
F: 702.382.0540
E: jcw@cwlawlv.com

From: Allie Carnival <acarnival@sdfnvlaw.com>
Date: Monday, June 25, 2018 at 3:57 PM
To: Phil Erwin <pre@cwlawlv.com>, Colby Williams <jcw@cwlawlv.com>
Cc: Dana Dwiggins <ddwiggins@sdfnvlaw.com>, "Erin L. Hansen" <ehansen@sdfnvlaw.com>, "Tess E. Johnson" <tjohnson@sdfnvlaw.com>, Craig Friedel <cfriedel@sdfnvlaw.com>, "Jeffrey P. Luszeck" <jluszeck@sdfnvlaw.com>, 'Elizabeth Brickfield' <EBrickfield@dickinson-wright.com>
Subject: Scott Lyle Graves Canarelli Irrevocable Trust

Good afternoon Colby and Phil,

Please see the attached correspondence from Dana Dwiggins.

Alexandra Carnival, Legal Assistant

SOLOMON DWIGGINS & FREER, LTD.
Legal Assistant to Mark A. Solomon and Dana A. Dwiggins
Cheyenne West Professional Center | 9060 W. Cheyenne Avenue | Las Vegas, NV 89129
Direct: 702.589.3507 | Office: 702.853.5483 | Facsimile: 702.853.5485
Email: acarnival@sdfnvlaw.com | Website: www.sdfnvlaw.com
www.facebook.com/sdfnvlaw
www.linkedin.com/company/solomon-dwiggins-&-freer-ltd-

SOLOMON
DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS

Please consider the environment before printing this email.

EXHIBIT 11

Subject: Canarelli, Potential Privileged Document
Date: Thursday, June 28, 2018 at 12:09:55 PM Pacific Daylight Time
From: Dana Dwiggins
To: Phil Erwin, Colby Williams, Joel Z. Schwarz
CC: Tess E. Johnson, Erin L. Hansen, Elizabeth Brickfield
Attachments: image001.jpg, image002.jpg, image003.jpg, image004.png, image009.jpg, image010.jpg, MyScan.pdf

Gentlemen,

Pursuant to our conversation, please see attached the documents that potentially include privileged communications for your review. Even though we disagree on the date "litigation commenced," as I mentioned in my prior email, I do agree that once you received Dan Gerety's letters from our office litigation was anticipated as to the accounting matters. As I previously mentioned, my position is that the valuation matters have a later date in time. I mention this to avoid any misunderstanding.

If it is your intent to claw a portion of the documents back, please so indicate and I will extract from our database. FYI, the handwriting on the first page is my paralegal's writing. She marked it for me to review for the purposes of today's call.

Also, as confirmation of our call this morning, I am extracting the following documents:

RESP0074239-74262 (please confirm range because EB has first document with an additional number, 742390)
RESP0074366-74368
RESP0074731
RESP0074372-74373
RESP0074374
RESP0074735
RESP00747374377
RESP0074378-74434
RESP0074435

*Note the foregoing are all referenced in the second paragraph of the June 22 letter.

We are agree to extract the following:

RESP0077186
RESP0077894
RESP0078720
RESP0087604-87606

As to RESP0087604-87606, I am holding off on the actual extraction until you look at the remainder of this document group to decide whether the documents should be reproduced as non-privileged documents.

You are reserving your rights as to RESP0084310-84313 and not requiring it to be destroyed at this time.

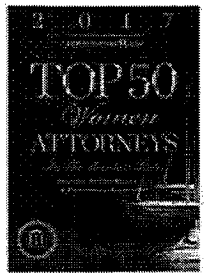
As to all remaining documents set forth in the June 22 letter, you will be reviewing again to determine whether you agree such documents are non-privileged (with the exception of RESP0078559, which you are

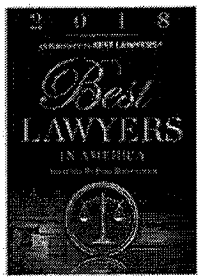
reviewing to see if wrong bate number referenced).

If I missed anything, please let me know.

Dana A. Dwiggins
SOLOMON DWIGGINS & FREER, LTD.
Cheyenne West Professional Center | 9060 W. Cheyenne Avenue | Las Vegas, NV 89129
Direct: 702.589.3505 | Office: 702.853.5483 |
Direct Facsimile: 702.473.2834 | Facsimile: 702.853.5485
Email: ddwiggins@sdfnvlaw.com | Website: www.sdfnvlaw.com
www.facebook.com/sdfnvlaw
www.linkedin.com/company/solomon-dwiggins-&-freer-ltd-

SOLOMON DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS





Please consider the environment before printing this email.

Dana A. Dwiggins (#7049)
Craig D. Friedel (#13873)
Jacob D. Crawley (#15200)
SOLOMON DWIGGINS & FREER, LTD.
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: (702) 853-5483
Facsimile: (702) 853-5485
ddwiggins@sdfnvlaw.com
cfriedel@sdfnvlaw.com
jcrawley@sdfnvlaw.com

Attorneys for Scott Canarelli

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of THE SCOTT LYLE GRAVES CANARELLI IRREVOCABLE TRUST, dated February 24, 1998.	Case No.: Dept. No.: Hearing Date: Hearing Time:	P-13-078912-T XXVI/Probate July 28, 2020 9:00 a.m.

REPLY TO OPPOSITION TO COUNTERMOTION FOR WAIVER OF THE ATTORNEY CLIENT PRIVILEGE

Petitioner Scott Canarelli ("Scott"), beneficiary of The Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998 (the "SCIT"), by and through his counsel, the law firm of Solomon Dwiggins & Freer, Ltd., hereby submits his Reply to Opposition to Countermotion for Waiver of the Attorney Client Privilege (the "Reply"). This Reply is made and based upon the pleadings and papers on file in this action, the attached Memorandum of Points and Authorities, all attached exhibits, and any oral argument that this honorable Court may entertain at the time of hearing.

///

///

///

///

///

///

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction.

Tellingly, Respondents do not even attempt to rebut the fact that they recklessly disclosed Bates labeled RESP0013284 –13288 (the "Group 1 Documents") and have thus conceded the issue. Instead, Respondents exclusively and erroneously claim that Scott is barred from bringing a waiver due to reckless disclosure argument under three erroneous theories: (1) waiver under the law of the case doctrine; (2) laches; and (3) contractual prohibition under Section 21 of the parties' ESI Protocol dated December 15, 2017 ("ESI Protocol"). Each creative theory lacks merit.

First, waiver in the law-of-the-case context does not apply. Judge Sturman never had an opportunity to rule on the reckless disclosure issue as it relates to the relevant portion of the Group 1 Documents (*i.e.* the middle section of Bates Labeled RESP13285 (the "Typed Note") submitted by Respondents for *in camera* review)[1] because she found that it was **not** privileged in the first place. Indeed, had Judge Sturman ruled on whether the privilege was waived on a document that was not privileged, it would have constituted nothing more than dicta – which the Nevada Supreme Court has held cannot act a preclusive ruling for purposes of waiver under the law of the case doctrine. Notwithstanding, the Nevada Supreme Court lacked jurisdiction over the reckless disclosure issue for several reasons, namely, that: (1) such issue was not ripe because Scott would be harmed *only if* the Supreme Court overturned Judge Sturman's ruling that the relevant portion of the document was privileged; (2) Scott lacked standing, as he was not an "aggrieved party" that could benefit from an appeal until the Court found that the relevant portion of the document was privileged; and (3) jurisdiction over an appeal may not depend on the "existence of some other appeal"[2] —e.g. the Court first granting Respondents' writ.

---

[1] Notably, Respondents opposition to the Countermotion largely make arguments related to other portions of the Group 1 Documents that Judge Sturman found to be privileged as opposed to the relevant portion that she found was not privileged. Petitioner believes this was intentionally done to conflate the issues. This instant Reply attempts to focus this Court's attention on the limited portion of the Group 1 Documents that actually has implications with respect to the claims alleged in the underlying case.

[2] *Ford v. Showboat Operating Co.*, 110 Nev. at 756 (1994).

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS

Second, laches does not apply because: (1) there was no inexcusable delay by Scott since the issue did not become justiciable until the Supreme Court ruled the relevant portion of the document was privileged in the first place; (2) Scott did not knowingly acquiescence to any purported adjudication of the reckless disclosure issue since it would have been legally improper to appeal such issue until Respondents' writ was determined; and (3) Respondents have not identified any prejudice beyond their inaccurate, generic and conclusory claim that they were forced to incur attorney's fees arguing an issue that was purported decided previously.

Third, the plain terms of Section 21 of the ESI Protocol do not permit a disclosing party to avoid a pre-production review and rely on a claw back provision, or otherwise avoid counsel's ethical obligations. Such conduct amounts to recklessness. While Respondents rely upon Section 21 to contend that Scott "may only contest the asserted privileges on grounds other than the **inadvertent** production, Respondents completely ignore the basis of the Countermotion, namely that the documents were recklessly disclosed. Scott does not contend that such disclosure was inadvertent; rather, he relies on compelling case law that explains that where a disclosure is the product of gross negligence it is legally deemed to be an **intentional** disclosure. Such an argument is not barred by the plain terms of the ESI Protocol. In short, the plain construction of Section 21 of the ESI protocol reveals that it is only intended to protect against truly inadvertent/accidental disclosures—not the intentional disclosure without any pre-production review based on the erroneous belief in a blanket claw back provision.

For the foregoing reason, the Countermotion should be granted in its entirety.

II. Legal Argument.

A. Respondents Have Conceded that their Disclosure was Reckless.

Nevada courts treat a party's failure to respond directly to an argument as the party conceding to the merits of that same argument.[3] As explained in Scott's Opposition to Respondents' Motion to Disqualify the Honorable Gloria Sturman and Countermotion for Waiver

[3] *See e.g., Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 563 (2009) (a party that fails to respond to an argument concedes that such argument is meritorious); *Bates v. Chronister*, 100 Nev. 675, 682 (1984) (failure to respond to argument deemed a "confession of error.").

SOLOMON DWIGGINS & FREER TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

of Attorney-Client Privilege Due to Reckless Disclosure (the "Countermotion"), a party waives attorney-client privilege where it discloses a document in a manner that is reckless or grossly negligent.[4] Such reckless disclosure waives the privilege because the law deems the disclosure to have been intentional, *not inadvertent*.[5]

Specifically, Scott alleges that the Respondents have waived the Group 1 Documents' attorney-client privilege status because Respondents' disclosure was so reckless and grossly negligent that it became an intentional disclosure. Revealingly, however, Respondents' Reply in Support of Motion to Disqualify the Honorable Gloria Sturman and Opposition to Countermotion for Waiver of the Attorney Client Privilege (the "Opposition") does not respond to the merits of whether the Respondents' disclosure was reckless. Instead, Respondents rely on the law of the case doctrine to erroneously claim that Scott is time barred from making a reckless disclosure argument and the terms of the ESI Protocol governing *inadvertent* disclosures. For these reasons, as set forth below, Respondents' contention is not supported by the law or the terms of the ESI Protocol. Accordingly, this Court should rule that the attorney-client privilege was waived as to the relevant portion of Typed Notes (included within the Group 1 Documents) because Respondents have conceded that they recklessly disclosed the Group 1 Documents by failing to respond to Scott's detailed allegations supporting such a finding. In sum, based upon Respondents' contention, the crux of the issue before this Court at this point is not whether reckless disclosure occurred (as the same is conceded); rather, the issue is *exclusively* whether Respondents should be permitted to escape the resulting waiver of the attorney-client privilege based on the erroneous claims that Scott is barred from making the reckless disclosure argument in the first place.

B. Scott did not Waive his Reckless Disclosure Argument Under the Law of the Case Doctrine.

Scott could not have sought appellate review of or a writ on his reckless disclosure argument because the issue was not ripe for review and he lacked standing to do so. While Respondents

---

[4] *Ciba-Geigy Corp. v. Sandoz Ltd.*, 916 F.Supp. 404, 411 (D.N.J. 1995) (citing *Fed. Deposit Ins. Corp. v. Marine Midland Realty Credit Corp.*, 138 F.R.D. 479 (E.D.Va. 1991)).

