

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

MESCALERO APACHE TRIBE, a
Federally Recognized Indian Tribe,

Plaintiff,

vs.

KENNETH J. WOODLEY, LEAVITT
GROUP OF ALBUQUERQUE, INC.,
LEAVITT GROUP ENTERPRISES, INC.,
KELLY RUSSELL, and DANE O. LEVITT,

Defendants.

ENDORSED
FILED IN MY OFFICE THIS

MAY 08 2006

Juanita M. Duran
CLERK DISTRICT COURT

COPY

CAROLYN ANAYA

Case No. CV 2005 07921

**MOTION TO REVOKE PRIVILEGE OF NONADMITTED COUNSEL TO
PRACTICE LAW IN NEW MEXICO, PURSUANT TO RULE 1-089.1
NMRA 2006, WITH SUPPORTING POINTS AND AUTHORITY**

Plaintiff Mescalero Apache Tribe (hereinafter "Mescalero" or "the Tribe"),
respectfully moves to revoke the privilege of nonadmitted counsel Stephen E. Crofton to
practice law in New Mexico, pursuant to Rule 1-089.1 NMRA 2006. In support of this
Motion, Mescalero states as follows:

I. INTRODUCTION

This is a case about an admitted fraud. The only substantial issue in dispute is the
amount of Mescalero's damages.

Four of the five defendants have admitted that the "managing co-owner in [the
Leavitt Group's] Albuquerque office" made "misrepresentations," and likewise have

admitted that the fraud “harmed clients.” Leavitt Group Press Release, attached as Exhibit 1 to Plaintiff’s Complaint; Answer of Defendants Leavitt Group of Albuquerque, Leavitt Group Enterprises, Kelly Russell, and Dane O. Leavitt (filed December 30, 2005). The fifth defendant declined to admit the fraud, and instead has asserted his privilege against self-incrimination. Answer of Defendant Kenneth J. Woodley (filed December 19, 2005).

After Mescalero uncovered the fraud and confronted defendants with irrefutable evidence, Leavitt Group CEO and defendant herein Dane Leavitt made a number of disclosures, including the following statement in the press release:

We have sought to swiftly determine what happened, tell clients and regulators what happened, apologize, [and] set things right It will take some time to resolve these breaches of trust but we will. We regret what happened.

Notwithstanding the Leavitt Group’s public statements, as well as its representations to Mescalero and government regulators, nonadmitted counsel for Defendants Dane O. Leavitt, Leavitt Group Enterprises, Inc., Leavitt Group of Albuquerque, Inc., and Kelly Russell (hereinafter “Leavitt Defendants”) has engaged in a relentless pattern of wrongful conduct to obstruct Mescalero’s right to develop the evidence of its damages, contrary to New Mexico law and practice. A permanent consequence of nonadmitted counsel’s misconduct already has been to corruptly and irretrievably distort the factual record. A second, temporary consequence has been to hog-tie the discovery process in a seemingly endless morass of gamesmanship and obfuscation.

While the revocation of nonadmitted counsel’s privilege to practice in our Courts does not guarantee that discovery thereafter will proceed amicably and in accordance with New Mexico Rules and practice, without the requested relief further corruption of the fact-finding process and virtually endless motion practice appear to be a near certainty.

When nonadmitted counsel abuses the privilege to practice in New Mexico's Courts, Rule 1-089.1(A) specifically provides the remedy: "For good cause shown, the Court may revoke the privilege granted by this rule of any attorney not licensed to practice law in New Mexico" Accord *In re Rimsat, Limited (Appeal of Kauthar)*, 212 F.3d 1039, 1046 (7th Cir. 2000) (affirming financial sanctions and revocation of *pro hac vice* status where nonadmitted counsel "apparently embarked upon what appears to be a conscious effort to maximize litigation and, in doing so, make certain that the litigation is as time-consuming, difficult, unpleasant, and expensive as humanly possible"). For the reasons set forth below, nonadmitted Counsel's misconduct here provides more than ample grounds for Mescalero to invoke this remedy. Concurrence of opposing counsel was requested, but not received.

II. NONADMITTED COUNSEL'S MISCONDUCT TO DATE

A. Tawnya Davis' Deposition.

As disclosed by the Leavitt Defendants in the Press Release attached to Plaintiff's Complaint, and as the Leavitt Defendants further disclosed to Mescalero and the New Mexico Insurance Division, the Leavitt Group conducted an "audit," in the course of their "internal investigation" of the fraud. Mescalero intends to prove that this purported "audit" was a deliberate attempt to mislead Mescalero, government regulators, and the public at large by (1) falsely and grossly misrepresenting the scope of damages, and (2) misrepresenting the Leavitt Defendants' supposed intention to "set things right."

On February 15, 2006, Mescalero commenced the deposition of Tawnya Davis, who is the Leavitt Group Controller specifically referenced in the letter disclosing the audit to Mescalero. Nonadmitted counsel defended the deposition. While it is beyond the scope of this Motion to attempt to compel further discovery from Ms. Davis, the following summary

overview of the first day of the deposition nevertheless is instructive: (1) The transcript of the proceedings is 151 pages (pp. 5 through 155), (2) Mescalero posed 374 total questions, (3) nonadmitted counsel objected to 145 questions, (4) it was necessary to re-read 50 questions, typically because the witness lost sight of the questions after nonadmitted counsel's long, speaking objections, (5) on more than a few occasions nonadmitted counsel lodged further speaking objections to questions after they were re-read, necessitating that the questions be re-read two, three, four, five and even six times before the witness could answer, and (6) substantially more than a fifth of the transcript is consumed by nonadmitted counsel's objections, arguments, and comments. *See* chart attached hereto as Exhibit A.

It plainly would be impossible to unravel all of the discovery disputes created by this conduct within the page limits provided in Local Rule LR2-119 and LR2-120. But, as Mescalero will demonstrate below, the deleterious effects of this conduct pale in comparison to nonadmitted counsel's successful efforts to corrupt the factual record. The transcript pages cited herein to demonstrate this fact are attached hereto collectively as Exhibit B. A reading of page 43, line 22 through page 54, l. 23, and page 75, line 11 through page 80, line 14, in their entirety, provides the best evidence of the misconduct. The discussion that follows summarizes and places this testimony in context.

Although the Leavitt Defendants previously had not disclosed these facts, Mescalero discovered at Tawnya Davis's deposition that (1) Ms. Davis is Defendant Dane O. Leavitt's niece (p. 94, l. 20 - p. 95, l. 7), (2) she lacks the qualifications to conduct an internal audit (*e.g.* p. 42, l. 2 - p. 43, l. 8, and p. 58, l. 12 - p. 60, l. 8), and (3) she does not even understand what steps a prudent auditor would have taken under the circumstances (p. 135, l. 1 - p. 136, l. 18, and p. 146, l. 19 - 24). Given these facts – as well as other previously undisclosed

evidence indicating that Ms. Davis's selection as lead auditor is highly suspicious – Mescalero intends to prove at trial that the Leavitt Defendants selected Ms. Davis for improper purposes, as part of defendants' deliberate attempt to mislead the Tribe. Accordingly, the following testimony is critical, in which Mescalero asked Ms. Davis the following questions, and received the following objections and answers (emphasis added):

“Q Was there a lead auditor on this internal audit team?”

MR. CROFTON: Object to the form to the extent that it is vague and ambiguous and lacks foundation and calls for speculation on her part.

THE WITNESS: *As Dane characterized it in the letter, I was characterized as the lead auditor.*

Q BY MR. FALLICK: . . . In your mind, what does that characterization mean?

A To me, that means that I was the one that followed through all the different steps of the audit and compiled the information.

Q And the audit you're referring to is the internal audit that was conducted and reported in the document that's been marked as Exhibit 1 to your deposition?

A Yes.

Q Is it fair to say that you're the person most knowledgeable about the audits of Mescalero's accounts?

A Yes.” (Page 43, l. 22 through page 44, l. 17.)

The transcript demonstrates that nonadmitted counsel thereafter immediately began attempting to change Ms. Davis's above-quoted testimony to conform to his prior misrepresentations regarding her role. Then, by the time nonadmitted counsel returned from the lunch break with the witness, he successfully had caused her to completely contradict her own sworn testimony, quoted above.

Following the quoted testimony, Mescalero asked questions calculated to demonstrate that nonadmitted counsel previously had attempted to forestall Ms. Davis's deposition by

misrepresenting her role. *Nonadmitted counsel then made it clear to Ms. Davis in no uncertain terms that he expected her to change her sworn testimony to support his prior misrepresentations, by claiming – contrary to her sworn testimony – that she really was not the lead auditor for “the internal audit that was conducted and reported,” but rather only would have been the lead auditor for a proposed audit that never was conducted. See p. 45, l. 4 - p. 54, l. 23, and Exhibit C hereto (Deposition Exhibit 2).*

Notwithstanding nonadmitted counsel’s efforts, Ms. Davis admitted that she had understood the clear and unambiguous references in Mescalero’s previous questions to the audit that had been conducted, and not to the proposed audit that was not conducted:

Q BY MR. FALLICK: How many audits of the Mescalero Apache Tribe accounts were conducted that are reported in the Exhibit No. 1?

A There was one audit that was performed. But in the letter, it states that if the client would like, that an additional audit could be performed -- be conducted on the invoices and payments.

Q Now, does that mean that there was one audit that was conducted that's reported in the September 29th, 2005, letter that's been marked as Exhibit 1 and there was a second audit that was offered, but never conducted? Is that what that answer means?

A Yes.

Q *So there was one audit that was conducted and there was one audit that was not conducted; true?*

A *True.*

Q *Earlier today, when I asked you to agree on terminology to make the questioning a little simpler and I asked you if you would agree to respond to questions about "the audit" meaning the audit reported in Exhibit No. 1, did you understand that to mean the audit that was conducted or the audit that was not conducted?*

MR. CROFTON: Object to form to the extent that misstates prior testimony and other contents of the record.

. . . . [Question repeated.]

THE WITNESS: *My understanding was of the audit that was conducted.* (Page 50, l. 7 through page 51, l. 18.)

Nevertheless, despite nonadmitted counsel's unsuccessful efforts to mischaracterize Ms. Davis's prior testimony, he did succeed in promptly causing her to shade her prior testimony. Regarding Deposition Exhibit 1 (referenced in the testimony above), Mescalero asked the following questions and received the following objections and answers:

Q *Is it -- please turn to page L'4 of Exhibit 1. The second full paragraph that refers to you, when that says that "The auditor who is assigned to lead to this matter is Tawnya Davis," is it fair to say that that refers to the audit that was conducted?*

MR. CROFTON: Object to the form of the question. It seems to be asking the witness to speculate about the intent of the author of the letter. She did not write the letter.¹ The letter speaks for itself. Subject to that, you may answer as to your understanding, if you understand his question.

Q BY MR. FALLICK: Do you have the question in mind, Ms. Davis?

THE WITNESS: Please repeat it.

[Question repeated.]

MR. CROFTON: I also object to the question as being misleading.

. . . .

A As I read this, my interpretation of it would be that in this paragraph he is talking about the invoice and payment review audit, so I am assuming that he is talking in the sense of referring to that audit.

Q *So your testimony now is that when this sentence refers to "the auditor who is assigned to lead this matter," the matter he's talking about is the audit that was not performed?*

¹ The transcript further demonstrates that this objection is false and misleading, since Ms. Davis did at least partially draft the letter. Nevertheless, after making this objection, nonadmitted counsel then obstructed Mescalero's attempts to determine the scope of the language that was drafted by Ms. Davis. See page 54, line 24 - page 56, l. 19 and page 80, l. 15 - page 82, l. 22.

A *Since I don't know the intent of the author, the surrounding language of it appears to me as this is referring to the audit that was not conducted.*

Q *But you don't deny that you were the lead auditor on the audit that was conducted?*

MR. CROFTON: Object to the question as being vague and ambiguous. You can answer as to your understanding, whether you thought you were the lead auditor for the audit that was conducted.

THE WITNESS: *As we were performing the audit that was conducted, I was the person who had the greatest knowledge of what was going on and the information that was gathered. Whether or not that qualified me as the lead auditor, I'm unable to say.*

Q BY MR. FALLICK: *Is it your perception that any of your testimony today has changed as a result of the objections that Mr. Crofton has lodged?*

MR. CROFTON: I object to that as being vague and ambiguous. I think it's not a fair question to ask her when she doesn't have the transcript and an opportunity to go through to see all of the questions and answers.

Q BY MR. FALLICK: Do you have the question in mind, Ms. Davis?

THE WITNESS: Please repeat it.

[Question repeated.]

THE WITNESS: *I would need to review the questions and responses that I have given.* (Page 52, l. 7 through page 54, l. 23.)

Then, immediately upon returning from the lunch break with nonadmitted counsel, Ms. Davis followed the cue of nonadmitted counsel and did a complete about-face, directly contradicting her sworn testimony in the morning:

MR. CROFTON: Before your next question, she has something she'd like to say.

THE WITNESS: As I thought about the things that I've said earlier this morning, I just wanted to make clear, as we were talking -- well, answering questions concerning the audit and my position in the audit, during the letter, there's two different audits that are discussed. *I was not the lead auditor in the audit that was completed. But the audit that talked about a review of the invoices and payments that is*

normally done every six months, I was going to take a lead in that audit.

Q BY MR. FALLICK: *Do you recall whether you said this morning that you were the lead auditor in the audit that was conducted?*

A *Without looking at the transcript, I do not remember my different responses exactly.* (Page 75, l. 22 - page 76, l. 12.)

As demonstrated above, nonadmitted counsel has abused the privilege of practicing in this New Mexico Court by corruptly influencing the testimony of this very first witness. Mescalero has been prejudiced both by the corruption of the factual record, as well as by the additional costs and that it has and will incur in order to perform the factual development necessary to prepare this case for trial. Nonadmitted counsel should not be permitted the opportunity to extend his misconduct to the remaining witnesses in this case, to Mescalero's further prejudice.

B. Documentary Discovery.

Not surprisingly, nonadmitted counsel has shown the same spots in documentary discovery as he did in Ms. Davis's deposition. Nonadmitted counsel's obstructive conduct regarding written discovery has created an intractable morass that could not possibly be addressed within the page limits provided by this Court's Rules. In the remaining available space, Mescalero states as follows: (1) nonadmitted counsel repeatedly has broken promises he made in order to secure extensions and to forestall motions, (2) he has asserted multiple boilerplate, unsupported objections (*see* Exhibit D hereto), (3) he has refused to withdraw a single objection, and (4) he has used Mescalero's months of efforts to attempt to resolve or narrow these discovery issues – as required by our Rules – as a ploy to obfuscate and further delay discovery. It is apparent that nonadmitted counsel intentionally has created a tangled mess that would be impossible for this Court to unravel without Herculean efforts far beyond

what reasonably should be expected of the Court in regulating discovery, and far beyond what would be possible if litigants in this busy Court universally employed such tactics.

Rather than burdening the Court now with a motion to exceed the page limits and an extensive motion addressing all of the areas of dispute, Mescalero plans to file a motion to compel limited solely to a challenge of the Leavitt Defendants' claim that their supposed "audit" – the "results" of which they voluntarily disclosed to Mescalero, government regulators, and the public – somehow can be hidden from scrutiny because it supposedly is "privileged." Thereafter, if this Court agrees with Mescalero that the instant Motion should be granted, Mescalero will renew its efforts – this time with licensed New Mexico counsel – to attempt to resolve or at least narrow the remaining areas of dispute without the assistance of the Court.

III. CONCLUSION

WHEREFORE, for all of the foregoing reasons, Mescalero respectfully requests that the Court grant this Motion.

Respectfully submitted



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DATED: May 8, 2006.

EXHIBIT A

Davis Deposition, Volume I (February 15, 2006)

Questions by Mescalero (numbers assigned for analysis)	Transcript pages and lines	Objections by non-admitted counsel	Question re-read	Additional objections by non-admitted counsel	Question re-read again	Question re-read more than twice (# of repetitions)
1	P. 5, LL. 14-15					
2	P. 5, LL. 19-20					
3	P. 5, L. 22					
4	P. 5, L. 24					
5	P. 6, L. 3					
6	P. 6, LL. 5-9					
7	P. 6, LL. 11-13					
8	P. 6, LL. 15-17					
9	P. 6, LL. 19-23					
10	P. 6, L. 25 – P. 7, L. 2					
11	P. 7, LL. 4-10					
12	P. 7, LL. 15-17					
13	P. 7, LL. 19-21					
14	P. 7, LL. 23-24					
15	P. 8, L. 1					
16	P. 10, LL. 14-17					
17	P. 10, LL. 23-24					
18	P. 11, L. 3					
19	P. 11, LL. 8-9					
20	P. 11, L. 11					
21	P. 11, LL. 13-14					
22	P. 11, L. 24					
23	P. 12, LL. 1-4					
24	P. 12, LL. 6-8					
25	P. 12, LL. 11-12					
26	P. 12, LL. 14-17					
27	P. 12, L. 21 – P. 13, L. 1		X			
28	P. 13, LL. 8-9					
29	P. 13, LL. 11-14					
30	P. 13, L. 16					
31	P. 13, LL. 22-23					
32	P. 14, L. 4					
33	P. 14, L. 6					
34	P. 14, LL. 9-10					
35	P. 14, L. 12					
36	P. 14, LL. 14-15					
37	P. 14, L. 17					
38	P. 14, L. 20					
39	P. 14, L. 23					
40	P. 15, LL. 2-16	X	X			
41	P. 15, LL. 24-25					
42	P. 16, L. 2					
43	P. 16, L. 4	X				
44	P. 16, LL. 10-13					
45	P. 16, LL. 15-16	X				
46	P. 16, LL. 21-22	X				
47	P. 17, L. 23 – P. 18, L. 1	X				

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Questions by Mescalero (numbers assigned for analysis)	Transcript pages and lines	Objections by non-admitted counsel	Question re-read	Additional objections by non-admitted counsel	Question re-read again	Question re-read more than twice (# of repetitions)
48	P. 18, LL. 7-11					
49	P. 18, LL. 16-20					
50	P. 18, L. 24 – P. 19, L. 15	X	X			
51	P. 19, LL. 20-22					
52	P. 19, L. 24 – P. 20, L. 4					
53	P. 20, LL. 6-17					
54	P. 20, L. 21					
55	P. 21, LL. 1-2	X				
56	P. 21, L. 9	X				
57	P. 21, LL. 12-13					
58	P. 21, L. 16					
59	P. 21, L. 18					
60	P. 21, LL. 20-21					
61	P. 21, L. 23					
62	P. 21, L. 25 – P. 22, L. 2					
63	P. 22, L. 4					
64	P. 22, L. 7-10	X				
65	P. 22, LL. 14-20		X			
66	P. 22, L. 25 – P. 23, L. 1					
67	P. 23, LL. 3-14	X	X			
68	P. 23, LL. 19-21					
69	P. 23, L. 23					
70	P. 24, LL. 2-6					
71	P. 24, L. 8					
72	P. 24, L. 10					
73	P. 24, L. 12					
74	P. 24, LL. 14-15					
75	P. 24, LL. 21-22					
76	P. 24, LL. 24-25					
77	P. 25, L. 2					
78	P. 25, L. 4					
79	P. 25, LL. 6-7					
80	P. 25, L. 9					
81	P. 25, LL. 11-12					
82	P. 25, L. 14					
83	P. 25, L. 16					
84	P. 25, L. 18					
85	P. 25, L. 20					
86	P. 25, LL. 22-23					
87	P. 25, L. 25 – P. 26, L. 1					
88	P. 26, LL. 3-4					
89	P. 26, LL. 6-7					
90	P. 26, LL. 9-10					
91	P. 26, LL. 12-23	X	X		X	
92	P. 26, L. 24					
93	P. 27, L. 1					
94	P. 27, LL. 3-4					

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95	P. 27, LL. 6-14	X	X			
96	P. 27, LL. 17-21					
97	P. 27, LL. 23-24					
98	P. 28, L. 1					
99	P. 28, L. 4-6					
100	P. 28, LL. 12-13					
101	P. 28, LL. 15-22	X				
102	P. 28, L. 25 – P. 29, L. 1	X				
103	P. 29, LL. 5-6					
104	P. 29, L. 8 – P. 34, L. 25	X	X	X	X	5
105	P. 35, LL. 1-2					
106	P. 36, LL. 13-15	X				
107	P. 36, LL. 18-19					
108	P. 36, LL. 21-24					
109	P. 37, LL. 7-8	X				
110	P. 37, LL. 11-13	X				
111	P. 37, LL. 16-17	X				
112	P. 37, L. 20 – P. 38, L. 2	X				
113	P. 38, LL. 4-5	X				
114	P. 38, LL. 8-11	X				
115	P. 38, LL. 14-15	X				
116	P. 38, LL. 18-19	X				
117	P. 38, LL. 22-23	X				
118	P. 39, L. 1 – P. 40, L. 5	X	X		X	
119	P. 40, LL. 7-8	X				
120	P. 40, LL. 10-12	X				
121	P. 40, LL. 14-16	X				
122	P. 40, LL. 18-20	X				
123	P. 40, LL. 22-23	X		X		
124	P. 41, LL. 1-3	X				
125	P. 41, LL. 6-8	X				
126	P. 41, LL. 11-14	X				
127	P. 41, LL. 16-18	X				
128	P. 41, LL. 20-21	X				
129	P. 41, LL. 23-25	X				
130	P. 42, LL. 2-3	X				
131	P. 42, LL. 22-23	X				
132	P. 43, LL. 2-3					
133	P. 43, L. 5					
134	P. 43, L. 7					
135	P. 43, LL. 9-10	X				
136	P. 43, LL. 15-16	X				
137	P. 43, L. 20					
138	P. 43, LL. 22-23	X				
139	P. 44, LL. 4-7					
140	P. 44, LL. 11-13					
141	P. 44, LL. 15-16					

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Questions by Mescalero (numbers assigned for analysis)	Transcript pages and lines	Objections by non-admitted counsel	Question re-read	Additional objections by non-admitted counsel	Question re-read again	Question re-read more than twice (# of repetitions)
142	P. 45, LL. 11-12					
143	P. 45, L. 14 – P. 47, L. 12	X	X	X	X	3
144	P. 46, LL. 10-12					
145	P. 46, L. 14 – P. 47, L. 4	X				
146	P. 46, LL. 20-21					
147	P. 47, LL. 17-18					
148	P. 47, LL. 22-24					
149	P. 48, LL. 5-6	X		X		
150	P. 48, LL. 16-17	X				
151	P. 48, LL. 21 – P. 50, L. 6	X				
152	P. 49, LL. 5-9	X				
153	P. 50, LL. 7-9					
154	P. 50, LL. 14-18					
155	P. 50, LL. 20-21					
156	P. 50, L. 23 – P. 51, L. 16	X	X			
157	P. 51, LL. 19-24					
158	P. 52, LL. 1-2	X				
159	P. 52, L. 7 – P. 53, L. 5	X	X	X		
160	P. 53, LL. 13-16					
161	P. 53, LL. 20-21	X				
162	P. 54, LL. 7-21	X	X			
163	P. 54, L. 24 – P. 55, L. 1					
164	P. 55, L. 5 – P. 56, L. 18	X	X		X	3
165	P. 55, LL. 14-16					
166	P. 58, LL. 12-14					
167	P. 58, LL. 16-17					
168	P. 58, L. 19 – P. 59, L. 2	X	X			
169	P. 59, LL. 1-2	X				
170	P. 59, LL. 6-7					
171	P. 59, LL. 15-16					
172	P. 59, LL. 18-19					
173	P. 59, L. 21					
174	P. 59, L. 23 – P. 60, L. 7	X	X			
175	P. 60, LL. 9-10	X				
176	P. 60, LL. 16-19					
177	P. 60, LL. 21-23	X				
178	P. 61, LL. 1-3	X				
179	P. 61, LL. 6-8	X				
180	P. 61, L. 11 – P. 62, L. 2	X	X		X	3
181	P. 62, LL. 8-12	X	X			
182	P. 62, L. 25 – P. 63, L. 3	X				
183	P. 63, LL. 7-12					
184	P. 63, LL. 19-22					
185	P. 63, L. 24 – P. 64, L. 3					
186	P. 64, L. 5					
187	P. 64, L. 7					
188	P. 64, LL. 9-10					

EXHIBIT A

Davis Deposition, Volume I (February 15, 2006)