[5] *Id.*

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON DWIGGINS & FREER TRUST AND ESTATE ATTORNEYS

correctly cite to the application of waiver under the law of the case doctrine, it is not applicable here. "Waiver in the law-of-the-case context applies when: (1) "the trial court has expressly or impliedly ruled on a question;" and (2) "there has been an opportunity to challenge that ruling on a prior appeal."[6] Despite Respondents' contention to the contrary, the May 31, 2019 order (the "May 31, 2019 Order") did not expressly or impliedly decide whether reckless disclosure applied to the entirety of the Group 1 Documents. In addition, Scott simply did not have an opportunity to challenge the reckless disclosure issue up on Writ because the Nevada Supreme Court lacked jurisdiction over that particular issue as it related to the relevant portion of the Group 1 Documents; said portion which the District Court determined was not privileged.

i. Judge Sturman Did Not Explicitly or Implicitly Decide the Reckless Disclosure Issue.

With respect to the first *Zhang* prong, Respondents contend that the May 31, 2019 Order explicitly and implicitly rejected Scott's reckless disclosure argument alleged in his Objection to the Discovery Commissioner's DCRR (the "Objection to DCRR"). In particular, Respondents allege that the ruling "Petitioner's Objections to the DCRR are DENIED" in the May 31, 2019 Order somehow explicitly rejects the issue and that it was implicitly rejected when Judge Sturman found portions of the Group 1 Documents to be privileged without exception. Both claims misconstrue the findings of the May 31, 2019 Order and the proper scope of the Writ.

As this Court is aware, a document must first be deemed privileged before a court may determine whether that privilege was waived.[7] Moreover, "[a] significant corollary to the [law of the case] doctrine is that **dicta have no preclusive effect**."[8] The May 31, 2019 Order makes clear

---

[6] *Recontrust Co. v. Zhang*, 130 Nev. 1, 9 (2014) (quoting *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 740, n.2 (D.D.C. 1995)).

[7] *See, e.g. Wells Dairy, Inc. v. American Indus. Refrigeration, Inc.*, 690 N.W.2d 38, 42 (Iowa 2004) ("[I]t is only necessary to address the issue of inadvertent disclosure...if the underlying disputed documents or materials are protected by the privilege. A document must first be privileged to support any claim for protective relief due to inadvertent disclosure."); *State Compensation Ins. Fund v. WPS, Inc.*, 70 Cal.App.4th 644, 651, 82 Cal.Rptr.2d 799 (Cal. Ct. App. 1999) (determining privilege before analyzing whether disclosure was inadvertent).

[8] *Fergason v. LVMPD*, 131 Nev. 939, 947 (2015) (quoting *Rebel Oil Co. v. Atl. Richfield Co.*, 146 F.3d 1088, 1093 (9th Cir. 1998)).

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON DWIGGINS & FREER TRUST AND ESTATE ATTORNEYS

that Judge Sturman upheld the Discovery Commissioner's finding that the relevant portion of the Typed Notes was not privileged because the section, in part, constituted facts.[9] Accordingly, Judge Sturman could not have determined whether reckless disclosure had occurred because the Court found that the relevant portion of the Group 1 Documents was not privileged as a matter of law. Indeed, any attempt by Judge Sturman to adjudicate the reckless disclosure argument after finding no privilege existed would constitute non-controlling dictum, which the Nevada Supreme Court has held cannot serve as the basis for waiver under the law of the case doctrine.[10]

Likewise, pursuant to *Zhang*, the law of the case doctrine would not apply to a decision on reckless disclosure where a court first found that the document was not privileged in the first place. Scott's Objection to the DCRR specifically requested that the Court apply the reckless disclosure argument to the Group 1 Documents ***only if*** it first found the same to be protected by attorney-client privilege.[11] Thus, with respect to the portion of the Group 1 Documents that were deemed not privileged, the ruling that "Petitioner's Objections to the DCRR are DENIED" could not act as an ruling on the merits of the reckless disclosure claim as such objection was raised **only if** the Court held that portion of the Group 1 Documents was privileged and such prerequisite did not occur. For the foregoing reasons, Judge Sturman could not have explicitly or implicitly rejected Scott's reckless disclosure argument and he may bring the same now.

ii. Scott Did Not Have the Opportunity to Seek a Writ on the May 31, 2019 Order.

Regardless of whether the Court rendered a decision on reckless disclosure, waiver is still not appropriate because the second *Zhang* prong – requiring an opportunity to challenge that ruling on a prior appeal – has not been met. Respondents incorrectly argue that Scott had the following

---

[9] *See* May 31, 2019 Order, at ¶5.

[10] *See St. James Village, Inc. v. Cunningham,* 125 Nev. 211, 216 (2009) ("A statement in a case is dictum when it is 'unnecessary to a determination of the questions involved.") (citing *Stanley v. Levy & Zetner Co.*, 60 Nev. 432, 448 (1941)); *see also Fergason*, 131 Nev. at 947.

[11] *See* Objection to DCRR at 39:20-40:2 ("…should this Court entertain any argument that the [Group 1 Documents] are privileged, it should find that such protections have been waived by the reckless manner that Respondents have handled discovery."); *Fergason*, 131 Nev. at 947.

SOLOMON DWIGGINS & FREER TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

"opportunities" to appeal the reckless disclosure issue: (1) Scott "could have promptly sough writ relief…in response to the portion of the district court's ruling that was adverse" to him; (2) Scott "could have sought to file a cross-petition once the Supreme Court directed him to answer" the Respondents' writ petition; and (3) Scott "could have better developed his waiver arguments in his answering brief when responding" to the Respondents' writ petition.[12] Each of these suggestions improperly assume that the Nevada Supreme Court even had jurisdiction to hear the reckless disclosure issue, either on writ or on a cross-writ. In reality, however, the Nevada Supreme Court did **not** have jurisdiction over the reckless disclosure issue because: (1) the reckless disclosure issue was not ripe; (2) Scott lacked standing to assert the issue; and (3) Scott was not an "aggrieved party" necessary to file a writ or cross writ. Furthermore, Scott could not brief the reckless disclosure issue in his brief answering Respondents' writ petition because it was not an issue addressed within the scope of Respondents' petition.

a. Scott Could Not Have Filed an Independent Writ of Mandamus.

Respondents' first allege that Scott waived the reckless disclosure argument because he could have promptly sought independent writ relief on the reckless disclosure issue.[13] However, the Nevada Supreme Court may not issue advisory opinions and may only resolve "actual controversies by an enforceable judgment."[14] The Nevada Supreme Court must evaluate the justiciability of an actual controversy prior to a writ or appeal because "a controversy must be present through all stages of the proceeding."[15] Actual, justiciable controversies require that a party have both standing and that the claim for relief is ripe for review.[16] Here, The Nevada Supreme

---

[12] Opposition at 18:4-9.

[13] *Id.* at 18:4-5.

[14] *Personhood Nevada v. Bristol*, 126 Nev. 599, 602 (2010) (citing *NCAA v. Univ. of Nev.*, 97 Nev. 56, 57 (1981)).

[15] *Id.* (citing *Arizonans for Official English v. Ariz.*, 520 U.S. 43, 67 (1997) and *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 476-78 (1990)).

[16] *See generally, In re Amerco Derivative Litigation*, 127 Nev. 196 (2011) ("Although state courts do not have constitutional Article III standing, "Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief."); *Tom v. Innovative Home Systems,*

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON DWIGGINS & FREER TRUST AND ESTATE ATTORNEYS

Court lacked jurisdiction over the reckless disclosure argument because the issue was not ripe and Scott did not have the requisite standing.

1. The Nevada Supreme Court Did Not Have Jurisdiction over the Reckless Disclosure Argument Because It Was Not Ripe.

The doctrine of ripeness "focuses on the timing of the action… ."[17] A particular issue is only ripe where "the harm alleged by the party seeking review is sufficiently concrete, rather than remote or hypothetical… ."[18] If the harm has not yet occurred, the issue is only ripe where it is at least probable that the harm will occur absent judicial relief.[19] The issue of whether a disclosure was intentional and thereby results in the waiver of the privilege remains hypothetical (*i.e.* not ripe) until the court determines the necessary precursor of whether the document was even privileged in the first place.[20] Indeed, a court ruling that a non-privileged document was recklessly disclosed would constitute nothing more than non-controlling dictum.[21]

Here, as explained above, Judge Sturman's May 31, 2019 Order found that the relevant portions of the Group 1 Documents (i.e. the middle section of Bates No. RESP0013285) were **not**

LLC, 132 Nev. 161, 178 (2016) (J. Tao concurring) (Nevada appellate courts review cases with an eye toward established doctrines of justiciability that include standing and ripeness); *Doe v. Bryan*, 102 Nev. 523, 525 (1986).

[17] *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 887 (2006) (quoting *In re T.R.*, 119 Nev. 646, 651 (2003)).

[18] *Id.*

[19] *Id.*

[20] *See, e.g. Wells Dairy, Inc. v. American Indus. Refrigeration, Inc.*, 690 N.W.2d 38, 42 (Iowa 2004) ("[I]t is only necessary to address the issue of inadvertent disclosure…if the underlying disputed documents or materials are protected by the privilege. A document must first be privileged to support any claim for protective relief due to inadvertent disclosure."); *State Compensation Ins. Fund v. WPS, Inc.*, 70 Cal.App.4th 644, 651, 82 Cal.Rptr.2d 799 (Cal. Ct. App. 1999) (determining privilege before analyzing whether disclosure was inadvertent).

[21] *See St. James Village, Inc. v. Cunningham,* 125 Nev. 211, 216 (2009) ("A statement in a case is dictum when it is 'unnecessary to a determination of the questions involved.'") (citing *Stanley v. Levy & Zetner Co.*, 60 Nev. 432, 448 (1941)).

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS

protected by attorney-client privilege[22] Thus, the issue of inadvertent disclosure was not ripe for adjudication by Judge Sturman. In turn, Respondents filed their writ petition seeking, in part, that the Nevada Supreme Court overrule the May 31, 2019 Order to find that that the Group 1 Documents were privileged in their entirety.[23] At such juncture, the reckless disclosure issue was not ripe because the harm to Scott alleged, *i.e.* that the document was privileged in its entirety, was not yet concrete. Indeed, Scott could not have filed an independent writ petition since the resolution of Respondents writ would (and ultimately did) determine whether the inadvertent disclosure issue *ever* became ripe.

2. The Nevada Supreme Court Did Not Have Jurisdiction over the Reckless Disclosure Argument Because Scott Lacked Standing.

Standing, like ripeness, is necessary for the Nevada Supreme Court to have appellate jurisdiction over a writ of mandamus or prohibition.[24] The court in *Heller v. Legislature of State of Nev.* explains:

> "Standing is the legal right to set judicial machinery in motion." To establish standing in a mandamus proceeding, the petitioner must demonstrate a "beneficial interest" in obtaining writ relief. Although this court has not defined "beneficial interest," the California courts have: "To demonstrate a beneficial interest sufficient to pursue a mandamus action, a party must show a direct and substantial interest that falls within the zone of interests to be protected by the legal duty asserted." "Stated differently, **the writ must be denied if the petitioner will gain no direct benefit from its issuance and suffer no direct detriment if it is denied**."[25]

Moreover, the Nevada Supreme Court is a "court of limited appellate jurisdiction" and "has jurisdiction to entertain an appeal only where the appeal is brought by an aggrieved party."[26] Indeed, NRAP 3A(a), entitled "Standing to Appeal," expressly provides that "[a] party who is

---

[22] *See* May 31, 2019 Order at 2:13-3:2, a true and correct copy attached hereto as **Exhibit 1**.

[23] *See* Petition for Writ of Prohibition or Mandamus at 2-3; 22-26.