Questions by Mescalero (numbers assigned for analysis)	Transcript pages and lines	Objections by non-admitted counsel	Question re-read	Additional objections by non-admitted counsel	Question re-read again	Question re-read more than twice (# of repetitions)
189	P. 64, LL. 12-17					
190	P. 64, LL. 19-22					
191	P. 64, L. 24 – P. 66, L. 7	X	X	X	X	3
192	P. 67, LL. 17-21					
193	P. 67, LL. 23-25					
194	P. 68, LL. 2-3	X				
195	P. 68, LL. 8-10					
196	P. 68, LL. 12-13					
197	P. 68, LL. 15-17					
198	P. 68, LL. 19-20					
199	P. 68, LL. 24-25					
200	P. 69, LL. 2-6					
201	P. 69, LL. 9-10	X				
202	P. 69, LL. 14-20	X		X		
203	P. 69, LL. 24 – P. 73, L. 4	X	X	X	X	6
204	P. 73, L. 7 – P. 74, L. 18 (also, P. 83, LL. 9-12)		X		X	5
205	P. 76, LL. 8-10					
206	P. 76, LL. 13-24	X	X			
207	P. 77, LL. 4-7					
208	P. 77, LL. 9-10					
209	P. 77, L. 19 – P. 78, L. 4	X				
210	P. 78, LL. 12-14	X				
211	P. 78, LL. 20-22	X				
212	P. 79, 5-7					
213	P. 79, LL. 9-10	X				
214	P. 79, L. 16					
215	P. 80, LL. 2-4	X	X			
216	P. 80, LL. 15-16					
217	P. 80, LL. 18-20	X				
218	P. 81, LL. 7-10					
219	P. 81, LL. 12-15					
220	P. 81, LL. 17-18	X				
221	P. 83, LL. 14-16	X				
222	P. 83, LL. 23-24	X				
223	P. 84, L. 5 – P. 85, L. 23	X	X		X	3
224	P. 85, L. 25 – P. 86, L. 17	X	X			
225	P. 86, LL. 20-21	X				
226	P. 87, L. 2					
227	P. 87, L. 4 – P. 90, L. 16	X	X			
228	P. 90, LL. 21-25	X				
229	P. 91, LL. 5-9	X	X			
230	P. 91, LL. 22-24	X				
231	P. 92, LL. 5-12	X	X			
232	P. 92, LL. 15-25	X	X			
233	P. 93, LL. 8-9					
234	P. 93, LL. 12-19	X	X			

EXHIBIT A

Davis Deposition, Volume I (February 15, 2006)

Questions by Mescalero (numbers assigned for analysis)	Transcript pages and lines	Objections by non-admitted counsel	Question re-read	Additional objections by non-admitted counsel	Question re-read again	Question re-read more than twice (# of repetitions)
235	P. 93, LL. 21-22	X				
236	P. 94, LL. 6-18	X	X			
237	P. 94, LL. 20-21					
238	P. 94, L. 25 – P. 95, L. 1					
239	P. 95, LL. 3-4					
240	P. 95, L. 6					
241	P. 95, LL. 8-10	X				
242	P. 95, LL. 15-16					
243	P. 95, LL. 20-21					
244	P. 95, L. 25 – P. 96, L. 3					
245	P. 96, L. 10					
246	P. 96, L. 12 – P. 97, L. 1	X	X			
247	P. 97, L. 3 – P. 98, L. 7		X		X	3
248	P. 97, LL. 13-15					
249	P. 98, LL. 9-11	X				
250	P. 98, LL. 22-25					
251	P. 99, LL. 2-5	X				
252	P. 99, L. 14					
253	P. 99, LL. 16-17					
254	P. 99, LL. 19-20					
255	P. 99, LL. 22-24					
256	P. 100, L. 1					
257	P. 100, L. 4					
258	P. 100, LL. 6-17	X	X			
259	P. 100, LL. 20-22	X				
260	P. 100, L. 25 – P. 101, L. 4					
261	P. 101, LL. 6-9					
262	P. 101, L. 11					
263	P. 101, LL. 13-14					
264	P. 101, LL. 16-18	X				
265	P. 101, L. 22 – P. 102, L. 3		X			
266	P. 102, LL. 5-8	X				
267	P. 106, LL. 9-14					
268	P. 106, LL. 16-18					
269	P. 107, LL. 12-17					
270	P. 107, LL. 19-25					
271	P. 108, LL. 2-4					
272	P. 108, LL. 6-7					
273	P. 108, LL. 9-21		X			
274	P. 108, L. 23					
275	P. 109, LL. 4-5					
276	P. 109, LL. 7-9					
277	P. 109, LL. 11-14					
278	P. 109, LL. 18-22					
279	P. 109, L. 24 – P. 110, L. 3					
280	P. 110, LL. 5-6					
281	P. 110, LL. 8-9					

EXHIBIT A

Davis Deposition, Volume I (February 15, 2006)

Questions by Mescalero (numbers assigned for analysis)	Transcript pages and lines	Objections by non-admitted counsel	Question re-read	Additional objections by non-admitted counsel	Question re-read again	Question re-read more than twice (# of repetitions)
282	P. 110, LL. 11-12					
283	P. 110, LL. 14-16	X				
284	P. 110, L. 21 – P. 111, L. 1	X				
285	P. 111, LL. 5-15		X			
286	P. 111, LL. 17-20					
287	P. 111, L. 23 – P. 112, L. 1					
288	P. 112, LL. 3-6	X				
289	P. 112, LL. 11-14	X				
290	P. 112, L. 20 – P. 113, L. 9	X	X			
291	P. 113, L. 17 – P. 114, L. 6	X	X			
292	P. 114, LL. 15-18					
293	P. 114, LL. 20-25	X				
294	P. 115, LL. 4-7	X	X			
295	P. 115, LL. 19-20					
296	P. 115, L. 22					
297	P. 116, LL. 3-5					
298	P. 116, LL. 7-18	X	X			
299	P. 116, LL. 21-23	X				
300	P. 117, LL. 2-4	X				
301	P. 117, LL. 13-15	X				
302	P. 117, LL. 18-22					
303	P. 117, LL. 24-25	X				
304	P. 118, LL. 6-8	X	X			
305	P. 118, LL. 19-23					
306	P. 118, L. 25 – P. 119, L. 1					
307	P. 119, LL. 3-6					
308	P. 119, LL. 8-10	X				
309	P. 119, LL. 14-15					
310	P. 119, LL. 19-22	X				
311	P. 120, LL. 3-5					
312	P. 120, LL. 7-10	X				
313	P. 120, LL. 22-25					
314	P. 121, LL. 3-6					
315	P. 121, L. 8 – P. 122, L. 1		X		X	
316	P. 122, LL. 3-6	X				
317	P. 122, LL. 11-14	X				
318	P. 123, LL. 14-15					
319	P. 123, LL. 17-18					
320	P. 124, LL. 6-9					
321	P. 124, LL. 11-13					
322	P. 124, LL. 15-17	X				
323	P. 124, L. 25 – P. 126, L. 6	X	X			
324	P. 126, LL. 12-13					
325	P. 126, LL. 16-18	X				
326	P. 127, LL. 6-8	X				
327	P. 127, LL. 14-24	X	X			
328	P. 128, LL. 6-10					

EXHIBIT A

Davis Deposition, Volume I (February 15, 2006)

Questions by Mescalero (numbers assigned for analysis)	Transcript pages and lines	Objections by non-admitted counsel	Question re-read	Additional objections by non-admitted counsel	Question re-read again	Question re-read more than twice (# of repetitions)
329	P. 128, L. 12 – P. 129, L. 1	X	X			
330	P. 129, LL. 7-10	X				
331	P. 129, LL. 16-19	X				
332	P. 130, LL. 2-4					
333	P. 130, LL. 6-7	X				
334	P. 130, LL. 12-13					
335	P. 130, LL. 15-16	X				
336	P. 130, L. 23 – P. 131, L. 10	X	X			
337	P. 131, L. 16					
338	P. 131, LL. 18-20					
339	P. 131, L. 23 – P. 132, L. 2					
340	P. 132, LL. 4-7					
341	P. 132, LL. 9-11	X		X		
342	P. 132, LL. 18-19					
343	P. 132, LL. 21-22					
344	P. 132, LL. 24-25					
345	P. 133, LL. 2-3					
346	P. 133, LL. 5-9					
347	P. 133, LL. 11-13	X				
348	P. 133, LL. 19-23	X				
349	P. 134, LL. 4-8	X				
350	P. 134, LL. 15-17	X				
351	P. 134, LL. 23-24					
352	P. 135, L. 1 – P. 136, L. 16	X	X		X	4
353	P. 138, LL. 22-24					
354	P. 139, L. 1					
355	P. 139, LL. 5-8	X				
356	P. 139, LL. 14-17					
357	P. 139, LL. 21-23					
358	P. 140, LL. 5-6					
359	P. 140, LL. 8-10					
360	P. 140, LL. 12-14					
361	P. 140, LL. 16-20	X				
362	P. 141, LL. 12-14					
363	P. 141, LL. 19-21					
364	P. 142, L. 1					
365	P. 142, LL. 4-7	X				
366	P. 143, L. 16 – P. 144, L. 14	X	X		X	
367	P. 144, L. 18 – P. 145, L. 7	X	X	X	X	
368	P. 145, LL. 11-15	X				
369	P. 145, LL. 21-23	X				
370	P. 146, LL. 2-4					
371	P. 146, LL. 6-9	X				
372	P. 146, LL. 12-15	X				
373	P. 146, LL. 19-20	X				
374	P. 146, L. 25 – P. 147, L. 2	X				

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Prepared for The Plaintiff (see p. 2)
STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

MESCALERO APACHE TRIBE, a)
Federally Recognized Indian Tribe,)

)
Plaintiff,)

)
vs.) Case No. CV 2005-07921

)
KENNETH J. WOODLEY, LEAVITT GROUP)
OF ALBUQUERQUE, INC., LEAVITT GROUP)
ENTERPRISES, INC., KELLY RUSSELL,)
and DANE O. LEAVITT,)

)
Defendants.)

DEPOSITION OF TAWNYA J. DAVIS

VOLUME I
(Pages 1 through 156)
Phoenix, Arizona
February 15, 2006
10:04 a.m.

Prepared for: Prepared By:
GREGG VANCE FALICK, ESQ. LORENA MARIN-GARCIA
Registered Merit Reporter
Certified Realtime Reporter
Arizona CR No. 50541
CANYON STATE REPORTING, LTD.
3300 North Central Avenue
Suite 2380
(Copy) Phoenix, AZ 85012

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2 TAWNYA J. DAVIS

3 EXAMINATION

4 Page Line

5 BY MR. FALICK 5 13

6 EXHIBITS

7 Page Line

8 1 Correspondence to Mark Chino, 10 23
President, Mescalero Apache Nation,
9 from Dane Leavitt, CEO, LGE, Inc.,
9/29/05; Attachments (L000001 - '0020)

10 2 E-mail to Stephen Crofton, Esq., from 45 4
Gregg Fallick, Esq., 11/30/05

11 3 Notepad 107 3

13 INSTRUCTIONS NOT TO ANSWER

14 P. 33/L. 7 P. 40/L. 6 P. 55/L. 7

P. 36/L. 16 P. 40/L. 9 P. 60/L. 14

15 P. 37/L. 9 P. 40/L. 13 P. 60/L. 24

P. 37/L. 14 P. 40/L. 17 P. 61/L. 4

16 P. 37/L. 18 P. 40/L. 21 P. 61/L. 9

P. 38/L. 3 P. 40/L. 24 P. 66/L. 16

17 P. 38/L. 6 P. 41/L. 4 P. 67/L. 15

P. 38/L. 12 P. 41/L. 9 P. 70/L. 23

18 P. 38/L. 16 P. 41/L. 15 P. 81/L. 19

P. 38/L. 18 P. 41/L. 19 P. 93/L. 25

19 P. 38/L. 24 P. 41/L. 22 P. 122/L. 9

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1 Pursuant to Rule 39(f)(2) of the Arizona Rules of Civil
2 Procedure, which states, "Upon payment of reasonable charges
3 therefor, the officer shall furnish a copy of the deposition
4 to any party or to the deponent," the deponent for
5 attorney has received a copy of this proceeding.

6 I, the officer, will provide a certified copy to each
7 ordering party at the same copy rate, thus complying with
8 Section 7-206, Appendix A Standard 3(a) of the Arizona Code
9 of Judicial Administration (ACJA) Court Reporter Standard
10 Certification (Effective January 1, 2003).

11 Each purchased copy of this transcript will be signed and
12 certified by myself, thus complying with ACJA Section
13 7-206F(3).

14 A.R.S. 32-4003(B) provides, "Beginning July 1, 2000, a
15 certified reporter shall sign and certify each transcript
16 that the certified reporter prepares before the transcript
17 may be used in court, except for transcripts that the court
18 reporter prepares for proceedings that occurred before July
19 1, 2000." Thus, only an originally signed copy of my work
20 product can be used in any proceeding before the Court.

21 Any copies of this transcript (paper or electronic) made for
22 any other party in this case who has not paid Canyon State
23 Reporting, Ltd. (thus the reporter) for such copy of this
24 transcript, or received written permission for same, will be
25 considered theft of services, a violation of property
rights, and be considered restraint of trade with
appropriate penalties sought.

1 DEPOSITION OF TAWNYA J. DAVIS,

2 taken on February 15, 2006, commencing at 10:04 a.m., at the
3 offices of Salmon, Lewis & Weldon, P.L.C., Phoenix, Arizona,
4 before Lorena Marin-Garcia, a Certified Reporter,
5 Certificate No. 50541, for the State of Arizona.

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18 Also Present:

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<p>1 Q BY MR. FALLICK: Is it fair to say that the audit</p> <p>2 was performed at least in part for the Mescalero Apache</p> <p>3 Tribe's benefit?</p> <p>4 MR. CROFTON: Same objections and same</p> <p>5 instruction.</p> <p>6 Q BY MR. FALLICK: Did Michael Chidester tell the</p> <p>7 internal auditors his opinion about how the audit should be</p> <p>8 conducted?</p> <p>9 MR. CROFTON: Same objections and same</p> <p>10 instruction.</p> <p>11 Q BY MR. FALLICK: Did Michael Chidester tell the</p> <p>12 internal auditors his opinion about the -- strike that.</p> <p>13 Did Michael Chidester tell the internal auditors</p> <p>14 his opinion about what the results of the audit should show?</p> <p>15 MR. CROFTON: Same instruction.</p> <p>16 Q BY MR. FALLICK: Did any lawyer tell the internal</p> <p>17 auditors his or her opinion about what the results of the</p> <p>18 audit should show?</p> <p>19 MR. CROFTON: Same instruction.</p> <p>20 Q BY MR. FALLICK: Did any lawyer tell you his or</p> <p>21 her opinion about how the audit should be conducted?</p> <p>22 MR. CROFTON: Same instruction.</p> <p>23 Q BY MR. FALLICK: Did any lawyer attempt to</p> <p>24 influence the audit in any way by offering his or her</p> <p>25 conclusions or legal theories concerning a possible lawsuit?</p>	<p>1 THE WITNESS: To my understanding, no.</p> <p>2 Q BY MR. FALLICK: Are you a certified public</p> <p>3 accountant?</p> <p>4 A No.</p> <p>5 Q Do you have any auditing certifications?</p> <p>6 A No.</p> <p>7 Q Do you have any accounting certifications?</p> <p>8 A No.</p> <p>9 Q Did any member of the internal audit team hold any</p> <p>10 auditing certifications?</p> <p>11 MR. CROFTON: Object to the form to the extent it</p> <p>12 lacks foundation and calls for speculation.</p> <p>13 But you may answer to the extent you may know.</p> <p>14 THE WITNESS: I don't know if people do or do not.</p> <p>15 Q BY MR. FALLICK: Did any member of the internal</p> <p>16 audit team hold any accounting certifications?</p> <p>17 MR. CROFTON: Same objections.</p> <p>18 THE WITNESS: I do know some of them are</p> <p>19 accountants and some are CPAs.</p> <p>20 Q BY MR. FALLICK: Which ones are CPAs?</p> <p>21 A To my knowledge, Vance Smith and Nate Esplin.</p> <p>22 Q Was there a lead auditor on this internal audit</p> <p>23 team?</p> <p>24 MR. CROFTON: Object to the form to the extent</p> <p>25 that it is vague and ambiguous and lacks foundation and</p>
Page 42	Page 44
<p>1 MR. CROFTON: Same instruction.</p> <p>2 Q BY MR. FALLICK: Are you a certified internal</p> <p>3 auditor?</p> <p>4 MR. CROFTON: Object to form to the extent it's</p> <p>5 vague and ambiguous, lacks foundation, and calls for</p> <p>6 speculation.</p> <p>7 But you can answer as to your understanding.</p> <p>8 THE WITNESS: To my understanding, no.</p> <p>9 MR. FALLICK: And I just want the record to</p> <p>10 reflect that at the conclusion of that question, when there</p> <p>11 was no objection pending, the witness is looking to</p> <p>12 Mr. Crofton in response to each question to determine</p> <p>13 whether she should answer.</p> <p>14 Q BY MR. FALLICK: Are you --</p> <p>15 MR. CROFTON: Object to your characterization.</p> <p>16 MR. FALLICK: Is it false? Is that a false</p> <p>17 characterization of what's physically happening in this</p> <p>18 room?</p> <p>19 MR. CROFTON: The witness is certainly entitled to</p> <p>20 determine whether there would be an objection before she</p> <p>21 begins her response.</p> <p>22 Q BY MR. FALLICK: Are you a certified fraud</p> <p>23 examiner?</p> <p>24 MR. CROFTON: Same objections.</p> <p>25 But you may answer as to your understanding.</p>	<p>1 calls for speculation on her part.</p> <p>2 THE WITNESS: As Dane characterized it in the</p> <p>3 letter, I was characterized as the lead auditor.</p> <p>4 Q BY MR. FALLICK: What does that</p> <p>5 characterization -- strike that.</p> <p>6 In your mind, what does that characterization</p> <p>7 mean?</p> <p>8 A To me, that means that I was the one that followed</p> <p>9 through all the different steps of the audit and compiled</p> <p>10 the information.</p> <p>11 Q And the audit you're referring to is the internal</p> <p>12 audit that was conducted and reported in the document that's</p> <p>13 been marked as Exhibit 1 to your deposition?</p> <p>14 A Yes.</p> <p>15 Q Is it fair to say that you're the person most</p> <p>16 knowledgeable about the audits of Mescalero's accounts?</p> <p>17 A Yes.</p> <p>18 MR. FALLICK: Would you please mark that as</p> <p>19 Exhibit 2.</p> <p>20 (Deposition Exhibit No. 2 was marked for</p> <p>21 identification by the reporter.)</p> <p>22 MR. FALLICK: Can you see hers? Otherwise, I can</p> <p>23 mark up another one for you.</p> <p>24 MR. CROFTON: You don't need to mark it up if you</p> <p>25 have an extra copy.</p>

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1 MR. FALLICK: Yeah, I do. I'm going to put little
2 marks at the beginning and end of the part that's
3 highlighted in the exhibit so that you can see it.

4 Q BY MR. FALLICK: I've placed in front of you
5 Exhibit 2 to your deposition, which is an e-mail that I sent
6 to Mr. Crofton on November 30th, 2005. And the exhibit in
7 front of you has highlighted language, and you can feel free
8 to read the whole e-mail, but I'm going to ask you questions
9 about the highlighted language.

10 A Okay.

11 Q Ms. Davis, have you had a chance to review
12 Exhibit No. 2?

13 A Yes.

14 Q Referring directly to the language that's
15 highlighted on the exhibit in front of you, is that a fair
16 and accurate statement regarding your role in the audit?

17 MR. CROFTON: Object to the form.
18 Could you reread the question for me, please.

19 (The following was read back by the court
20 reporter:

21 Q Referring directly to the language that's
22 highlighted on the exhibit in front of you, is that a fair
23 and accurate statement regarding your role in the audit?)

24 MR. CROFTON: I'm going to object to the form as
25 being vague and ambiguous and misleading. The term "the

1 reporter:

2 Q So before he started to talk, you weren't looking
3 at the document in front of you in response to my question
4 and shaking your head up and down?)

5 THE WITNESS: To my recollection, I was shaking my
6 head because he had put his hand up for me to stop, so I
7 shook my head in response to what he was motioning, for me
8 to stop.

9 Q BY MR. FALLICK: Well, now let's get back to my
10 question, my initial question to which he has objected.

11 Is the highlighted portion of Exhibit 2 a fair and
12 accurate statement of your role in the audit?

13 MR. CROFTON: Same objections, particularly that
14 the question is vague and ambiguous regarding what is meant
15 by "the audit" in the context of the pending question and,
16 therefore, is misleading.

17 Q BY MR. FALLICK: Do you have the question in mind,
18 Ms. Davis?

19 A Yes.

20 **There are contradictory things in the highlighted**
21 **portions, so I can't say yes or no.**

22 Q Well, please explain what's contradictory about
23 the statements in the highlight and also please explain why
24 you can't answer yes or no.

25 A In it, it talks about "your clients' statement to

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1 audit," as used by Mr. Fallick this morning has apparently
2 been referring, at least for the most part, to the audit
3 concerning quotes and the proposals associated with the
4 account as referenced on page 4 of Exhibit 1.

5 So his question is vague and ambiguous and
6 misleading because he's now mixing different audits,
7 including an audit dealing with payments and invoices. And
8 his e-mail seems to be talking only about the type of audit
9 that pertains to the quotes and proposals.

10 Q BY MR. FALLICK: Now, before Mr. Crofton made that
11 objection, you were shaking your head yes in response to my
12 question; is that true?

13 A No. I was shaking my head to his responses.

14 Q So before he started to talk, you weren't looking
15 at the document in front of you in response to my question
16 and shaking your head up and down?

17 MR. CROFTON: Object to your attempt to
18 characterize her conduct in the deposition. Ask her
19 questions and let her answer to the best of her ability.

20 Q BY MR. FALLICK: Do you have my question in mind,
21 Ms. Davis?

22 A Which question?

23 MR. FALLICK: Would you read back my last
24 question, please.

25 (The following was read back by the court

1 you that Tawnya Davis was not in charge of the audit and
2 would not be the best person for some or all of a 30(b)(6)
3 deposition about the audit is contrary to what was
4 represented to my client."

5 Q Do you agree with that part you've just read? Is
6 that an accurate statement?

7 MR. CROFTON: Same objections.

8 Mr. Fallick, I think your line of questioning is
9 all very confusing. She was not a party to the defendants'
10 statement referenced in your e-mail.

11 MR. FALLICK: Let me --

12 MR. CROFTON: The phrase "the audit" was not --
13 (Brief interruption by the reporter.)

14 MR. FALLICK: I'll withdraw the question. Let's
15 break it down.

16 Q BY MR. FALLICK: Is the statement "Tawnya Davis
17 was not in charge of the audit," is that a fair statement?

18 MR. CROFTON: Same objections.

19 THE WITNESS: I'm unaware of whose statement that
20 is.

21 Q BY MR. FALLICK: I'm not asking you to agree
22 whether or not that statement was made or who made it. I'm
23 just asking you this: The statement, in isolation, "Tawnya
24 Davis was not in charge of the audit," is that a fair
25 statement?