[24] *See Heller v. Legislature of State of Nev.*, 120 Nev. 456, 460-61 (2004); *see also, Anse, Inc. v. Eighth Jud. Dist. Ct.*, 124 Nev. 862, 867 (2008).

[25] 120 Nev. 456 at 460-61 (2004).

[26] *Valley Bank of Nevada v. Ginsburg,* 110 Nev. 440, 444, 874 P.2d 729, 732 (Nev. 1994) (citing NRAP 3A(a))

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON DWIGGINS & FREER TRUST AND ESTATE ATTORNEYS

aggrieved by an appealable judgment or order may appeal from that judgment or order, with or without first moving for a new trial." "A party is 'aggrieved' within the meaning of NRAP 3A(a) 'when either a personal right or a right property is adversely and substantially affected by a district court's ruling."[27]

Respondents' allegation that Scott could have filed an independent writ petition ignores this standing requirement. The May 31, 2019 Order favored Scott because the Court held that the relevant portion of the Group 1 Documents was not privileged. Scott achieved the benefit he sought from the Court when the relevant portion was held not to be privileged. Scott could not, therefore, file an independent writ on the reckless disclosure issue, because he had already achieved the relief to be requested in such a writ (i.e. that the document was not privileged and could be disclosed to Scott). Indeed, if Respondents had not filed their writ petition on the privilege issue, then Scott would today possess the relevant portion of the Group 1 Documents. This means that Scott would derive no benefit or detriment from a reckless disclosure ruling because he had already achieved such relief. Accordingly, Scott did not possess the requisite standing to allow the Nevada Supreme Court jurisdiction over the reckless disclosure issue.

b. Scott Could Not Have Filed a Cross-Writ on the Reckless Disclosure Issue.

Respondents further allege that Scott waived his reckless disclosure argument when he failed to file a cross-petition requesting writ relief on the same.[28] As a preliminary matter, as discussed *supra* at Section B(ii)(a) and (b), the reckless disclosure issue was not ripe, nor did Scott possess standing to appeal the issue. As such, Scott could not have asserted a cross-writ without first possessing standing on a ripe issue.

---

[27] *Valley Bank*, 110 Nev., at 446, 874 P.2d, at 734 (quoting *Hughes' Estate v. First Nat. Bank of Nevada*, 96 Nev. 178, 180, 605 P.2d 1149, 1150 (Nev. 1980)); *see also*, *Bates v. Nevada Sav. & Loan Ass'n*, 85 Nev. 441, 444, 456 P.2d 450, 452 (Nev. 1969) (holding that "an aggrieved party is one whose personal right is injuriously affected by the adjudication, or where the right of property is adversely affected or diverted."); *Ford v. Showboat Operating Co.*, 110 Nev. 752, 755-56 (1994).

[28] *See* Opposition at 18:5-8.

SOLOMON DWIGGINS & FREER TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

In *Ford v. Showboat Operating Co.*, the Nevada Supreme Court clarified that it does not have jurisdiction over cross-appeals sought by a prevailing party.[29] The court affirmed: "[a] party who prevails in the district court and who does not wish to alter any rights of the parties arising from the judgment is not *aggrieved* by the judgment" (*i.e.* has no standing under NRAP 3A).[30] The court further held that each appeal must stand on its own and that the jurisdiction of an appeal **may not depend on the "existence of some other appeal."**[31]

Here, Scott was not an "aggrieved party," as contemplated by NRAP 3A(a) because Scott successfully obtained a favorable ruling regarding the non-privileged nature of the relevant portion of the Group 1 Documents *via* the application of the fiduciary exception and a finding that such portion contained facts. Simply put, Scott was a "prevailing party" such that the Nevada Supreme Court lacked jurisdiction over any cross appeal (or writ) filed by him pursuant to *Ford*. Moreover, any cross-writ filed by Scott regarding reckless disclosure would have necessarily been dependent upon the existence of a successful writ by Respondents asserting that the relevant portion of the Group 1 Documents was privileged. Only if such writ was successful would any cross-writ by Scott regarding reckless disclosure become thereafter necessary. This is the exact type of contingent scenario the Nevada Supreme Court is loath to address as it wastes finite judicial resources and client funds in addressing issues that only have a possibility of actually being relevant to the underlying matter. Based on the foregoing, any cross-appeal by Scott would have been improper because Scott had no jurisdictional basis to assert a reckless disclosure argument until ***after*** the Nevada Supreme Court's decision reversing Judge Sturman on the privilege issue via Respondent's writ.

c. Scott Could Not Have Argued Reckless Disclosure in his Brief Answering Respondents' Writ Petition.

Finally, Respondents argue that even if Scott could not have sought an independent writ or cross-writ, Scott had the opportunity to more fully brief the issue in his Answer to Respondents'

---

[29] 110 Nev. at 756 (1994).

[30] *Id.* (emphasis in original).

[31] *Id.*

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON | DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS

writ petition.[32] As a preliminary matter, this would have been an improper argument to make whether in an appeal, cross-writ, or as part of an Answer to Respondents' Writ for the reasons set forth above related to standing and ripeness.

Moreover, the second prong of *Zhang* requires that there was an "opportunity to challenge that ruling on a prior appeal." Here, Scott could not have "challenged" a ruling by Judge Sturman that reckless disclosure warranted waiver of the privilege as to the relevant portion of the Group 1 Documents because no such ruling was ever made; rather, the Court held that such relevant portion of the document was not privileged such that it would have been dicta to opine on the waiver issue. As set forth above, dicta cannot serve as the basis for waiver under the law of the case doctrine.[33] Accordingly, the second prong of Zhang could not have been met by making an alternative argument in Scott's answer to Respondent's writ. Notwithstanding, Respondents' contention fails to recognize the well settled principle that the Nevada Supreme Court is a court of limited jurisdiction whose "review in a writ proceeding is limited to the argument and documents provided by the parties."[34] Setting aside whether the reckless disclosure issue was ripe for Scott's standing, Respondents chose not to address the reckless disclosure argument in the original writ petition. Accordingly, the reckless disclosure issue was **not** before the Nevada Supreme Court on writ, foreclosing Scott's ability to argue that reckless disclosure applied within his answering brief.

C. Laches is Not Applicable.

The doctrine of laches does not bar Scott's reckless disclosure argument because Scott has timely raised the issue and Respondents fail to demonstrate any sustained prejudice. Laches applies to a petition for a writ of mandamus where: (1) "there was an inexcusable delay in seeking the petition;" (2) "an implied waiver arose from the petitioner's knowing acquiescence in existing

---

[32] *See* Opposition at 18:7-9.

[33] *Fergason*, 131 Nev. at 947 (2015) ("A significant corollary to the [law of the case] doctrine is that dicta have no preclusive effect.").

[34] *Pan v. Eighth Jud. Dist. Ct.*, 120 Nev. 222, 229 (2004).

SOLOMON DWIGGINS & FREER TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

conditions;" and (3) "there were circumstances causing prejudice to the respondent."[35] Concerning the necessity of prejudice to the respondent, the Nevada Supreme Court in *Home Sav. Ass'n v. Bigelow* explained:

> Laches is more than mere delay in seeking to enforce one's rights, it is delay that works a disadvantage to another. **The condition of the party asserting laches must become so changed that he cannot be restored to his former state**. It is well-established that especially strong circumstances must exist to sustain the defense of laches when the statute of limitations has not run.[36]

In other words, "to invoke laches, the party must show that the delay caused ***actual*** prejudice."[37] In this regard, where the issue to be decided is a question of law, even the loss of important factual information does not result in sufficient prejudice to warrant a finding of laches.[38] Finally, "[p]rejudice is never presumed; rather it must be affirmatively demonstrated by the [movant] in

---

[35] *Building and Const. Trades Council of Northern Nevada v. State ex rel. Public Works Bd.*, 108 Nev. 605, 611 (1992) ("Laches is an equitable doctrine which may be invoked when delay by one party works to the disadvantage of the other, causing a change of circumstances which would make the grant of relief to the delaying party inequitable. Especially strong circumstances must exist, however, to sustain a defense of laches when the statute of limitations has not run.") (quotations and citations omitted).

[36] 105 Nev. 494, 496 (1989) (internal quotations and citations omitted) (emphasis added); *see also Miller v. Walser*, 42 Nev. 497, 181 P. 437, 443 (Nev. 1919) ("Strictly speaking, laches implies more than mere lapse of time in asserting a right; it requires some actual or presumable change of circumstances rendering it inequitable to grant relief."); *Cooney v. Pedroli*, 49 Nev. 55, 235 P. 637, 640 (Nev. 1925) ("Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no steps to enforce them until the condition of the other party has, in good faith, *become so changed* that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable and operates as an estoppel against the assertion of the right. The disadvantage may come from loss of evidence, change of title, intervention of equities and other causes, but when a court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief.").

[37] *Besnilian v. Wilkinson*, 117 Nev. 519, 25 P.3d 187 (Nev. 2001) (emphasis added).

[38] *Id.* (where district court found that wife's delay in bringing her suit "resulted in valuable evidence being lost...[and that] respondents were prejudiced by the loss of legal and medical records", the Nevada Supreme court held that the loss of such records did not result in sufficient prejudice to warrant laches because the issue to be decided was "a matter of law regarding the effect of one party's gift deed to homestead property.").

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON | DWIGGINS & FREER | TRUST AND ESTATE ATTORNEYS

order to sustain his burdens of proof and the production of evidence on the issue."[39] Generic or conclusory claims of prejudice, including claims of incurred attorney's fees, are insufficient to demonstrate laches.[40]

Here, the first element of laches is not met because, as discussed in Section B(ii) and (iii) *supra*, Scott lacked standing and the issue of waiver due to reckless disclosure was not ripe until the Nevada Supreme Court overturned the lower court's decision that the relevant portion of the Group 1 Documents was not privileged on May 28, 2020. Two months later, Scott filed the Countermotion alleging waiver due to reckless disclosure. As Nevada appellate procedure does not specify the time-frame necessary within which a party must file a writ petition,[41] the reckless disclosure argument was not untimely or otherwise beyond any applicable statutory limitation period. In such instances, "especially strong circumstances must exist to sustain the defense of laches" which has not been proven here.[42]

The second element is also not met as Scott did not knowingly acquiesce in any waiver of the reckless disclosure argument. As mentioned above, it would have been legally improper for Scott to bring the waiver due to reckless disclosure issue before the Nevada Supreme Court. Accordingly, Scott could not have waived a right that he otherwise did not have.

Lastly, the third element of laches has not be met because Respondents have not been prejudiced by the purported delay in bringing the waiver due to reckless disclosure argument at this juncture. Indeed, Respondents only claimed prejudice is that they have been forced "to spend time and resources re-arguing an issue that was decided long ago."[43] Beyond not being accurate, such

---

[39] Miller v. Eisenhower Medical Center, 27 Cal.3d 614, 624, 614 P.2d 258, 264, 166 Cal.Rptr. 826, 832 (Cal. 1980) (in bank) (internal citations and quotations omitted) (emphasis added).

[40] *See In re Beaty*, 306 F.3d 914, 928 (9th Cir. 2002) ("generic claims of prejudice do not suffice for a laches defense in any case, and are particularly insufficient in a case in which a heightened showing of extraordinary circumstances and demonstrable prejudice is required.").

[41] *See Buckholt v. Second Jud. Dist. Ct.*, 94 Nev. 631, 633 (1978), overruled on other grounds by *Pan v. Eighth Jud. Dist. Ct.*, 120 Nev. 222, 229 (2004) (discussing NRAP 21).

[42] *Home Sav. Ass'n v. Bigelow*, 105 Nev. 494, 496 (1989).

[43] *See* Opposition at 20:14-17.

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON | DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS

basis is impermissibly generic and conclusory and related solely to the incurrence of attorney's fees. Indeed, Respondents have failed to demonstrate that any factual information has been lost that could be detrimental to proving that they did not recklessly disclose the relevant portion of the Group 1 Documents. As set forth in Section A *supra*, Respondents' counsel has tellingly elected not to directly confront the factual allegations that they recklessly disclosed such document by failing to adequately conduct a pre-production review, disclosing the Group 1 Documents a second time the same day they clawed it back, etc. In short, Respondents have not identified any actual prejudice warranting laches.