12 (Pages 45 to 48)

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<p>1 MR. CROFTON: Same objections. When you use the</p> <p>2 term "the audit" in the question you just asked, are you</p> <p>3 using it in the same way you defined it earlier in this</p> <p>4 deposition, meaning the quote and proposal audit?</p> <p>5 Q BY MR. FALLICK: We agreed earlier in this</p> <p>6 deposition, Ms. Davis, that when I refer to "the audit"</p> <p>7 throughout the rest of this deposition it would refer to the</p> <p>8 audit of the Mescalero Apache Tribe accounts referenced in</p> <p>9 Exhibit No. 1; is that true?</p> <p>10 MR. CROFTON: My understanding of what you meant,</p> <p>11 Mr. Fallick, and maybe you need to clarify this, is you</p> <p>12 meant -- the problem here is the letter refers to at least</p> <p>13 two different audits.</p> <p>14 It's not clear from your attempt to define the</p> <p>15 term "the audit" whether you mean just one or both of those</p> <p>16 types of audit. The letter itself is very clear there are</p> <p>17 multiple types of audits referred to.</p> <p>18 I don't think you're trying to mislead the</p> <p>19 witness, but the effect is to mislead the witness by talking</p> <p>20 about "the audit" without distinguishing between those.</p> <p>21 MR. FALLICK: I consider -- and I'm going to say</p> <p>22 this for the record and then I'm going to try to resolve</p> <p>23 this so that we can move on.</p> <p>24 I consider your objections to be obstructive. I</p> <p>25 consider them to try to twist what's happening in this</p>	<p>1 "the audit" meaning the audit reported in Exhibit No. 1, did</p> <p>2 you understand that to mean the audit that was conducted or</p> <p>3 the audit that was not conducted?</p> <p>4 MR. CROFTON: Object to form to the extent that</p> <p>5 misstates prior testimony and other contents of the record.</p> <p>6 Q BY MR. FALLICK: Do you have the question in mind,</p> <p>7 Ms. Davis?</p> <p>8 THE WITNESS: Can you please repeat it?</p> <p>9 (The following was read back by the court</p> <p>10 reporter:</p> <p>11 Q Earlier today, when I asked you to agree on</p> <p>12 terminology to make the questioning a little simpler and I</p> <p>13 asked you if you would agree to respond to questions about</p> <p>14 "the audit" meaning the audit reported in Exhibit No. 1, did</p> <p>15 you understand that to mean the audit that was conducted or</p> <p>16 the audit that was not conducted?)</p> <p>17 THE WITNESS: My understanding was of the audit</p> <p>18 that was conducted.</p> <p>19 Q BY MR. FALLICK: Let's continue to talk about the</p> <p>20 audit that was conducted, and let's go back to</p> <p>21 Exhibit No. 2, please.</p> <p>22 Based on that understanding of the word "the</p> <p>23 audit," is it fair to say that Tawnya Davis was not in</p> <p>24 charge of the audit?</p> <p>25 A Yes.</p>
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<p>1 deposition and try to renege on agreements that we've</p> <p>2 already made, so I consider it to be a waste of time and I</p> <p>3 consider it to be improper.</p> <p>4 That being said, I'm going to try to clarify this</p> <p>5 so that we can have one less issue for the judge to have to</p> <p>6 decide.</p> <p>7 Q BY MR. FALLICK: How many audits of the Mescalero</p> <p>8 Apache Tribe accounts were conducted that are reported in</p> <p>9 the Exhibit No. 1?</p> <p>10 A There was one audit that was performed. But in</p> <p>11 the letter, it states that if the client would like, that an</p> <p>12 additional audit could be performed -- be conducted on the</p> <p>13 invoices and payments.</p> <p>14 Q Now, does that mean that there was one audit that</p> <p>15 was conducted that's reported in the September 29th, 2005,</p> <p>16 letter that's been marked as Exhibit 1 and there was a</p> <p>17 second audit that was offered, but never conducted? Is that</p> <p>18 what that answer means?</p> <p>19 A Yes.</p> <p>20 Q So there was one audit that was conducted and</p> <p>21 there was one audit that was not conducted; true?</p> <p>22 A True.</p> <p>23 Q Earlier today, when I asked you to agree on</p> <p>24 terminology to make the questioning a little simpler and I</p> <p>25 asked you if you would agree to respond to questions about</p>	<p>1 Q It is fair to say that you were not in charge of</p> <p>2 the audit?</p> <p>3 A Yes.</p> <p>4 MR. CROFTON: Asked and answered.</p> <p>5 Q BY MR. FALLICK: All right. I wanted to make sure</p> <p>6 I understood it.</p> <p>7 Is it -- please turn to page L4 of Exhibit 1.</p> <p>8 The second full paragraph that refers to you, when</p> <p>9 that says that "The auditor who is assigned to lead to this</p> <p>10 matter is Tawnya Davis," is it fair to say that that refers</p> <p>11 to the audit that was conducted?</p> <p>12 MR. CROFTON: Object to the form of the question.</p> <p>13 It seems to be asking the witness to speculate about the</p> <p>14 intent of the author of the letter. She did not write the</p> <p>15 letter. The letter speaks for itself.</p> <p>16 Subject to that, you may answer as to your</p> <p>17 understanding, if you understand his question.</p> <p>18 Q BY MR. FALLICK: Do you have the question in mind,</p> <p>19 Ms. Davis?</p> <p>20 THE WITNESS: Please repeat it.</p> <p>21 (The following was read back by the court</p> <p>22 reporter:</p> <p>23 The second full paragraph that refers to you, when</p> <p>24 that says that "The auditor who is assigned to lead to this</p> <p>25 matter is Tawnya Davis," is it fair to say that that refers</p>

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1 to the audit that was conducted?)

2 MR. CROFTON: I also object to the question as
3 being misleading.

4 Q BY MR. FALLICK: Once again, Ms. Davis, do you
5 have the question in mind?

6 A Yes.

7 As I read this, my interpretation of it would be
8 that in this paragraph he is talking about the invoice and
9 payment review audit, so I am assuming that he is talking in
10 the sense of referring to that audit.

11 Q So your answer is that this sentence refers to you
12 as the lead -- strike that.

13 So your testimony now is that when this sentence
14 refers to "the auditor who is assigned to lead this matter,"
15 the matter he's talking about is the audit that was not
16 performed?

17 A Since I don't know the intent of the author, the
18 surrounding language of it appears to me as this is
19 referring to the audit that was not conducted.

20 Q But you don't deny that you were the lead auditor
21 on the audit that was conducted?

22 MR. CROFTON: Object to the question as being
23 vague and ambiguous.

24 You can answer as to your understanding, whether
25 you thought you were the lead auditor for the audit that was

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1 your deposition today?

2 A I know that I was e-mailed drafts of -- I may have
3 been e-mailed a draft of this letter, but I don't know for
4 sure if I was.

5 Q Did you write any of the language that appears
6 anywhere in Exhibit 1 to your deposition?

7 MR. CROFTON: I'm going to object and instruct her
8 not to answer because I think trying to find out who wrote
9 certain language in the letter gets into work product and
10 attorney-client privileged areas.

11 This was all done after receiving and in response
12 to the demand letter from the Mescalero and the draft
13 complaint from the Mescalero.

14 Q BY MR. FALLICK: Mr. Crofton objected to questions
15 earlier today about Exhibit L'1 by saying that you didn't
16 write the letter. Is that objection accurate?

17 A I did not write the letter.

18 MR. FALLICK: And, Mr. Crofton, are you persisting
19 in your instruction to the witness to not respond to the
20 question of whether she wrote any of the language in the
21 letter?

22 MR. CROFTON: I'm willing to agree that if she
23 answers that question, you will not argue that that by
24 itself constitutes a waiver of any attorney-client privilege
25 or work product.

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1 conducted.

2 THE WITNESS: As we were performing the audit that
3 was conducted, I was the person who had the greatest
4 knowledge of what was going on and the information that was
5 gathered. Whether or not that qualified me as the lead
6 auditor, I'm unable to say.

7 Q BY MR. FALLICK: Is it your perception that any of
8 your testimony today has changed as a result of the
9 objections that Mr. Crofton has lodged?

10 MR. CROFTON: I object to that as being vague and
11 ambiguous. I think it's not a fair question to ask her when
12 she doesn't have the transcript and an opportunity to go
13 through to see all of the questions and answers.

14 Q BY MR. FALLICK: Do you have the question in mind,
15 Ms. Davis?

16 THE WITNESS: Please repeat it.

17 (The following was read back by the court
18 reporter:

19 Q Is it your perception that any of your testimony
20 today has changed as a result of the objections that
21 Mr. Crofton has lodged?)

22 THE WITNESS: I would need to review the questions
23 and responses that I have given.

24 Q BY MR. FALLICK: Did you have any role in the
25 preparation of the letter that is marked as Exhibit 1 to

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1 MR. FALLICK: I will agree for that question only
2 that it does not waive any otherwise valid objection to
3 discovery, including attorney-client privilege.

4 MR. CROFTON: With that stipulation, I will let
5 her answer yes or no to your question as to whether she
6 wrote any of the letter that has been marked as Exhibit 1.

7 MR. FALLICK: Would you read back my question
8 based on that agreement so that the witness has the question
9 clearly in mind?

10 (The following was read back by the court
11 reporter:

12 Q Did you write any of the language that appears
13 anywhere in Exhibit 1 to your deposition?)

14 THE WITNESS: One more time, please.
15 (The following was read back by the court

16 reporter:

17 Q Did you write any of the language that appears
18 anywhere in Exhibit 1 to your deposition?)

19 THE WITNESS: Yes.

20 MR. FALLICK: Can we go off the record for a
21 minute?

22 MR. CROFTON: Sure.

23 (Recess at 12:12; resumed at 12:13.)

24 MR. FALLICK: Let's go back on the record.

25 What I was saying off the record was that, in the

14 (Pages 53 to 56)

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1 preparation of the transcript, when questions are reread to
2 the witness, I would like them to appear in the transcript
3 at the time that they're reread again before the answer so
4 that it will become clear from the transcript what happened
5 today. And I'd like Mr. Crofton to have an opportunity to
6 comment on it.

7 And I also told Mr. Crofton off the record that,
8 you know, I agree that by preparing the transcript in that
9 manner, it doesn't, you know, supersede or invalidate any
10 prior objection. It's simply done for the convenience of
11 the reader so that the reader will know what that answer is
12 referring back to.

13 Do you have any objection to that, Mr. Crofton?

14 MR. CROFTON: No.

15 MR. FALLICK: It is 12:15. We started after
16 10:00. I'm prepared to continue. If you all want to take a
17 break for lunch, I'm prepared to do that and come back after
18 lunch. We're going to have to eat sometime, so why don't
19 you all tell me what your preference is and we'll -- it's
20 particularly the witness's preference, and we will go with
21 that.

22 MR. CROFTON: Do you want to go a little bit
23 longer and then take the lunch break?

24 THE WITNESS: That's fine.

25 MR. CROFTON: Miss some of the crowd out there.

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1 MR. FALLICK: Do you want to break at 1:00? Is
2 that a good time? Would that be a good time, or would you
3 rather break a little later to avoid crowds?

4 MR. CROFTON: Let's go in about a half an hour,
5 12:45.

6 MR. FALLICK: That's fine.

7 Is that fine with you?

8 THE WITNESS: Uh-huh.

9 Q BY MR. FALLICK: Okay. Ms. Davis, are you
10 familiar with the International Standards for Professional
11 Practice of Internal Accounting? Strike that. I'm sorry.

12 Are you familiar with the International Standards
13 for Professional Practice of Internal Auditing published by
14 the Institute of Internal Auditors?

15 A No.

16 Q Are you familiar with the Code of Ethics published
17 by the Institute of Internal Auditors?

18 A No.

19 Q Are you familiar with Generally Accepted Auditing
20 Standards?

21 MR. CROFTON: Object to the form to the extent
22 it's vague and ambiguous.

23 THE WITNESS: Can you please restate the question?

24 (The following was read back by the court

25 reporter:

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1 Q Are you familiar with Generally Accepted Auditing
2 Standards?)

3 MR. CROFTON: Same objection.

4 THE WITNESS: I have learned about them in the
5 past, so -- but I currently could not restate them.

6 Q BY MR. FALLICK: Are you familiar with the acronym
7 GAAS for Generally Accepted Auditing Standards?

8 A Do you know if that's the same as GAAP?

9 Q I can represent to you it is not the same as GAAP.

10 A Then I was thinking that they were possibly
11 similar, so in my last response, I learned about GAAP, not
12 GAAS.

13 Q Okay. Well, you've now gotten to my next
14 question.

15 So you're familiar in general with Generally
16 Accepted Accounting Principles and the acronym GAAP?

17 A I am familiar with that.

18 Q But you're not thoroughly familiar with them, at
19 least as you sit here today. Is that what you're saying?

20 A Correct.

21 Q Are you familiar with Auditing Standard Number 99?

22 A No.

23 Q Are you familiar with any auditing standard for
24 the detection of fraud?

25 MR. CROFTON: Object to the form as being vague

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1 and ambiguous.

2 Subject to that, you may answer.

3 THE WITNESS: Can you please repeat it?

4 (The following was read back by the court
5 reporter:

6 Q Are you familiar with any auditing standard for
7 the detection of fraud?)

8 THE WITNESS: With that wording, no.

9 Q BY MR. FALLICK: Did the internal audit team apply
10 any auditing standards for the detection of fraud?

11 MR. CROFTON: Object to the form of the question
12 as being vague and ambiguous and calling for speculation.
13 And you're also asking her to divulge work product, at least
14 as I interpret your question, so I would instruct her not to
15 answer the question as posed.

16 Q BY MR. FALLICK: We have an ongoing understanding
17 that you intend to follow all instructions not to answer and
18 that continues throughout this deposition to be true; is
19 that correct?

20 A Yes.

21 Q Did anyone at any time do anything to attempt to
22 influence the internal auditors' independence in conducting
23 this audit?

24 MR. CROFTON: Same objections and same

25 instruction.

15 (Pages 57 to 60)

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1 (The following was read back by the court
 2 reporter:
 3 Q Do you understand what Dane Leavitt was
 4 apologizing about?)
 5 MR. CROFTON: Same objections.
 6 THE WITNESS: Yes.
 7 Q BY MR. FALLICK: Was one of the primary points
 8 that Dane Leavitt was apologizing about the fact that Ken
 9 Woodley relied on fabricated numbers to convince the tribe
 10 to pay more than it rightly should have for insurance?
 11 MR. SILVA: Object to form.
 12 MR. CROFTON: Could you read that question,
 13 please?
 14 (The following was read back by the court
 15 reporter:
 16 Q Was one of the primary points that Dane Leavitt
 17 was apologizing about the fact that Ken Woodley relied on
 18 fabricated numbers to convince the tribe to pay more than it
 19 rightly should have for insurance?)
 20 MR. CROFTON: I'll allow you to try to answer the
 21 question, Tawnya, to the extent you can do so based upon
 22 information that was provided to the Mescalero.
 23 THE WITNESS: Can you repeat it?
 24 (The following was read back by the court
 25 reporter:

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1 Q Was one of the primary points that Dane Leavitt
 2 was apologizing about the fact that Ken Woodley relied on
 3 fabricated numbers to convince the tribe to pay more than it
 4 rightly should have for insurance?)
 5 THE WITNESS: That isn't wording that you got from
 6 the letter, is it?
 7 Q BY MR. FALLICK: I need to ask you to answer the
 8 question the way I've posed it. I don't want to complicate
 9 it. You can assume that it is nothing more than the four
 10 corners of the question exactly the way I've asked it.
 11 And that being said, would you read it back again
 12 to her, please?
 13 (The following was read back by the court
 14 reporter:
 15 Q Was one of the primary points that Dane Leavitt
 16 was apologizing about the fact that Ken Woodley relied on
 17 fabricated numbers to convince the tribe to pay more than it
 18 rightly should have for insurance?)
 19 MR. CROFTON: Again, you may answer yes or no to
 20 that question if you are able to do so based upon
 21 information that was provided to the Mescalero Tribe.
 22 THE WITNESS: No.
 23 MR. CROFTON: It's almost 1 o'clock. Do you want
 24 to take our lunch break?
 25 MR. FALLICK: If I can ask two more questions,

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1 I'll finish up this line of questioning. And if not, I can
 2 do it after. But I thought it made sense to ask a couple
 3 more. But if you want to stop now, we can stop now.
 4 MR. CROFTON: I'll leave it up to the witness, but
 5 so far each question seems to be taking a while.
 6 MR. FALLICK: What do you think, Ms. Davis? Do
 7 you want to finish up this line of questioning or do you
 8 want to pick up here after lunch?
 9 THE WITNESS: Let's just pick up after lunch.
 10 MR. FALLICK: Okay.
 11 (Recess at 12:51; resumed at 2:04.)
 12 MR. FALLICK: Would you please read the witness
 13 the last question that was asked of her and the last answer
 14 that she gave.
 15 (The following was read back by the court
 16 reporter:
 17 Q Was one of the primary points that Dane Leavitt
 18 was apologizing about the fact that Ken Woodley relied on
 19 fabricated numbers to convince the tribe to pay more than it
 20 rightly should have for insurance?
 21 A No.)
 22 MR. CROFTON: Before your next question, she has
 23 something she'd like to say.
 24 THE WITNESS: As I thought about the things that
 25 I've said earlier this morning, I just wanted to make clear,

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1 as we were talking -- well, answering questions concerning
 2 the audit and my position in the audit, during the letter,
 3 there's two different audits that are discussed.
 4 I was not the lead auditor in the audit that was
 5 completed. But the audit that talked about a review of the
 6 invoices and payments that is normally done every six
 7 months, I was going to take a lead in that audit.
 8 Q BY MR. FALLICK: Do you recall whether you said
 9 this morning that you were the lead auditor in the audit
 10 that was conducted?
 11 A Without looking at the transcript, I do not
 12 remember my different responses exactly.
 13 Q Well, assume for the purposes of my question that
 14 you did say that, and the transcript will speak for itself,
 15 can you explain the basis for the change in your testimony?
 16 MR. CROFTON: I'll object to the form to the
 17 extent that mischaracterizes her testimony or states facts
 18 not in evidence.
 19 Can you repeat the question?
 20 (The following was read back by the court
 21 reporter:
 22 Q Well, assume for the purposes of my question that
 23 you did say that, and the transcript will speak for itself,
 24 can you explain the basis for the change in your testimony?)
 25 MR. CROFTON: Same objections.

19 (Pages 73 to 76)

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1 THE WITNESS: As I started to think about the
2 testimony, things like that, I just wanted to make it clear
3 that that was what truly did occur.
4 Q BY MR. FALLICK: The time period in which you
5 started to think about this was the time period between the
6 time we adjourned this morning's session and now? Is that
7 the time period during which you were thinking about it?
8 A No.
9 Q What was the time period in which you were
10 thinking about it?
11 A It was during this morning's -- as we were going
12 through this morning.
13 MR. CROFTON: You're Mr. Wheeler.
14 MR. WHEELER: I am.
15 MR. CROFTON: Is he here as the corporate
16 representative of the plaintiff?
17 MR. FALLICK: He is.
18 MR. CROFTON: Thanks. I wanted to clarify that.
19 Q BY MR. FALLICK: Did you testify this morning that
20 you were the person most knowledgeable about the conduct of
21 the audit that was conducted regarding the Mescalero Apache
22 Tribe accounts?
23 THE WITNESS: Can you please repeat the question?
24 (The following was read back by the court
25 reporter:

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1 Q Did you testify this morning that you were the
2 person most knowledgeable about the conduct of the audit
3 that was conducted regarding the Mescalero Apache Tribe
4 accounts?)
5 MR. CROFTON: I'll object to the form to the
6 extent it may misstate the previous testimony. The record
7 will speak for itself as to what the question was and what
8 the answer was.
9 THE WITNESS: As I remember earlier, I did testify
10 that I was the most knowledgeable in the information, the
11 results that were provided.
12 Q BY MR. FALLICK: Does that mean that you did not
13 testify this morning that you were the person most familiar
14 with the conduct of the audit referenced in Exhibit No. 1?
15 MR. CROFTON: Same objections.
16 THE WITNESS: How that has been stated, I do not
17 agree.
18 Q BY MR. FALLICK: As you sit here now, are you --
19 strike that.
20 As you sit here now, is your testimony that you
21 were the person most knowledgeable about the conduct of the
22 audit?
23 MR. CROFTON: Object to form to the extent it
24 lacks foundation and calls for speculation.
25 THE WITNESS: What do you mean by "conduct of the

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1 audit?"
2 Q BY MR. FALLICK: Let me rephrase the question.
3 A Okay.
4 Q As you sit here today -- let me strike it.
5 As you sit here now, is it your testimony that
6 you're the person most familiar with how the audit was
7 conducted?
8 A No.
9 Q Who is the person who is most familiar with how
10 the audit was conducted?
11 MR. CROFTON: Object to the form as lacking
12 foundation and calling for speculation. Also assumes facts
13 not in evidence.
14 THE WITNESS: There are a number of people that
15 are knowledgeable about the conduct of the audit.
16 Q BY MR. FALLICK: Who are they?
17 A My opinion would be Dane Leavitt, Nate Esplin --
18 MR. SILVA: Who was the second one? I'm sorry.
19 THE WITNESS: Nate Esplin.
20 -- Mike Chidester, Derek Snow, Dennis Freire, and
21 Vance Smith.
22 MR. FALLICK: We're going to go off the record for
23 just one second. Is that okay?
24 MR. CROFTON: Uh-huh.
25 (Recess at 2:14; resumed at 2:15.)

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1 MR. FALLICK: We're back on the record.
2 Q BY MR. FALLICK: Are any of the people you just
3 listed more knowledgeable than you about how the audit was
4 conducted?
5 MR. CROFTON: I'm sorry. Can you repeat the
6 question? I was distracted for a moment.
7 (The following was read back by the court
8 reporter:
9 Q Are any of the people you just listed more
10 knowledgeable than you about how the audit was conducted?)
11 MR. CROFTON: I object to the form as calling for
12 speculation.
13 You may answer it if you know.
14 THE WITNESS: I don't know.
15 Q BY MR. FALLICK: What part of Dane Leavitt's
16 letter did you write?
17 A I did not write any part of the letter.
18 Q You testified this morning that you wrote some of
19 the language that appears in Dane Leavitt's letter that's
20 attached -- that's marked as Exhibit 1; true?
21 MR. CROFTON: I object to the extent that it
22 misstates her prior testimony.
23 MR. FALLICK: You know, since we're getting a lot
24 of this, I think I need to ask you to find that testimony.
25 Can you -- do you have the ability to do that,

20 (Pages 77 to 80)

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1 find the testimony where we talk -- maybe the key word is
 2 "language." I think you might be able to find it with the
 3 word "language."
 4 When you're doing this and when the transcript
 5 appears, I want this to be in the transcript at this place.
 6 (A discussion ensued off the record.)
 7 Q BY MR. FALLICK: The question was, "Did you write
 8 any of the language that appears anywhere in Exhibit 1 to
 9 your deposition?" And the answer was, "Yes."
 10 Do you understand that?
 11 A Yes.
 12 Q Okay. And you're shaking your head yes to that?
 13 MR. SILVA: Nodding. Nodding her head.
 14 Q BY MR. FALLICK: I'll accept -- are you nodding
 15 your head yes as I'm reading that question and answer?
 16 A Yes.
 17 Q Okay. My question is to you now, what language is
 18 the basis for your yes?
 19 MR. CROFTON: Well, I'm going to object to the
 20 question and instruct her not to answer. This was a letter
 21 written in response to the tribe's demand letter and its
 22 draft of the complaint. The letters and all of Exhibit 1
 23 speak for themselves.
 24 Our position is that you're not entitled to
 25 inquire behind that and find out exactly who wrote what in

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1 communications to the tribe any more than I would be able to
 2 inquire into exactly who wrote what if you sent a settlement
 3 letter to me.
 4 So in summary, I think what you're trying to get
 5 her to do goes into work product and/or attorney-client
 6 privilege in trying to find out exactly who did what in the
 7 preparation of Exhibit 1.
 8 We might add, we have given you the results. We
 9 have given you access to all of the documents that were
 10 reviewed. You, your expert, your other representatives are
 11 free to review those, agree or disagree with the results.
 12 I do not believe you're entitled to force them to
 13 try to disclose the activity and the communications by each
 14 of the Leavitt people in the preparation of this.
 15 MR. FALLICK: I am not going to purport to
 16 restrict how you make whatever record you feel you need to
 17 make today. I will point out that I consider many of your
 18 objections to be in the nature of filibusters that are
 19 wasting quite a bit of time, and when it goes to the extreme
 20 of telling me what I can and cannot do with my experts, I
 21 think it's so far over the line I can't see the line
 22 anymore.
 23 So I'm going to say that for the record and I'm
 24 going to keep moving on, and you'll make the record you feel
 25 you need to make and I'll make the record I feel I need to