For the foregoing reasons, Respondents' laches argument should be denied by this Court.

D. The ESI Protocol Terms Do Not Prohibit Scott from Asserting a Reckless Disclosure Argument.

The ESI Protocol does not preclude Scott from asserting that Respondents' disclosure was so reckless that it constituted intentional conduct. As this Court is aware, and as Respondents admit, Nevada has not adopted a counterpart to Federal Rule of Evidence 502 related to the inadvertent disclosure of documents and claw back agreements related thereto. This Court must therefore interpret the ESI Protocol terms pursuant to common law contract principles and not in the context of FRE 502.

Nevada courts enforce contracts "as written where the language is clear and unambiguous."[44] Courts construe the language of the contract in light of the parties' intent but may only derive party intent from the "four corners" of the contract itself.[45] Parol evidence is only admissible when a contract contains ambiguous provisions.[46]

The ESI Protocol is clear and unambiguous in its terms:

> ...the Objecting Party...may only contest the asserted privileges on ground other than the **inadvertent** production of such document(s). In making such a motion,

---

[44] *See MMAWC, LLC v. Zion Wood Obi Wan Trust*, 135 Nev. 275, 279 (2019) (citing *State Dept. of Trans. v. Eighth Jud. Dist. Ct.*, 133 Nev. 549 (2017)).

[45] *Id.* (citations omitted).

[46] *See Trans Western Leasing Corp. v. Corrao Const. Co., Inc.*, 98 Nev. 445, 447 (1982).

SOLOMON DWIGGINS & FREER TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

the Objecting Party shall not disclose the content of the document(s) at issue, but may refer to the information contained on the privilege log. **Nothing herein shall relieve counsel from abiding by applicable ethical rules regarding inadvertent disclosure and discovery of inadvertently disclosed privileged or otherwise protected material**.[47]

Respondents claim that this language prevents Scott from arguing reckless disclosure does not hold up under the plain meaning of the ESI Protocol's language. "Inadvertent disclosure," is defined as "[t]he **accidental** revelation of confidential information, as by sending it to a wrong e-mail address or by negligently allowing another person to overhear a conversation."[48] In contrast, jurisdictions analyzing reckless disclosure prior to FRE 502 have routinely stated that disclosures made with such "extreme or gross negligence" (i.e. reckless disclosures) will be deemed **intentional**, rather than **inadvertent** or **accidental**, disclosures.[49] Scott and Respondents only agreed to not dispute **accidentally** disclosed documents, not **intentionally** disclosed documents. Respondents' argument taken to its logical conclusion would prohibit Scott from contesting the privileged nature of documents intentionally and knowingly given to Scott – a result as preposterous as it is contrary to common law.

Rather than interpret ESI Protocol according to contract principles, Respondents misleadingly cite at length to *Great-West Life & Annuity Ins. Co. v. American Economy Ins. Co.*, 2013 WL 5332410, at *1 (D. Nev. Sept. 23, 2013) to allege that Scott is barred from asserting his reckless disclosure argument by the terms of the ESI Protocol. *Great-West Life*, however, is not applicable here because, in addition to being an unpublished decision prior to January 1, 2016, it analyzes claw back agreements in the context of FRE 502.[50] Nevada does not have a counterpart

---

[47] *See* Countermotion, Declaration of Dana A. Dwiggins, Exhibit 2, at ¶21 (emphasis added).

[48] DISCLOSURE, BLACK'S LAW DICTIONARY (11th ed. 2019).

[49] *See e.g., Ciba-Geigy Corp. v. Sandoz Ltd.*, 916 F.Supp. 404, 411 (D.N.J. 1995); *Fed. Deposit Ins. Corp. v. Marine Midland Realty Credit Corp.*, 138 F.R.D. 479, 482 (E.D.Va. 1991).

[50] 2013 WL 5332410, at *10-14 (D. Nev. Sept. 23, 2013) ("[t]he Court respectfully disagrees that an…agreement entered into under Rule 502(d) or (e) requires 'concrete directives be included in the…agreement regarding each prong of the [Rule 502(b)] analysis.' The text of the rule does not contain or support such rigid, formulaic requirements.").

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON | DWIGGINS & FREER | TRUST AND ESTATE ATTORNEYS

to FRE 502 and therefore, those cases cited by Scott that analyze reckless disclosure pre-passage of FRE 502 are directly on point. *See* Countermotion, at Section III.

Even if *Great-West Life* were controlling, it does not support Respondents' contention that the ESI protocol prevents waiver even if Respondents recklessly disclosed the relevant portion of Group 1 Documents. The opposite is true. More specifically, the *Great-West Life* court is tasked with determining when the default inadvertent disclosure provision under FRE 502(b) – which explains that a disclosure does not operate as waiver **only if "the holder of the privilege or protection took reasonable steps to prevent disclosure" and "promptly took reasonable steps to rectify the error"** – may be superseded by contract. The court in *Great-West Life* ultimately takes a middles approach by holding that while a claw back agreement need not specify "what constitutes inadvertence, what precautionary measures are required, and what the producing party's postproduction responsibilities are to escape waiver" (*i.e.* expressly displace each FRE 502(b) factor):

> It goes without saying that parties must adequately articulate the desire to supplant analysis under Rule 502(b) in any agreement under Rule 502(d) or (e). **In determining whether such agreements have been entered, the Court looks to the language of the agreement**.[51]

In short, *Great West Life* confirms that the agreement controls.

Here, the claw back provision set forth in the Section 21 of the ESI Protocol is substantively different from the provision analyzed in *Great-West Life* because it expressly states that all relevant ethical obligations must be adhered to, including [52] the requirement of NRPC 1.6 that lawyers make reasonable efforts to prevent inadvertent disclosures (*i.e.* it expressly retains FRE 502(b)(2)'s requirement that the holder of the privilege take reasonable steps to prevent disclosure):

///

///

---

[51] *Great-West Life & Annuity Ins. Co. v. American Economy Ins. Co.,* 2013 WL 5332410, at *12-13 (D. Nev. Sept. 23, 2013).

[52] NRPC 1.6(c) ("A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.").

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON | DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS

Section 21 of ESI Protocol	*Great-West Life* Clawback Provision
21. Effect of Disclosure of Privileged Information. The Receiving Party hereby agrees to promptly return, sequester, or destroy any Privileged Information disclosed or produced by Disclosing or Producing Party upon request by Disclosing or Producing Party regardless of whether the Receiving Party disputes the designation of Privileged Information.... [claw back procedure] .... In the event the parties do not resolve their dispute, The Objecting Party may bring a motion for a determination of whether the privilege applies within ten (10 days of the meet and confer session but may only contest the asserted privileges on grounds other than the inadvertent production of such document(s).[53] ...**Nothing herein shall relieve counsel from abiding by applicable ethical rules regarding inadvertent disclosure and discovery of inadvertently disclosed privileged or otherwise protected material.** ***The failure of any party to provide notice or instructions[54] under this Paragraph shall not constitute a waiver*** of, or estoppel as to, any claim of attorney-client privilege, attorney work product, or other ground for withholding production as to which the Disclosing or Producing Party would be entitled in this action.	**12. *Inadvertent Disclosure.*** Nothing in this protective order abridges applicable law concerning inadvertent disclosure of a document that the Disclosing Party believes contains attorney-client communications, attorney work product, or otherwise privileged information. **If a party inadvertently discloses documents or information subject to a claim of privilege or work product protection, such disclosure will not waive otherwise applicable claims of privilege or work product protection under applicable law.** ...[clawback procedure]

The retention of the ethical obligations confirms that by entering into the ESI Protocol the parties prevented only accidental or unintentional disclosures from acting as a waiver so as to maintain an attorney's duty under RPC 1.6(c), **not** reckless or intentional disclosures. In other words, the parties did not prohibit a reckless or intentional disclosure argument because the ESI Protocol terms do not exculpate the parties from the duty to act reasonably under RPC 1.6(c). A plain reading of the ESI

[53] Notably this sentence is superseded to the extent it is not consistent with the next sentence regarding counsel being required to abide by applicable ethical rules as demonstrated by the "nothing herein shall relieve" counsel of such duty language.

[54] Notably, unlike the *Great-West Lake* provision, which offers waiver protection when "a party inadvertently discloses documents," Section 21 of the ESI Protocol offers waiver protection to the extent a party fails to "provide notice or instruction" under such paragraph. Here, Petitioner does not primarily argue that Respondents failed to timely claw back under Section 21 (although this is also true); rather Petitioner contends, in part, that Respondents failure to conduct a pre-production review and the resulting disclosure of the relevant portion of the Group 1 Documents resulted in the waiver.

SOLOMON DWIGGINS & FREER TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

Protocol terms demonstrates that neither Scott nor Respondents agreed to waive *reckless* disclosure arguments.

E. Respondents May Not Circumvent the Necessity of Producing a Timely Privilege Log.

Respondents violated the ESI Protocol by failing to timely produce a privilege log and may not avoid the consequences of doing so. Under the test adopted by the Ninth Circuit, privilege is not *per se* waived if a privilege log is not produced within the thirty (30) day time limit espoused by FRCP 34.[55] Instead, the Ninth Circuit in *Burlington* provided an inexhaustive list of factors the court must review to determine whether the privilege log was timely, including: (1) the degree to which the log assists the recipient party to evaluate the privileged nature of the document; (2) the timeliness of an objection; (3) the size of the document production; and (4) other factual circumstances that make responding to discovery simple or difficult.[56] For perspective, the *Burlington* court found that a privilege log filed **five months** after a document production was untimely and constituted waiver of the privilege.[57]

Applying the *Burlington* factors by analogy, Respondents failed to produce a timely privilege log. In pertinent part, the ESI Protocol states: "[a] Producing Party will produce a privilege log within **120 days** after the completion of its document production."[58] Respondents shockingly and erroneously interpret this provision to mean that a privilege log is due 120 days only after the completion of ***all*** discovery (i.e. after the discovery deadline).[59] Rather than produce

---

[55] *See Bullion Monarch Mining, Inc. v. Newmont USA Ltd.*, 271 F.R.D. 643, 647-48 (D. Nev. 2010) (citing and quoting *Burlington Northern & Santa Fe Ry. Co. v. U.S. Dist. Ct. for the Dist. of Mont.*, 408 F.3d 1142 (9th Cir. 2005)).

[56] *Id.*

[57] *Id.*

[58] *See* Countermotion, Declaration of Dana A. Dwiggins, Exhibit 2, at ¶17 (emphasis added).

[59] *See* Opposition at 24:15-17. Such a position would lead to absurd results in that it could act to prohibit Scott from refuting Respondent's privilege designation as the discovery deadline would have already passed before he ever obtained the privilege log. It is also untenable in that it would deprive Scott of attempting to find alternative means to bring related evidence that Respondents claim is subject to privilege for the same reasons.

SOLOMON | DWIGGINS & FREER | TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

a privilege log within 120 days of the December 2017 production (which consisted of only approximately 8,000 new pages of documents from Lubbers' hard file),[60] Respondents did not produce a privilege log identifying the Typed Note as privileged until June 12, 2018 – over 180 days later. The Typed Note was subsequently disclosed for the second time on June 5, 2018. However, to date, the privilege log has never been updated to reflect the second disclosure of the Typed Note despite **over 25 months passing from its disclosure**. Such is telling in light of the fact that the June 5, 2018 production, containing the Group 1A Documents, consisted of only 3,588 pages of documents.[61] Respondents, therefore, failed to produce a timely privilege log related to small productions, thereby warranting waiver of any privilege associated with the Typed Note under *Burlington*.