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1 make.
 2 Let's go back to the lunch break, and I would like
 3 to go back again to what I was starting the afternoon with,
 4 which is the last question asked of the witness before the
 5 break and the last answer provided by the witness before the
 6 break.
 7 (The following was read back by the court
 8 reporter:
 9 Q Was one of the primary points that Dane Leavitt
 10 was apologizing about the fact that Ken Woodley relied on
 11 fabricated numbers to convince the tribe to pay more than it
 12 rightly should have for insurance?
 13 A No.)
 14 Q BY MR. FALLICK: Is there any part of that
 15 question that accurately describes part of what Mr. Leavitt
 16 was apologizing for?
 17 MR. CROFTON: I object to the question as lacking
 18 foundation and calling for speculation. But I'll allow you
 19 to answer to the extent, if any, that you're able to do so
 20 based on the information that was provided to the tribe to
 21 your knowledge.
 22 MR. FALLICK: I withdraw the question.
 23 Q BY MR. FALLICK: Did Ken Woodley rely on
 24 fabricated numbers?
 25 MR. CROFTON: Object to the form of the question

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1 as being vague and ambiguous, lacking foundation, and
 2 calling for speculation on her part.
 3 MR. SILVA: Join.
 4 MR. FALLICK: I'm going to withdraw that question.
 5 Q BY MR. FALLICK: In Ken Woodley's capacity as the
 6 insurance broker servicing the accounts of the Mescalero
 7 Apache Tribe, did he submit any fabricated numbers to the
 8 Mescalero Apache Tribe?
 9 MR. SILVA: Same. Join.
 10 MR. FALLICK: You have to let him object before
 11 you join.
 12 MR. CROFTON: Same objections.
 13 MR. FALLICK: I'd like you to state the objections
 14 because I've lost sight of them.
 15 MR. CROFTON: Object to the form of the question
 16 as being vague and ambiguous, lacking foundation, and
 17 calling for speculation. And I would add that it calls for
 18 a legal conclusion.
 19 MR. SILVA: Join the objection.
 20 MR. FALLICK: Would you now reread the question to
 21 the witness so she has it in mind?
 22 MR. SILVA: Can we get an understanding that if
 23 one party states the objection, the other party can join, or
 24 do I have to say it?
 25 I'll say it. That keeps me alert down here.

21 (Pages 81 to 84)

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1 MR. CROFTON: Object to the form as being vague
2 and ambiguous.
3 Try to answer, if you can.
4 THE WITNESS: My recollection is that something
5 was said about Leavitt Group of Albuquerque's corporate
6 licensure being revoked and Dane made some comment to that
7 effect.
8 Q BY MR. FALLICK: To the effect that "Sometimes you
9 get lucky"?
10 A I don't know if that was the wording, but I
11 vaguely remember some remark similar.
12 Q At the time, did you have an understanding about
13 what that meant?
14 MR. CROFTON: Object to form as being vague and
15 ambiguous.
16 THE WITNESS: In his response?
17 Q BY MR. FALLICK: When Mr. Leavitt said that or
18 something similar, at the time, did you have an
19 understanding of what he was talking about?
20 A I don't recall.
21 Q As you sit here today, do you have some
22 understanding about what he was talking about?
23 MR. CROFTON: Object to the form because, again,
24 your question is so broad that it encompasses
25 attorney-client communications and work product. I'd

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1 instruct her not to answer the question as framed for that
2 reason. Perhaps you'd like to restate it.
3 MR. FALLICK: There's no way to get the answer
4 without asking the question, so we'll leave it for the judge
5 to decide.
6 Q BY MR. FALLICK: Have you talked with any family
7 members about the Mescalero Apache Tribe?
8 MR. CROFTON: Just for clarification, your
9 question is anytime about any matter whatsoever relating in
10 some way to the Mescaleros?
11 MR. FALLICK: Correct, in the broadest possible
12 way you could read that question. That's what I meant by
13 the word "any."
14 So would you read her back the question, please?
15 (The following was read back by the court
16 reporter:
17 Q Have you talked with any family members about the
18 Mescalero Apache Tribe?)
19 THE WITNESS: Yes.
20 Q BY MR. FALLICK: Are you related to any of the
21 Leavitts by blood or marriage?
22 A Yes.
23 Q Other than the defendants in this lawsuit -- well,
24 strike that.
25 Who are you related to in the Leavitt family by

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1 blood or marriage?
2 A Dane Leavitt's wife is my mom's sister.
3 Q Dane Leavitt's wife is your aunt by -- I'm sorry,
4 Dane Leavitt's wife is your aunt?
5 A Yes.
6 Q And Dane Leavitt is your uncle by marriage?
7 A Yes.
8 Q Other than your mother and Dane Leavitt, have you
9 discussed the Mescalero Apache Tribe with anyone in your
10 family?
11 MR. CROFTON: I object to the form to the extent
12 you are implying that she has had conversations with certain
13 people. Lack of foundation for that.
14 MR. FALLICK: I'll withdraw the question.
15 Q BY MR. FALLICK: Who in your family have you
16 talked to about the Mescalero Apache Tribe?
17 A Many members of my family know about the
18 deposition and that I have been involved in things having to
19 do with the Mescalero Apache Tribe.
20 Q Please list the family members who you've spoken
21 with about the Mescalero Apache Tribe.
22 A Those that I can recollect at this moment are my
23 mom and my dad, my sisters and brother-in-laws, my grandma
24 and grandpa, my aunt, and a few of my cousins.
25 Q Could you list all those people by their name,

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1 please?
2 A Brent --
3 Q First and last name, please?
4 A -- Davis; Julie Davis; Amber Wright, W-r-i-g-h-t;
5 Jeff Wright; KayeLynn, K-a-y-e-l-y-n-n, Guptill,
6 G-u-p-t-i-l-l; Travis Guptill; Heidi Tuttle, T-u-t-t-l-e;
7 Joseph Tuttle; Ruth Leavitt; Aaron Jolley, J-o-l-l-e-y;
8 Dorothy Jolley; Brooke MacNaughtan; Kirk MacNaughtan; Dixon
9 Leavitt; Parker Leavitt; Skye Leavitt.
10 Q Did you include Dane Leavitt in that list?
11 A Dane Leavitt.
12 Q Putting aside Dane Leavitt, did any of the people
13 you just listed share any thoughts with you that they had
14 about the Mescalero Apache Tribe?
15 MR. CROFTON: I'm going to object because your
16 question is so broad that -- well, I'll let her answer yes
17 or no to the question that you asked.
18 Q BY MR. FALLICK: Do you have the question in mind,
19 Ms. Davis?
20 THE WITNESS: Let's have it repeated just to make
21 sure.
22 (The following was read back by the court
23 reporter:
24 Q Putting aside Dane Leavitt, did any of the people
25 you just listed share any thoughts with you that they had

24 (Pages 93 to 96)

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<p>1 A Correct.</p> <p>2 Q And it appears in the row across from Mescalero</p> <p>3 Forest Products; correct?</p> <p>4 A Correct.</p> <p>5 Q You reviewed Exhibit B to Dunathan's declaration</p> <p>6 today and saw that according to that document, not only was</p> <p>7 there no \$232,876 quote for Mescalero Forest Products, but</p> <p>8 there are two memos from Tribal First saying they decline to</p> <p>9 quote for that coverage; correct?</p> <p>10 A Correct.</p> <p>11 Q Do you have any reason to question the conclusion</p> <p>12 that that number as an HIC number for Mescalero Forest</p> <p>13 Products coverage for 2004/2005 is a false number?</p> <p>14 MR. SILVA: Object to form, ambiguous, vague.</p> <p>15 MR. CROFTON: I join and also calls for</p> <p>16 speculation and lacks foundation.</p> <p>17 THE WITNESS: I don't know if that number is</p> <p>18 false.</p> <p>19 Q BY MR. FALLICK: Do you have any basis to support</p> <p>20 any conclusion other than the fact that Mr. Woodley was</p> <p>21 lying to the tribe when he said that there was an HIC bid</p> <p>22 for Mescalero Forest Products in 2004/2005 in the amount of</p> <p>23 \$232,876?</p> <p>24 MR. CROFTON: Object to the form as lacking</p> <p>25 foundation and calling for speculation.</p>	<p>1 Q Would a prudent auditor under these circumstances</p> <p>2 accept that handwritten estimate as anything other than a</p> <p>3 fabricated number without doing further auditing to verify</p> <p>4 the number?</p> <p>5 MR. CROFTON: Object to the form. Lacks</p> <p>6 foundation, calls for speculation. It's vague and</p> <p>7 ambiguous. It's asking in part for a legal conclusion.</p> <p>8 THE WITNESS: Please repeat the question.</p> <p>9 (The following was read back by the court</p> <p>10 reporter:</p> <p>11 Q Would a prudent auditor under these circumstances</p> <p>12 accept that handwritten estimate as anything other than a</p> <p>13 fabricated number without doing further auditing to verify</p> <p>14 the number?)</p> <p>15 MR. CROFTON: Same objections.</p> <p>16 THE WITNESS: Given that I was not a part of this</p> <p>17 investigation of the workers comp portion, I cannot say</p> <p>18 whether further investigation was made on this or not.</p> <p>19 Q BY MR. FALLICK: I'm asking you a different</p> <p>20 question.</p> <p>21 Would you please repeat the question?</p> <p>22 (The following was read back by the court</p> <p>23 reporter:</p> <p>24 Would a prudent auditor under these circumstances</p> <p>25 accept that handwritten estimate as anything other than a</p>
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<p>1 MR. SILVA: Join.</p> <p>2 THE WITNESS: My understanding would be that by</p> <p>3 stating that, he was misrepresenting what occurred.</p> <p>4 Q BY MR. FALLICK: The fact that this \$232,876 on</p> <p>5 Mr. Woodley's submission for Leavitt Group of Albuquerque</p> <p>6 was a misrepresentation and that the exact same identical</p> <p>7 number appears on Appendix A to Mr. Leavitt's letter, do you</p> <p>8 consider that, as an auditor, to be suspicious?</p> <p>9 MR. CROFTON: Object to the form as lacking</p> <p>10 foundation and calling for speculation, and it's also vague</p> <p>11 and ambiguous.</p> <p>12 THE WITNESS: My previous response stating a</p> <p>13 misrepresentation, I was meaning a misrepresentation that it</p> <p>14 did not come from Hudson.</p> <p>15 Q BY MR. FALLICK: My question is, does the fact</p> <p>16 that those two numbers are identical give you reason to</p> <p>17 believe, at a minimum, that the number is suspicious?</p> <p>18 MR. CROFTON: Lacks foundation.</p> <p>19 You can answer if you can.</p> <p>20 THE WITNESS: My understanding is that that</p> <p>21 number, while it misrepresented HIC, was not misrepresenting</p> <p>22 the assigned risk pool.</p> <p>23 Q BY MR. FALLICK: And that is based on what</p> <p>24 Mr. Freire told you existed in a handwritten estimate?</p> <p>25 A Correct.</p>	<p>1 fabricated number without doing further auditing to verify</p> <p>2 the number?)</p> <p>3 MR. CROFTON: Same objections.</p> <p>4 THE WITNESS: What's your definition of "prudent"?</p> <p>5 Q BY MR. FALLICK: That's my question to you. And</p> <p>6 if you don't know what a prudent auditor is, then you can</p> <p>7 say so. But I'm asking for your opinion of what a prudent</p> <p>8 auditor would do.</p> <p>9 So, again, would you read that question back to</p> <p>10 her?</p> <p>11 (The following was read back by the court</p> <p>12 reporter:</p> <p>13 Q Would a prudent auditor under these circumstances</p> <p>14 accept that handwritten estimate as anything other than a</p> <p>15 fabricated number without doing further auditing to verify</p> <p>16 the number?)</p> <p>17 MR. CROFTON: Same objections.</p> <p>18 THE WITNESS: I don't know.</p> <p>19 MR. CROFTON: Gregg, it's a little bit past 5:15.</p> <p>20 I have a variety of other obligations this evening so we'll</p> <p>21 need to wrap up within half an hour.</p> <p>22 MR. FALLICK: Okay. Let me say on the record what</p> <p>23 I said when we were off the record before. I would like to</p> <p>24 work as late as you will permit tonight and I'd like to work</p> <p>25 as late as you will permit tomorrow, so let's keep going</p>

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(The following was read back by the court reporter:

Q Is there any indication in the documents in Leavitt Group of Albuquerque's files that Mr. Woodley attempted to resolve the possible discrepancy between the coverage at \$683,911 and the potentially identical coverage for \$589,059?)

MR. CROFTON: It's also vague and ambiguous and assumes facts not in evidence.

THE WITNESS: I do not know.

Q BY MR. FALLICK: Do you agree that an insurance agent doing his job honestly and fairly would not just rely on the higher quote under these circumstances without making any effort to determine whether the lowest price was accurate and available?

MR. SILVA: Object to form. States facts not in evidence, lack of foundation, lack of qualifications for this witness for such an opinion.

MR. CROFTON: Join.

THE WITNESS: I do not know.

Q BY MR. FALLICK: Does Dane Leavitt's damages analysis simply assume that the coverage could not be bound for \$589,059?

MR. CROFTON: Object to the form as lacking foundation, calling for speculation.

the \$202,161 Ski Apache quote in Leavitt of Albuquerque's files?

MR. CROFTON: Object to the form to the extent that may lack foundation and call for speculation.

But to the extent you may have personal knowledge, you may answer.

THE WITNESS: I do not know.

Q BY MR. FALLICK: I will represent to you that after a variety of searches using a variety of different methods, we have not been able to locate that quote in the documents that were produced in discovery.

And on that basis, I'm going to ask you a series of questions based on the assumption that it's not there.

MR. CROFTON: It's already almost 10 minutes to 5:00 -- or 6:00, rather. It's about 5:54 according -- sorry, 5:48 according to my watch. We're past the 5:45. If you have a question or two, I'll give you some leeway, but if this is going to be a series and take 5 or 10 minutes, then let's resume in the morning.

MR. FALLICK: It's going to be a series that's going to take some time.

As long as we are breaking at this point, I would ask you, Mr. Crofton, to use whatever electronic search engines you have -- I know you're using Concordance -- to see if you can locate in the files the document that appears

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THE WITNESS: What number are you referring to?

Q BY MR. FALLICK: On your Exhibit 3, you totaled the two individual estimates and came up with 589- -- excuse me, \$589,059; correct?

A Yes. Correct.

Q And I'm asking you, does Dane Leavitt's damage calculation in Exhibit 1 simply assume that this coverage could not be bound for \$589,059 and therefore relies on the higher number of \$683,911?

MR. CROFTON: Same objections.

THE WITNESS: I do not know.

Q BY MR. FALLICK: Do you know if the internal auditors applied any auditing standards to validate the assumption that the coverage costs \$683,911 and not \$589,059?

MR. CROFTON: Object to the form as lacking foundation and calling for speculation.

THE WITNESS: I do not know.

Q BY MR. FALLICK: Would a prudent auditor do nothing to try to resolve this potential discrepancy?

MR. CROFTON: Object to the form. Lacks foundation, it's vague and ambiguous, and calls for speculation.

THE WITNESS: I do not know.

Q BY MR. FALLICK: Did the internal auditors find

as attached to the complaint, Exhibit B, 5 of 16, because I'm going to ask a series of questions about Ms. Davis' knowledge regarding the completeness of the documents in Leavitt of Albuquerque's files.

And if you can determine that you agree that it's not there, instead of asking them in the hypothetical, I can ask them in the affirmative. So I would appreciate it if you can do that.

MR. CROFTON: I do not believe I'll be able to do that this evening.

MR. FALLICK: Well, then I'll pick up where I left here, which we'll represent to you that we have not found it, and based on that representation, I will ask you my questions.

Thank you.

MR. CROFTON: We can put on the record that tomorrow we can go from 9 a.m. until noon. That's all.

MR. SILVA: Until what time?

MR. CROFTON: Until noon tomorrow. That's all I'm going to be able to do tomorrow.

MR. FALLICK: Well, you know, I'd ask you to, you know, look into whether there's something you can do about that. And we have our prior communications about this day, but that is certainly not my understanding of --

MR. WHEELER: I'd like this on the record,

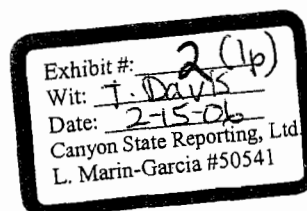
37 (Pages 145 to 148)

From: Gregg Vance Fallick <GVF@fallicklaw.com>
Subject: **Mescalero Apache Tribe v. Woodley, et al.**
Date: November 30, 2005 5:44:53 PM MST
To: "Stephen E. Crofton" <SEC@SLWPLC.COM>
Cc: Ben Silva <bsilva@silvalaw.org>

Message:

Steve -- As I said in our telephone conversation this evening, your clients' statement to you that Tawyna Davis was not in charge of the audit and would not be the best person for some or all of a 30(b)(6) deposition about the audit is contrary to what was represented to my client, colleagues, and me at the meeting in Mescalero. We were advised that she was the auditor directly responsible, and there even was some discussion about the extended hours she worked on the matter and how she ought to get some time off to recover. Moreover, Dane Leavitt's September 29th letter states as follows: "The auditor who is assigned to lead this matter is Tawyna Davis, who works in our office, and who you will meet in connection with our visit. It might be helpful for you to introduce Tawyna to the person(s) in your operation(s) with whom Tawyna would interact in conducting the invoice and payment reviews." Accordingly, we intend to proceed with her deposition as planned, subject to any reasonable changes in the date and a possible change of location. As I said, my client does not want any unnecessary delay in proceeding with this deposition, so we would rather take it in Cedar City than delay it with a dispute over the site. If we are unable to reach some sort of agreement now on how to resolve the site issue, we can ask the Court to resolve it later for future depositions. Finally, I understand that you will be representing Leavitt Group of Albuquerque, Inc., that Ben Silva will be representing Mr. Woodley, and that you both anticipate requesting a modest amount of additional time to file answers to the complaint and to respond to discovery. While my client would like to keep the matter moving forward expeditiously, if you both need a few more days my client will accommodate you. We simply want to keep this case on the front burner. I look forward to hearing from you and Ben soon to try to nail all this down, and in particular to agree on a prompt setting for Ms. Davis's deposition. Best regards. -- Gregg

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STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

MESCALERO APACHE TRIBE,

Plaintiff,

v.

No. CV-2005-07921

KENNETH J. WOODLEY, *et al.*,

Defendants.

**RESPONSE OF DEFENDANT LEAVITT GROUP ENTERPRISES
TO PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS
ADDRESSED TO DEFENDANT LEAVITT GROUP ENTERPRISES**

Pursuant to Rule 1-034 NMRA 2005, defendant Leavitt Group Enterprises, Inc. ("LGE"), by and through its attorneys of record, Salmon, Lewis & Weldon, P.L.C. and Miller Stratvert P.A., submits the following response to *Plaintiff Mescalero Apache Tribe's First Request for Production of Documents, Addressed to Defendant Leavitt Group Enterprises, Inc.* (the "Request").

GENERAL OBJECTIONS

1. The Request requests production at the office of plaintiff's counsel. LGE objects to producing original documents at the office of plaintiff's counsel; originals that are produced will be made available at Miller Stratvert's office in Albuquerque, New Mexico for review, inspection and copying at a mutually convenient time.

2. To the extent that the Request is not limited to plaintiff and its affiliated entities but rather encompasses the entire "audit" as defined in Request No. 1, the Request is unduly broad, calls for production of documents that are not relevant to any issue in this case and are not reasonably calculated to lead to the discovery of admissible evidence, and is unduly burdensome and expensive. Many of the requested documents, or portions of the contents of those documents, that pertain to clients other than plaintiff and its affiliated entities are protected from disclosure



under the relevant privacy provisions of state and federal law. Attempting to segregate or redact such protected documents or information from the entire population of documents encompassed by the Request would be unduly burdensome and expensive.

3. Many of the requested documents, or portions of the contents of those documents, that pertain to clients other than plaintiff and its affiliated entities constitute confidential or proprietary business information of such a nature that disclosure to competitors of LGE would injure LGE and defendant Leavitt Group of Albuquerque, Inc. Attempting to segregate or redact such confidential or proprietary documents or information from the entire population of documents falling within the Request would be unduly burdensome and expensive.

4. LGE objects to the Request to the extent it seeks production of documents and information which are protected from discovery by the attorney-client privilege, the work-product privilege, or any other applicable privilege. Privileged documents that may be responsive to the Request are not being produced and will be identified in compliance with applicable court rules. LGE does not waive, and intends to preserve, the attorney-client privilege, the work-product privilege, and every other applicable privilege or protection with respect to each and every document protected by such a privilege or protection. Nearly all of the documents created by LGE or its counsel, or received from LGE's insurance company, after September 14, 2005 fall within the attorney-client and/or work product privileges and are not discoverable. The burden or expense of identifying and conducting a privilege review of all of the post-9/14/05 documents and of listing them individually in a privilege log outweighs the likely benefit of the exercise. In addition, to the extent that those post-9/14/05 documents may contain non-privileged discoverable information, most or all of that information could be obtained through other means that would be more convenient, less burdensome or less expensive. Nevertheless, without waiving these objections relating to privilege, LGE is in the process of reviewing the post-9/14/05 documents and intends to produce any such documents that are discoverable and to prepare and serve a more detailed description of the documents that are withheld from production on the ground of privilege.

5. LGE objects to the Request to the extent it purports to require LGE to produce copies of plaintiff's pre-litigation demand and of items that have been served in this litigation by plaintiff or defendant Woodley. Plaintiff is already in possession of those documents.

6. LGE objects to the Request to the extent it exceeds the requirements imposed by applicable court rules.

7. LGE incorporates the foregoing general objections into the following responses to each paragraph of the Request, and into each and every amendment, supplement, or modification to such responses hereinafter provided to the Request. LGE does not intend to waive any general objection.

SPECIFIC RESPONSES AND OBJECTIONS

REQUEST NO. 1: Each and every document reviewed by the internal audit team (involving between four and ten individuals, depending on the audit stage), which audited the accounts of Leavitt Group of Albuquerque, as disclosed in the September 29, 2005 letter from Dane O. Leavitt to President Mark Chino and John Wheeler, Esquire (hereinafter "the audit").

RESPONSE TO REQUEST NO. 1: *See* the General Objections. LGE also objects to Request No. 1 as being vague, ambiguous, overbroad and unduly burdensome. Without waiving the aforementioned objections, LGE is producing the non-privileged documents pertaining to plaintiff or one of its affiliated entities that were reviewed by the internal audit team as part of its audit of accounts of plaintiff or its affiliated entities. *See* (a) Documents L 001 – L 270, photocopies of which are being mailed today from Cedar City, Utah to counsel of record for plaintiff and defendant Woodley, and (b) the boxes of original LGA files that will be produced at Miller Stratvert at a mutually convenient time for review and copying (the "Original LGA Files"). LGE will supplement this response following completion of its aforementioned review of post-9/14/05 documents.

REQUEST NO. 2: Each and every document relating in any manner and/or to any degree to the instructions and/or suggestions provided to the audit team, and/or any member thereof.

RESPONSE TO REQUEST NO. 2: *See the General Objections.* LGE also objects to Request No. 2 as being vague, ambiguous, overbroad and unduly burdensome. Without waiving the aforementioned objections, LGE is producing Documents L 001 – L 270 and the Original LGA Files and will supplement this response following completion of its aforementioned review of post-9/14/05 documents.

REQUEST NO. 3: Each and every document relating in any manner and/or to any degree to the scope of the audit to be performed, including any limitations – actual or potential – in the scope.

RESPONSE TO REQUEST NO. 3: *See the General Objections.* LGE also objects to Request No. 3 as being vague, ambiguous, overbroad and unduly burdensome. Without waiving the aforementioned objections, LGE is producing Documents L 001 – L 270 and the Original LGA Files and will supplement this response following completion of its aforementioned review of post-9/14/05 documents.

REQUEST NO. 4: Each and every document relating in any manner and/or to any degree to the goals and/or possible goals of the audit.

RESPONSE TO REQUEST NO. 4: *See the General Objections.* LGE also objects to Request No. 4 as being vague, ambiguous, overbroad and unduly burdensome. Without waiving the aforementioned objections, LGE is producing Documents L 001 – L 270 and the Original LGA Files and will supplement this response following completion of its aforementioned review of post-9/14/05 documents.

REQUEST NO. 5: Each and every document suggesting in any manner and/or to any degree goals that were and/or may be beyond the scope of the audit.

RESPONSE TO REQUEST NO. 5: *See the General Objections.* LGE also objects to Request No. 5 as being vague, ambiguous, overbroad and unduly burdensome. Without waiving