In order to circumvent this reality, Respondents' claim that they advised counsel that they were not going to log post-litigation communications. However, the ESI Protocol does not differentiate or otherwise relieve a party from producing a privilege log for pre-litigation communications. In any event, Respondents conveniently omit the fact that the Typed Note is a *pre*-litigation communication. Indeed, Respondents have *repeatedly* argued that the Typed Note was prepared in anticipation of litigation – e.g. pre-litigation – and, therefore, were protected by the work product doctrine and not otherwise subject to the fiduciary exception. Respondents may not now unilaterally alter their contentions, or alter the terms of the ESI Protocol, because it now suits their legal position.[62] For the foregoing reasons, Respondents may not avoid their responsibility to provide timely privilege logs, which they ultimately failed to do.

///

///

---

[60] *See* Countermotion at ¶4.

[61] *Id.* at ¶17.

[62] *See e.g., Clark County Sports Enterprises, Inc. v. City of Las Vegas*, 96 Nev. 167, 175 (1980) (mutual consent is required to modify a former contract); *Moore v. Wells Fargo Bank, N.A.*, 39 Cal.App.5th 280, 287, 251 Cal.Rptr.3d 779 (Cal. Ct. App. 2019) (same).

SOLOMON DWIGGINS & FREER TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

F. The ESI Protocol Does Not Relieve Respondents from Conducting a Pre-Production Review.

As briefed more fully in Section III(1)(a) of Scott's Countermotion, parties have an ethical obligation to conduct a pre-production review to prevent the disclosure of privileged material.[63] Indeed, this obligation can only be waived by a claw back agreement if the agreement clearly reflects waiver of such pre-production review.[64]

As mentioned above, the ESI Protocol specifies: "[n]othing herein shall relieve counsel from abiding by applicable ethical rules regarding inadvertent disclosure and discovery of inadvertently disclosed privileged or otherwise protected material."[65] This section facially demonstrates that the parties contemplated and agreed not to waive the pre-production review obligation established by NRPC 1.6(c) and common law concerning disclosure of privileged documents.

To establish that a document was inadvertently, rather than recklessly or intentionally, disclosed, the disclosing party bears the burden of demonstrating the reasonable precautions taken to prevent disclosure, including an explanation of the pre-production review procedures.[66] Despite having been afforded a second opportunity to disclose the process of their pre-production review, Respondents failed to illustrate their allegedly reasonable process. Rather, Respondents cite to explanations provided in Respondents' Opposition to Petitioners Objection to Discovery Commissioner's Report and Recommendation, filed January 14, 2019 (the "Opposition to Objection to DCRR"), as well as conclusory statements in the Declaration of J. Colby Williams, to demonstrate their pre-production review. In the Opposition to Objection to DCRR, however, Respondents cite to a July 13, 2018 Status Report and make conclusory statements that reasonable steps were taken because "[m]ultiple professionals…were involved in the review and production

---

63 *See* Countermotion at Section (III)(1)(a), 12:5-13:11.

64 *Id.* at 13:16-14:5.

65 *Id.*, Declaration of Dana A. Dwiggins, Exhibit 2, at ¶21 (emphasis added).

66 *Id.* at Section (III)(1)(a), 12:5-13:11

SOLOMON DWIGGINS & FREER TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

of documents" and electronic review software was employed by Respondents' counsel.[67] Notably absent from the Opposition to Objection to DCRR is a declaration from Respondents' counsel regarding the pre-production review of Respondents' initial disclosures issued in December 2017 or the June 5, 2018 production (i.e. the two productions containing the Typed Note that is actually relevant to the current discussion). Similarly, the Declaration of J. Colby Williams alleges that Respondents have demonstrated their document production procedures throughout the litigation, but references Status Reports dated July 13, 2018, July 16, 2018 and September 25, 2018.[68] These Status Reports, however, related to specific document productions that Respondents were required to undertake *after* performing searches pursuant to Court orders and/or the stipulation of the parties. Absent is any confirmation that a pre-production review was conducted with respect to Respondents' initial disclosures in December 2017, the June 5, 2018 production or other productions related to supplemental responses not ordered by the Court. Indeed, with respect to the same, Respondents submit no evidence that any preproduction review was undertaken, despite now having *at least* two opportunities to demonstrate to a court of competent jurisdiction the manner of its pre-production review, if any. Rather, Respondents intentionally remain silent. Such silence is deafening.

///

///

///

///

///

///

///

///

[67] *See* Opposition to Objection to DCRR at 37:18-38:24 and fn. 19.

[68] *See* Opposition, Declaration of J. Colby Williams at ¶15.

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS

IV. Conclusion.

Based upon the foregoing, the Countermotion should be granted.

DATED this 21st day of July, 2020.

SOLOMON DWIGGINS & FREER, LTD.

Dana A. Dwiggins (#7049)
Craig D. Friedel (#13873)
Jacob D. Crawley (#15200)
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: (702) 853-5483
Facsimile: (702) 853-5485
ddwiggins@sdfnvlaw.com
cfriedel@sdfnvlaw.com
jcrawley@sdfnvlaw.com

Attorneys for Scott Canarelli

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS

CERTIFICATE OF SERVICE

PURSUANT to NRCP 5(b), I HEREBY CERTIFY that on July 21st, 2020, I served a true and correct copy of the **REPLY TO OPPOSITION TO COUNTERMOTION FOR WAIVER OF THE ATTORNEY CLIENT PRIVILEGE** to the following in the manner set forth below:

Via:

[____] Hand Delivery

[____] U.S. Mail, Postage Prepaid

[____] Certified Mail, Receipt No.: _____

[____] Return Receipt Request

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

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

Jennifer Braster
Naylor & Braster
1050 Indigo Dr #112,
Las Vegas, NV 89145
Email: jbraster@naylorandbrasterlaw.com

Liane Wakayama, Esq.
Hayes - Wakayama
10001 Park Run Drive
Las Vegas, NV 89145
Email: lkw@hwlawnv.com

Susie Marfeel

An Employee of Solomon Dwiggins & Freer, Ltd.

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON | DWIGGINS & FREER | TRUST AND ESTATE ATTORNEYS

EXHIBIT 1

ORDR
CAMPBELL & WILLIAMS
J. Colby Williams, Esq. (5549)
jcw@cwlawlv.com
Philip R. Erwin, Esq. (11563)
pre@cwlawlv.com
700 South Seventh Street
Las Vegas, Nevada 89101
Telephone: (702) 382-5222
Facsimile: (702) 382-0540

DICKINSON WRIGHT, PLLC
Joel Z. Schwarz, Esq. (9181)
jschwarz@dickinsonwright.com
8363 West Sunset Road, Suite 200
Las Vegas, Nevada 89113
Telephone: (702) 550-4400
Facsimile: (844) 670-6009

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

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of: 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:

CAMPBELL & WILLIAMS

J. Colby Williams, Esq. (5549)
Philip R. Erwin, Esq. (11563)
700 South Seventh Street
Las Vegas, Nevada 89101
Telephone: (702) 382-5222
Facsimile: (702) 382-0540

-and-

DICKINSON WRIGHT, PLLC
Joel Z. Schwarz, Esq. (NSB #9181)
8363 W. Sunset Road, Suite 200
Las Vegas, Nevada 89113
Tel: (702) 550-4400

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

Agreed as to Form:

SOLOMON DWIGGINS & FREER, LTD.

Dana A. Dwiggins, Esq., (7049)
Tess E. Johnson, Esq., (13511)
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: (702) 853-5483
ddwiggins@sdfnvlaw.com
tjohnson@sdfnvlaw.com

Attorneys for Petitioner Scott Canarelli

ELECTRONICALLY SERVED
8/13/2020 7:19 AM

Electronically Filed
08/13/2020 7:19 AM
CLERK OF THE COURT

DAO

EIGHTH JUDICIAL 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. 26/Probate

DECISION AND ORDER GRANTING MOTION TO DISQUALIFY

The Former Trustees of the Scott Lyle Graves Canarelli Irrevocable Trust filed a motion to disqualify Judge Sturman. The Former Trustees argue that Judge Sturman's impartiality might be reasonably questioned based on Judge Sturman's review of privileged documents. This matter came before the Court for oral argument on July 28, 2020. After review of the papers, Judge Sturman's response, and consideration of oral argument, the Court grants the Former Trustees' request to disqualify Judge Sturman. Pursuant to Administrative Order 19-07, the Clerk of the Court is directed to randomly reassign case P-13-078912-T and its consolidated cases to Department 8 or Department 24.

I. Factual and Procedural Background

Heidi Canarelli, Lawrence Canarelli, and Edward Lubbers were Former Trustees of the Scott Lyle Graves Canarelli Irrevocable Trust. On September 30, 2013, Scott Canarelli filed a probate petition that raised adversarial allegations against the Former Trustees. The case was assigned to Judge Sturman and several other probate petitions filed by Mr. Canarelli were subsequently consolidated under this case. Mr. Canarelli's initial petition was later supplemented with surcharge petitions against the Former Trustees. Mr. Lubbers retained counsel and Mr. Lubbers conducted a conference call with counsel on October 14, 2013. Mr. Lubbers took notes related to the conference call and the notes included opinions on the merits of Mr. Canarelli's petitions.

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

Case Number: P-13-078912-T

The case proceeded to discovery and the Former Trustees' initial disclosures were served in December of 2017. The Former Trustees' initial disclosures included Mr. Lubbers's notes from the October 14, 2013, conference call. The Former Trustees attempted to claw back Mr. Lubbers's notes, arguing the notes were inadvertently disclosed and protected by attorney-client privilege. The discovery commissioner determined that while portions of Mr. Lubbers's notes were privileged, other portions of the notes were discoverable under the common law fiduciary duty exception to attorney-client privilege. Both parties objected to the discovery commissioner's findings and the matter came before Judge Sturman for hearing. Judge Sturman reviewed Mr. Lubber's notes affirmed the majority of the discovery commissioner's findings. Following Judge Sturman's ruling, the Former Trustees petitioned the Nevada Supreme Court for a writ of prohibition or mandamus.

One May 28, 2020, the Nevada Supreme Court granted the Former Trustees' petition. The high court found that Mr. Lubbers's notes were undiscoverable because they were protected by attorney-client privilege and that no exception applied. On June 8, 2020, the Former Trustees filed a motion to disqualify Judge Sturman. The Former Trustees argue that Judge Sturman's review of Mr. Lubbers's notes would cause a reasonable person to harbor doubts about Judge Sturman's impartiality. Judge Sturman filed an answer in response, categorically denying any bias or prejudice towards any party to the case. Mr. Canarelli filed an opposition and countermotion for waiver of attorney-client privilege, and the Former Trustees filed a reply in response.

Mr. Lubbers's notes were provided to the Court for in camera review on July 17, 2020, and the matter came before the Court for oral argument on July 28, 2020.

II. Discussion

A. Legal Standard

Nevada Revised Statute 1.230 provides the statutory grounds for disqualifying district Court judges. The statue in pertinent part provides:

> 1. A judge shall not act in an action or proceeding when the judge entertains actual bias or prejudice for or against one of the parties to the action.
> 2. A judge shall not act as such in an action or proceeding when implied bias exists in any of the following respects:
> (a) When the judge is a party to or interested in the action or proceeding.

> (b) When the judge is related to either party by consanguinity or affinity within the third degree.
> (c) When the judge has been attorney or counsel for either of the parties in the particular action or proceeding before the court.
> (d) When the judge is related to an attorney or counselor for either of the parties by consanguinity or affinity within the third degree. This paragraph does not apply to the presentation of ex parte or contested matters, except in fixing fees for an attorney so related to the judge.

The Revised Nevada Code of Judicial Conduct provides substantive grounds for judicial disqualification. Pursuant to NCJC 2.11(A):

> (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:
> (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might be reasonably questioned. Ybarra v. State, 247 P.3d 269, 271 (Nev. 2011). The test for whether a judge's impartiality might be reasonably questioned is objective and courts must decide whether a reasonable person, knowing all the facts, would harbor reasonable doubts about a judge's impartiality. Id. at 272.

The burden is on the party asserting the challenge to establish sufficient factual and legal grounds warranting disqualification. Las Vegas Downtown Redevelopment Agency v. District Court, 5 P.3d 1059, 1061 (Nev. 2000). A judge has a duty to preside to the conclusion of all proceedings, in the absence of some statute, rule of court, ethical standard, or compelling reason otherwise. Id. A judge is presumed to be unbiased. Millen v. District Court, 148 P.3d 694, 701 (Nev. 2006). A judge is presumed to be impartial, and the burden is on the party asserting the challenge to establish sufficient factual grounds warranting disqualification. Yabarra, 247 P.3d at 272. Additionally, the Court should give substantial weight to a judge's determination that the judge may not voluntarily disqualify themselves, and the judge's decision should not be overturned in the absence of clear abuse of discretion. In re Pet. To recall Dunleavy, 769 P.2d 1271, 1274 (Nev. 1988).

The Nevada Supreme Court has stated "rulings and actions of a judge during the course of official judicial proceedings do not establish legally cognizable grounds for disqualifications." Id. at 1275. The personal bias necessary to disqualify must 'stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from participation in the case." Id. "To permit an allegation of bias, partially founded upon a justice's performance of his [or her] constitutionally mandated responsibilities, to disqualify that justice from discharging those duties would nullify the court's authority and permit manipulation of justice, as well as the court." Id.

The Nevada Supreme Court has noted that while the general rule is that what a judge learns in his or her official capacity does not result in disqualification, "an opinion formed by a judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, constitutes a basis for a bias or partiality motion where the opinion displays 'a deep-seated favoritism or antagonism that would make fair judgment impossible." Kirksey v. State, 923 P.2d 1102, 1107 (Nev. 1996). However, "remarks of a judge made in the context of a court proceeding are not considered indicative of improper bias or prejudice unless they show that the judge has closed his or her mind to the presentation of all the evidence." Cameron v. State, 968 P.2d 1169, 1171 (Nev. 1998).

B. Disqualification is warranted because Judge Sturman's impartiality may be reasonably questioned based on Judge Sturman's review of Mr. Lubbers's notes.

The Former Trustees argue that Judge Sturman should be disqualified from this case because Judge Sturman reviewed Mr. Lubbers's notes. Those notes have now been determined to be privileged documents which should not have been discoverable. The Former Trustees argue that Judge Sturman's review of the Mr. Lubbers's notes would cause a reasonable person to harbor doubts about Judge Sturman's impartiality as the ultimate trier of fact in the case.

In her response, Judge Sturman denies any bias or prejudice and explains the legal basis for her review of Mr. Lubbers's notes for a privilege determination. Judge Sturman also notes that the Nevada Supreme Court's opinion did not direct reassignment of this case. Mr. Canarelli objects to disqualification, arguing that the information contained within Mr. Lubbers's notes would be

presented as evidence by other means. Mr. Canarelli further argues that the Former Trustees have failed to demonstrate a deep seated antagonism that would warrant disqualification of Judge Sturman.

NRS 1.235(1) provides specific deadlines that an affidavit to disqualify a judge must be filed. If new grounds for a judge's disqualification arise after the time limits in NRS 1.235(1), a party may file a motion to disqualify based on the judicial canons. Towbin Dodge, LLC v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark, 112 P.3d 1063, 1069 (Nev. 2005). Under the Nevada Code of Judicial Canons, "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." Nev. Sup. Ct. R. CJC Canon 2, Rule 2.11(A). The motion "must set forth facts and reasons sufficient to cause a reasonable person to question the judge's impartiality." Id. at 1069. Disqualification is appropriate if a reasonable person, knowing all the facts, would harbor reasonable doubts about a judge's impartiality. Ybarra v. State, 247 P.3d 269, 272 (Nev. 2011).

The general rule of law is that what a judge learns in their official capacity does not result in disqualification, unless the movant can show that the judge has formed an opinion based on the facts and the opinion displays "a deep-seated favoritism or antagonism that would make fair judgment impossible." Kirksey v. State, 923 P.2d 1102, 1119 (Nev. 1996). But, the US Supreme Court has found that "'examination of the 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). While Zolin involved privileged documents in a tax investigation, the Arizona Supreme Court raised similar concerns in a guardianship case. Lund v. Myers, 305 P.3d 374, 375 (Ariz. 2013). In Lund, the Arizona Supreme Court remanded a guardianship case to the trial judge for further arguments on the privilege of inadvertently disclosed documents. Id. at 377. The Arizona Supreme Court cautioned, however, "of the possibility that a review of privileged materials may be so prejudicial as to require the judge's recusal." Id. If the trial judge conducts an in camera review and determines that the documents are privileged, it may be necessary for the trial judge to recuse under the Arizona judicial canons. Id. Like Nevada, Arizona's judicial canons require

disqualification "in any proceeding in which the judge's impartiality might reasonably be questioned". AZ ST S CT RULE 81 CJC Rule 2.11.

Here, the Court finds that Judge Sturman's review of Mr. Lubbers's notes may cause Judge Sturman's impartiality to be reasonably questioned. Judge Sturman reviewed Mr. Lubbers's notes in an official judicial capacity, and there is no evidence that Judge Sturman has formed an opinion that would make fair judgment impossible. The general rule provides that disqualification in such circumstances would not be warranted. But, under NRS 153.031, the court is the ultimate trier of fact in petitions concerning trust affairs. See NRS 153.031(3). The Court has reviewed Mr. Lubbers's notes in camera. Mr. Lubbers's notes contained opinions that spoke directly on the merits of Mr. Canarelli's petitions and the notes also contained Mr. Lubbers's personal assessment of the risk faced by the Former Trustees. The Nevada Supreme Court has now determined that Mr. Lubbers's notes were privileged documents that should not have been discoverable. A reasonable person, aware of all the facts in the case, may reasonably question Judge Sturman's impartiality as the ultimate trier of fact because of the prejudicial effect of Mr. Lubbers's notes. Therefore, the Former Trustees' request to disqualify Judge Sturman is granted.

C. Mr. Canarelli's countermotion is denied because it is outside the scope of disqualification proceedings.

Mr. Canarelli's countermotion moves for a finding that the Former Trustees waived attorney-client privilege on Mr. Lubbers's notes. This case is before the Court only for consideration of the disqualification of Judge Sturman. A privilege determination is outside the scope of disqualification proceedings. Mr. Canarelli's countermotion is therefore denied.

/ / /

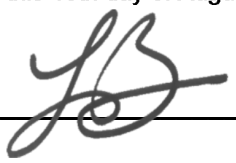
LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

III. Conclusion

Judge Sturman reviewed notes which were later determined to be privileged. A reasonable person, aware of the contents of the notes, may harbor reasonable doubts about Judge Sturman's impartiality in this case. Thus, the Former Trustees' request to disqualify Judge Sturman is granted. Pursuant to Administrative Order 19-07, the Clerk of the Court is directed to randomly reassign case P-13-078912-T and its consolidated cases to Department 8 or Department 24.

Mr. Canarelli's Countermotion for Waiver of Attorney-Client Privilege is denied because it is outside the scope of disqualification proceedings.

Dated this 13th day of August, 2020



6E9 E33 3FDD 11C6
Linda Marie Bell
District Court Judge

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

In the Matter of the Trust of: Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998	CASE NO: P-13-078912-T DEPT. NO. Department 26

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Decision and Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 8/13/2020

Amy Reams	areams@naylorandbrasterlaw.com
Jennifer Braster	jbraster@naylorandbrasterlaw.com
Dana Dwiggins	ddwiggins@sdfnvlaw.com
Craig Friedel	cfriedel@sdfnvlaw.com
Joshua Hood	jhood@sdfnvlaw.com
Docket .	LV_LitDocket@dickinsonwright.com
Gretta McCall .	gmccall@sdfnvlaw.com
Matt Wagner .	maw@cwlawlv.com
Terrie Maxfield	tmaxfield@sdfnvlaw.com
Renee Guastaferro	rguastaferro@sdfnvlaw.com
Andrew Sharples	asharples@naylorandbrasterlaw.com

Joel Schwarz	jschwarz@dickinsonwright.com
Austrey Dwiggins	adwiggins@sdfnvlaw.com
Elizabeth Brickfield	ebrickfield@dickinsonwright.com
Erin Hansen	ehansen@sdfnvlaw.com
J. Colby Williams	jcw@cwlawlv.com
Phil Erwin	pre@cwlawlv.com
Justin Bustos	jbustos@dickinsonwright.com
Ken Ching	kching@dickinsonwright.com
John Chong	jyc@cwlawlv.com
Melissa Douglas	mdouglas@dlnevadalaw.com
Elizabeth Brickfield	ebrickfield@dlnevadalaw.com
Jacob Crawley	jcrawley@sdfnvlaw.com
Roberto Campos	rcampos@sdfnvlaw.com
Liane Wakayama	lkw@hwlawnv.com
Julia Rodionova	julia@hwlawnv.com

If indicated below, a copy of the above mentioned filings were also served by mail via United States Postal Service, postage prepaid, to the parties listed below at their last known addresses on 8/14/2020

Donald Campbell	Campbell & Williams c/o: Donald J. Campbell 700 S Seventh Street Las Vegas, NV, 89101
Jennifer Braster	Naylor & Braster Attn: Jennifer L. Braster 1050 Indigo Drive - Suite 200 Las Vegas, NV, 89145

Electronically Filed
8/20/2020 2:11 PM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of: THE SCOTT LYLE GRAVES CANARELLI IRREVOCABLE TRUST, dated February 24, 1998	CASE#: P-13-078912-T DEPT. XXVI/Probate

BEFORE THE HONORABLE LINDA M. BELL, DISTRICT COURT JUDGE

TUESDAY, JULY 28, 2020

RECORDER'S TRANSCRIPT OF VIDEO CONFERENCE VIA BLUEJEANS HEARING
RESPONDENT'S MOTION TO DISQUALIFY THE HONORABLE GLORIA STURMAN

APPEARANCES:

For the Petitioner:	DANA A. DWIGGINS, ESQ. CRAIG FRIEDEL, ESQ.
For the Respondent:	J. COLBY WILLIAMS, ESQ.
Also Appearing:	SCOTT CANARELLI

RECORDED BY: KRISTINE SANTI, COURT RECORDER

Las Vegas, Nevada, Tuesday, July 28, 2020

[Case called at 11:13 a.m.]

MR. WILLIAMS: Good morning, Your Honor, Colby Williams on behalf of the former trustees, who are also referred to sometimes as the Respondents.

THE COURT: All right.

MS. DWIGGINS: Good morning, Your Honor. Dana Dwiggins on behalf of Scott Canarelli and Craig Friedel, also on behalf of Scott Canarelli. And Scott is present on the phone as well.

THE COURT: And this is a motion, the Motion to Disqualify Judge Sturman.

MR. WILLIAMS: That's right, Your Honor. Colby Williams, again, on behalf of the former trustees. I'll go ahead and proceed as it's our motion.

Your Honor, the way I was going to handle this was to address in my opening presentation the disqualification issue, because I believe that's what's at center here.

Ms. Dwiggins has, of course, filed a countermotion claiming that there's been a waiver through reckless disclosure. I'm happy to address that if the Court wants to hear anything from me on that in my opening presentation, but I'm inclined to just let Ms. Dwiggins present that argument and I'm happy to address her argument. So with that --

THE COURT: Okay.

MR. WILLIAMS: -- unless the Court wants to me handle it

differently, I'll just --

THE COURT: I mean, the -- I can only decide whether there's a disqualification or not. So to the extent there's any sort of evidentiary ruling in a countermotion.

And that's not properly before me, I just -- I mean, I can't -- I don't make substantive decisions in cases. I just decide is there an issue with this particular judge hearing the case or not?

MR. WILLIAMS: Fair enough, Your Honor. Well, I think that'll help shorten what we're here today to talk about. So let me just jump into it then.

Your Honor, we're here under the Towbin Dodge procedure that was articulated by the Supreme Court in 2005 or so. And what that procedure is is that when the time has expired to seek a judge's recusal or disqualification under NRS 1.230 and 1.235, which is the case here, because Judge Sturman has heard matters in this case as it's been going on for a while.

Towbin Dodge articulated a principle that allows parties to seek recusal or disqualification of judges under the Nevada Code of Judicial Conduct. And that's what we're here today to do.

Specifically, we have filed a motion under the Nevada Code of Judicial Conduct Rule 2.11. And what Towbin Dodge tells us with respect to the standard to be applied under that provision is to look at the PETA versus Bobby Berosini case, Your Honor, which both parties have cited.

And the standard that applies in this context, Your Honor, is an objective one. And the objective standard is would a reasonable person,

knowing all of the facts, question or harbor reasonable doubts about the judge's impartiality? It's very straightforward in many ways.

And so, what that necessarily means, Your Honor, is that it doesn't matter whether the judge is actually impartial. The question is whether the judge appears to be impartial to a reasonable observer.

And Your Honor, with all due respect, what that also means is that it doesn't matter what Judge Sturman's subjective views are with respect to her impartiality, just as it doesn't matter what my clients think about her impartiality. The question is what would a reasonable, fully informed person think?

And, Your Honor, that is because the public policy that's at play here is one that is designed to promote public confidence in the integrity of the judicial system.

Now, Your Honor, there is admittedly another public policy concern here, arguably a competing public policy concern, which is that litigants shouldn't be able to just veto a judge because he or she doesn't like the judge for a particular reason.

And so, you will see in the cases that the courts are equally concerned that these types of motions are not used for strategic purposes or tactical purposes.

And, Your Honor, I want to address that right up front, because I think that's critically important here. This is the opposite of a strategic motion. It is not being done for delay. Your Honor, we tried to avoid being here most respectfully.

Two years ago, we're coming up on it in August of 2018, we

wrote a letter to Judge Sturman. And we said in that letter, Your Honor, an issue, a dispute has developed regarding a set of privileged notes.

Those notes are arguably going to be before you in the context of a motion to dismiss. We would strongly encourage you to think about how to handle those notes.

Specifically, we would propose that you let a different district court judge make the call on this issue. At the time, Judge -- we were still litigating the issue in front of Commissioner Bulla. Judge Sturman did not move forward with the motion at that time and let the proceedings in front of Commissioner Bulla play out.

The issue then did come up through both parties objecting to the ruling in front of Judge Sturman. And we, again, warned the Court that they -- she may want to handle this in a different way.

And Judge Sturman, as is her prerogative, decided to deal with the matter on her own. I don't fault her for that, Your Honor. I'm not here to tell you that there is an absolute rule she had to do what I was suggesting.

What I'm here to say is that having chosen the course that she did, there are now potential consequences because if our position proved to be correct at the Supreme Court, and it was, then arguably, she has now reviewed privilege notes that are very sensitive.

So, Your Honor, I wanted to make clear, this was not for strategy. This was not for tactics like some of the cases addressed.

So moving on to the standard and its application here, which I will get to in just a minute, I want to quickly address a couple of Scott's

arguments.

And that is under Rule 2.11 of the Code, we are not limited. Disqualification is not limited to the six items specified under the rule. The plain language of the rule makes clear, including but not limited to. And the commentary to the rule makes that clear as well.

So the other argument that Scott has made is that the basis for disqualification has to be extrajudicial. It can't be intrajudicial, something that happened within the course of a case.

But, Your Honor, I think the case law is clear that while the general rule is that disqualifications are based on matters that are extrajudicial, it certainly is possible that things are going to happen in a case that warrant a judge's recusal. And the Nevada Supreme Court has recognized that, as has the U.S. Supreme Court.

So getting past those issues, Your Honor, let's talk about applying the standard here. What would the reasonable observer know in this situation when evaluating whether Judge Sturman should remain on the case?

The reasonable person would know the following, Your Honor. First, the reasonable person would know that Scott and his counsel have placed significant importance on these notes.

Repeatedly in the briefing below, and we've included examples as exhibits to our reply, Scott and his counsel have said that he will not be able to prove his fraud, conspiracy, and breach of fiduciary duty claims without these notes.

And even in the opposition to this motion has said that the notes

"are a key piece of evidence". So the reasonable observer would know these aren't just your ordinary notes. Scott views them as very important.

Next, the reasonable observer would know what I just went through, Your Honor, that we tried to avoid being here. We tried to propose a solution to Judge Sturman that would allow this to have been dealt with in a way that could keep her on the case.

Judge Sturman chose to go a different direction. The reasonable observer would know that as well, Your Honor.

Next, the reasonable observer would know the content of the notes. I'm not going to get into the specific content, because they are privileged, but we have provided them to Her Honor in camera. So the Court has had an opportunity to see them for herself.

But suffice it to say, the reasonable observer would know that these are notes that a party in this case confided in his counsel about risk involved in the case, strategy to employ in this case is belief on the merits.

And most importantly, for what we're here for, Your Honor, how Judge Sturman would potentially view the merits of the case. So the reasonable observer would know that.

The reasonable observer would know that Judge Sturman did decide to go ahead and review the notes herself when ruling on the parties' objections.

And the reasonable observer would know that she analyzed the issue at length in our hearing in front of her. We have included the relevant portions of the transcript. They comprise 17 pages.

Next, Your Honor, the reasonable observer would know that

when the Nevada Supreme Court did finally weigh in on this issue, that the *en banc* Supreme Court unanimously determined that all of these notes were privileged in their entirety and that Judge Sturman had abused her discretion by ordering a portion of them to be produced.

So, Your Honor, we would submit that the foregoing facts, which are undisputed because Judge Sturman has provided an answer here, but Judge Sturman hasn't disputed any of the facts that I've just going to through. While she says that she believes she can continue to be impartial, that's her subjective belief and that's not what we looked at, but she hasn't disputed any of these facts.

So the reasonable person, we submit, Your Honor, would question or harbor reasonable doubts about Judge Sturman's impartiality moving forward in this case. That's not my view. I submit that would be the reasonable person's view, Your Honor.

And while I don't think it's a close call, I would close with the following, that any reasonable doubts about this issue get resolved in favor of recusal, Your Honor, her disqualification. And I would submit it on that unless Your Honor has questions of me.

THE COURT: All right, no, I don't. Thank you.

MS. DWIGGINS: Thank you, Your Honor. I just want to start off by saying that we're here because of a document that Respondents inadvertently produced in the litigation.

And I want to -- I'm going to get into the standard and we refute what Mr. Williams sets forth as the standard. But initially in the motion, they relied predominantly on Towbin setting forth the standard.

In our opposition, we came back and cited Towbin and Lindsey, that was quoted by our Nevada Supreme Court, which is a U.S. Supreme Court case, that said that the bias or impartiality must stem from an extrajudicial source. And it must be personal, not judicially related.

In their reply, they said you got the standard wrong. That's a misstatement of law. And they said forth Kirksey, which is also a Nevada Supreme Court decision.

And the problem is is --

THE COURT: But I do -- hold on just a second. I mean, I do think that that is the general standard, right, that it is something external to defense -- or external to the case.

So, for example, what sometimes happens is that you have a very difficult lawyer. And over the course of litigation, the judge has become very frustrated with the lawyer.

That would not necessarily be the basis for recusal, but I don't think that that's a -- I'm not sure that that really applies when the question is does the judge have information? Was the judge provided confidential information that could potentially impact how a decision is made?

MS. DWIGGINS: I understand. I'm going to get into that, Your Honor. And the problem is Mr. Williams conflates the two standards set forth in Towbin and Kirksey.

And I'm going to just quote from Kirksey real quick, because it addresses what Your Honor just raised. And this had to do with the judge's knowledge of certain facts, which is very similar to the instant case.

The general rule of law is that what a judge learns in his official capacity does not result in disqualification. In other words, the party asserting the challenge must show the judge learned prejudicial information from an exjudicial source.

However, an opinion formed by a judge on the basis of facts introduced or events occurring in the course of the current proceedings or prior proceedings constitutes a basis for bias or impartiality motion, excuse me, partiality motion where the opinion displays a deep-seated favoritism or antagonism that would make fair judgment impossible.

That's the standard when we're dealing with this situation, where the judge learns of facts during the course of the proceeding. It's a deep-seated favoritism or antagonism that would make judgment impossible or fair judgment impossible.

And the Nevada Supreme Court cited to Litske [phonetic], which is a U.S. Supreme Court, and that's where the standard was adopted from.

And what's very significant is the U.S. Supreme Court stated that it is the rarest of circumstances where evidence can be presented to allow a degree of favoritism or antagonism required when there is no extrajudicial source involved.

So that's the standard that applies here, a deep-seated favoritism or antagonism and an opinion formed by Judge Sturman in relation to the same. It's not the reasonable person and the objective standard that is set forth in Towbin.

And if you notice in listening to Mr. Williams' oral arguments, he

never even referenced that standard at all. Rather, he just applied that that was in the PETA decision and the Towbin, and completely ignored the Kirksey standard.

Throughout their reply, and I quote page 11, they reference that the burden is on them for fact -- to set forth facts and reasons sufficient to cause a reasonable person to question Judge Sturman.

The applicable standard is an objective one and asks whether grounds exist to object -- to an objective observer reasonably to question the judge's impartiality.

They state that her impartiality is in question, that the fact-finding process is tainted. And they conclude that a well-informed, thoughtful observer would reasonably question the judge's impartiality.

Nowhere do they contend or even take on the standard set forth in Kirksey. They have not even stated that she has formulated an opinion which is required, an opinion that is deep-seated in favoritism or antagonism. And, in fact, they presented no evidence in this regard at all.

And I want to talk about the public policy, because Mr. Williams did. And again, this -- we're in this situation because of Respondents producing an inadvertent disclosure that both the Discovery Commissioner and Judge Sturman held at least a portion of it was not privileged.

Obviously, the Nevada Supreme Court ultimately ruled it was privileged, but they cite, the Respondents cite in the reply brief Arkansas Teacher Retirement System, which goes through these public policies and details.

And I think they're very important because it recognizes again what this high standard is for information that a judge learns in connection with the case and during the judicial proceeding.

And it states that the appearance of bias must be so extreme as to display a clear inability to render fair judgment. And this high threshold recognizes certain realities, those that they're driven by litigation strategies, the motion to disqualify, rather than ethical concerns that courts cannot afford to spawn a public perception that lawyers and litigants will benefit by undertaken such imaginations.

It results in forum shopping and the disqualification process must prevent parties from easily obtaining disqualification and manipulating the judicial system for strategic reasons, including obtaining a judge that's more to their liking.

And based upon these realities, the court goes on and says the judge should not be disqualified simply because a claim of partiality has been given widespread publicity based upon a ruling in the case.

And I dispute in the level of weight that we put on this document. We've contended that those statements in there constitute a party admission and it is evidence of fraud.

That's not our only evidence. And I think that's very significant in this case, Your Honor, because the facts are going to come in just through other means.

And I'd be more than willing to make a proffer of evidence to you, Your Honor, because it's no question or it's undisputable that distributions to my client's stock from the trust in or about May of

June -- excuse me, May of 2012.

Scott initially retained my law firm in June of 2012 because of the distributions that had stopped by the former trustees. My firm thereafter negotiated with Mr. Lubbers and the trustee to receive distributions. Distributions were ultimately agreed to and a certain amount near the end of December of 2012.

At about that same exact time, the former trustees incorporated an entity, SJA Acquisitions, which was ultimately one of the buyers.

It's also not disputed that the sale was never disclosed to either Scott or my law firm, despite the fact that we were representing him and that we learned of the sale subsequent thereto.

So those are the same facts that are going to come in through admissible evidence. And that is one of the key questions of whether or not the judge learned something that is otherwise not going to come into evidence at all.

And I think what's significant, Your Honor, our rules contemplate judges reviewing privileged materials in camera. I cite to Rule 26. And it's one of the subsections 5(b) that deals with claiming privilege or protecting trial preparation materials.

And subsection (b) contemplates that there's going to be disputes over the claims of privileged information. And it quotes -- and it states, excuse me, that either party may, and I quote, "promptly present the information to the court under seal for a determination of the claim".

That's an in camera review. And if you read that in connection with EDCR 7.10, that provides under Section A, no judge except the judge

having charge of the cause or proceeding may enter an order therein.

And sub (b) that says when any district court has begun a trial or hearing of any cause, proceeding, or motion, or made a ruling, order decision therein, no other judge may do any act or thing in or about such case, proceeding, or motion unless at the request of the judge.

And, in fact, you just recognized that at the beginning of this hearing, Your Honor, by stating that you're not going to entertain the countermotion because it's not properly before you, because as the chief judge, you are only to hear the disqualification motion.

And by requiring other courts to review in camera materials would place such a burden on the court system. The courts do it all the time. Business courts hear their own discovery. Probate court now handles its own discovery since the Discovery Commissioner has joined the Appellate Court.

The Nevada Supreme Court had an opportunity to remand this case and reassign it to a different judge and declined to do so. And I think Judge Sturman in her answer raised some good points that are worth noting is that the cases that are Nevada Supreme Court decisions support a judge reviewing materials in camera.

And she quoted to both the Wynn Resorts case and the Kotter [phonetic] case, where the Nevada Supreme Court instructed the trial judge to review the privileged materials in camera to determine whether or not the privilege applied before compelling its disclosure.

And although they cite to the Lund case, where the court held that a different judge should have reviewed it, Lund relies upon a U.S.

Supreme Court decision as well, the Zolin, in which the Court said it's completely discretionary for the Court to determine whether or not it reviews it itself in camera or gives to another judge. And that discretion cannot be overturned but for an abuse of discretion.

The facts also establish that the Court had reason to believe in good reasonable belief, which was what the standard that was set forth in Lund, as well as Zolin, which states that the Court may have an in camera inspection and it may be appropriate if it is necessary to resolve the privilege once a party makes a factual showing to support a reasonable good faith belief that the document is not privileged.

And that's exactly what we had in this case. We had a ruling by the Discovery Commissioner finding the document was not privileged. The Discovery Commissioner even noted that on its face, the document was not privileged. It was not marked attorney-client privilege. There was no indication that it had been communicated to an attorney.

And additionally, the Discovery Commissioner had found that the fiduciary exception applied. And, therefore, it was not privileged under that basis as well.

And although the Nevada Supreme Court addressed the fiduciary exception in the context of this case for the first time and it was an issue of first and precedent and decided that it does not or Nevada will not recognize it, it does not change the fact that the evidence before Judge Sturman, she had a reasonable belief and the evidence presented was that the document was not privileged.

And, Your Honor, reviewing privileged information is no different

than reviewing other inadmissible evidence. The Court makes -- it's an evidentiary issue. Courts make evidentiary decisions all the time, hearsay, subsequent remedial measures, privileged documents.

It is absolutely no different. Courts hear motions in limines during bench trials. It is absolutely no different. And on that basis, we submit, Your Honor, that Judge Sturman should not be disqualified, that they have --

THE COURT: Well --

MS. DWIGGINS: I'm sorry, did you have a question?

THE COURT: Yeah, I did, because I don't know how you can say that. I mean, if it is privileged information, then typically, the judge would never hear it.

So I don't view that as being -- I mean, normally those kinds of rulings are made with a jury trial, too, where the judge is the person making the evidentiary calls, but there's a different trier of fact. I mean, not always, but typically, that's the situation.

MS. DWIGGINS: Your Honor, bench trials hear evidentiary issues all the time in motion in limines.

THE COURT: True.

MS. DWIGGINS: And whether or not a statement is hearsay or not, for example, that statement could be very damaging evidence. And which is no different really than privileged information.

You could -- it would be hard pressed to say that every Court that reviews privileged information in camera has to be disqualified if it's determined that the documents are privileged where they act as the trier

of fact.

The bottom line is we have a Nevada Supreme Court case that sets forth that standard. That standard is in Kirksey. And it's that the Respondents bear the burden of demonstrating that Judge Sturman has formulated an opinion that is deep-seated favoritism or antagonism.

And they have not even said that she has formulated any opinion at all. She is a judicial officer that is perfectly capable of disregarding inadmissible evidence for the purpose of a trial even when she is the trier of fact.

And we don't think they've met the standard. They haven't even argued the correct standard. And on that basis, we think the motion should be denied.

THE COURT: All right, thank you.

MS. DWIGGINS: Thank you.

MR. WILLIAMS: Your Honor, Colby Williams again on behalf of the former trustees. I think I can be pretty brief and succinct here. I'm not going to move in any particular order, but let me hit some of the points that Ms. Dwiggins just argued.

And the bulk of them obviously follow around this distinction between intrajudicial versus an extrajudicial basis for seeking recusal or disqualification.

Let's start with the rule. 2.11 makes no distinction whatsoever between extrajudicial basis or intrajudicial basis for seeking recusal. So the plain language of the rule says including, but not limited to, and the commentary says whenever a judge's impartiality can be questioned. So

that's the rule.

Kirksey, Your Honor, Ms. Dwiggins didn't cite Kirksey. She -- her firm didn't cite this issue. We brought it up. We're not running from Kirksey or the Litkey [phonetic] case, which is the U.S. Supreme Court case. We cited them, Judge.

We understand. We're the one who brought this issue to the Court's attention insofar as the fact that these cases recognize that a basis for recusal does not have to always be extrajudicial.

Admittedly, those cases recognize that the majority of the time, we are talking about disqualification, that it is an extrajudicial source, Your Honor. That's what those cases are saying.

With respect, but they at the same time, they recognize that is only a general rule. If you go look at the Arkansas Retirement Systems case, again, a case we cited. This is not Ms. Dwiggins case, we cited it, because the judge makes clear in that setting, the basis for disqualification was intrajudicial.

They were not claiming that the judge was actually biased, but that a reasonable person would think that he wasn't impartial based on some ex parte communications that took place with a special master.

He goes through the Litkey standard, which is what the Nevada Supreme Court referenced in Kirksey. And Your Honor, it's still an objective standard.

The standard doesn't change to where the judge or somebody else gets to make the decision that, oh, well, you know, there's an opinion. If it doesn't reflect deep-seated favoritism or antagonism, it's still decided

by the reasonable observer.

And, Your Honor, we cited to you four cases. If this notion of extrajudicial versus intrajudicial carried the day, well, we still win because we have met the heightened the standard that would apply in that scenario, because we've provided to you cases that have articulated the concern that exists when a judge potentially reviews privileged material and the taint that can occur.

Now admittedly, again, and we put this out in our motion, judges do review documents for privilege in camera all the time. You want to talk about the Wynn case? Your Honor, I could spend five years talking to you about the Wynn case because I lived it forever. There were tons of in camera reviews of privileged material in that case. No question about it.

Here's the difference. It was a jury trial. Judge Gonzalez was sitting as a judge in a jury trial. She was making calls on privilege.

And I can tell you this. None of the notes or privileged materials submitted for consideration to Judge Gonzalez talked about what her views of the case may be on the merits like these notes do.

And, Your Honor, that's why we wrote the letter to Judge Sturman. We said, hey, these are different. These are not your garden variety arguably privileged notes at the time now definitively privileged notes after the Supreme Court's ruling. We tried to avoid the problem.

Your Honor, judges absolutely make calls on evidentiary issues that come up during bench trials. We get that and it would not be practical in that setting to refer the matter to a different judge to make, you know, day in, day out evidentiary calls in the middle of a bench trial. Of course.

But the cases that Ms. Dwiggins and her client rely on aren't dealing with just -- or those cases are dealing with just inadmissible documents because of an evidentiary objection where the higher court will presume that the court disregarded that evidence.

These are privileged notes containing highly prejudicial information that the judge clearly reviewed. And she is sitting as the trier of fact. That's what distinguishes this case from the normal in camera review.

Finally, just a couple of quick points and I don't need to spend a lot of time on them. Ms. Dwiggins keeps saying that the Discovery Commissioner and Judge Sturman found that these notes were not privileged. That is not the case. It was a mixed bag for both parties.

Some of the notes were privileged. Some of them were not. That's why we took it up to argue that all of them were privileged and we won on that point.

And, finally, Your Honor, the Supreme Court did not refuse to reassign this case. That was never presented to the Court. So that is just a misnomer, Your Honor. And I will submit it on that unless you have any further questions.

THE COURT: All right, no, I don't.

MS. DWIGGINS: Your Honor, if I may, and I'm not going to refute --

THE COURT: Sure.

MS. DWIGGINS: -- anything he said. I just want to bring up, I know Your Honor said you're not going to hear the countermotion, but the

reason why it was filed was because if there is a waiver based upon reckless disclosure, then the documents would not be privileged and it would render this underlining motion to disqualify moot.

I understand that you're not going to hear it, but I just wanted to state for purposes of the motion and with a countermotion and why we felt it was necessary to file before Your Honor.

THE COURT: Well, I mean there's -- I mean, I understand that. I mean, at this point, the Supreme Court has said it's privileged. And so, that's -- I have to decide based on that information that I have right now.

I have a question for you, though, about Kirksey. So Kirksey didn't just say that it was deep-seated favoritism, right? It also said that it would -- the disclosure of information would make fair judgments impossible.

And in fact, the Nevada Supreme Court gave an example, the example of when the sentencing judge had ex parte communication with members of the victim's family.

MS. DWIGGINS: It also [indiscernible] with the fact that again --

THE COURT: So in Kirksey, Judge Lehman had reached out to the -- I can't remember, I think Mr. -- Dr. Masters, a psychiatrist, psychologist I mean, and asked him some questions about his report, which probably wasn't the best idea ever, but you know, that the Supreme Court doesn't say this could never be the basis for disqualification.

MS. DWIGGINS: I agree with that. And the Court didn't say that. That was Litkey that the Supreme Court quoted that said it's only in the rarest of circumstances that it should happen.

And just to clarify, and if I misspoke, I apologize, but the standard that they set forth was a deep-seated favoritism or antagonism that would make fair judgment impossible.

So it is -- and I thought I had indicated that earlier in here. And I apologize, but in specific regards to that standard --

THE COURT: So our last -- I'm sorry.

MS. DWIGGINS: I'm sorry, in specific regards to that standard, the court was talking about the district court's knowledge of information that was not part of the record.

And that was specifically that he had learned the day the matter was set for trial that Kirksey had asked someone what the fastest way was to get the death penalty.

And the court said that that did not rise to the level of disqualification because it's something that he learned during the penalty phase anyway.

And that's why I bring up the fact that some of these facts that are set forth in this -- in the typed notes and the part that's relevant here is going to come into evidence anyway.

It's going to come in through different evidence, but it's going to be part of the record. And that's where we think it's no different than what Judge Lehman learned, because it's something he learned during the penalty phase anyway.

It's something that Judge Sturman is going to learn anyway in regards to why distributions or when distributions stopped, why they restarted, and the timing of the sale, and what was done without my

client's knowledge.

And that's why I made the proffer of evidence, so that you could understand that it's really -- the same information is going to come in through different means.

THE COURT: All right, thank you.

MS. DWIGGINS: And I hope I answered your question.

THE COURT: Thank you, uh-huh.

MR. WILLIAMS: Your Honor, I don't feel the need to respond to that, other than to say that --

THE COURT: Right.

MR. WILLIAMS: -- the notes are before Your Honor. You've seen them.

They cover a lot more than what Ms. Dwiggins is talking about, but I'm not going to debate what evidence may or may not be coming into this case some time down the road. The notes are what the notes are.

THE COURT: All right, thank you, folks. I will issue a decision very shortly.

MR. WILLIAMS: Thank you, Your Honor.

THE COURT: All right, have good afternoon.

MS. DWIGGINS: Thank you, Your Honor.

MR. FRIEDEL: Thank you, Your Honor.

[Proceedings concluded at 11:49 a.m.]

* * * * * * *

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

Chris Hwang
Transcriber