

**CAUSE NO. 05-11-17388-CV**

**VELNON, L.L.C.**  
**Plaintiff,**

**vs.**

**UNKNOWN HEIRS OF,**  
**ELIZABETH WARREN, ET AL**  
**Defendants.**

\* **THE DISTRICT COURT OF**  
\*  
\*  
\* **ROBERTSON COUNTY, TEXAS**  
\*  
\*  
\* **82<sup>nd</sup> JUDICIAL DISTRICT**

**ORAL DEPOSITION OF**  
**JAMES H. MCCULLOUGH**  
**JUNE 29, 2007**

**LAURA BAILEY, CSR 4475**

**COPY**

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**COPY**

1 CAUSE NO. 05-11-17388-CV  
2 VELNON, L.L.C. ) IN THE DISTRICT COURT  
Plaintiff, )  
3 )  
vs. ) ROBERTSON COUNTY, TEXAS  
4 )  
UNKNOWN HEIRS OF )  
5 ELIZABETH WARREN, ET AL., )  
Defendants. ) 82ND JUDICIAL DISTRICT

6

7

8

ORAL DEPOSITION

9

JAMES H. MCCULLOUGH

10

June 29, 2007

11

12 ORAL DEPOSITION OF JAMES H. MCCULLOUGH, produced as  
13 a witness at the instance of the Defendant and duly  
14 sworn, was taken in the above-styled and numbered cause  
15 on June 29, 2007, from 9:39 a.m. to 12:47 p.m., before  
16 Laura A. Bailey, Certified Shorthand Reporter in and for  
17 the State of Texas, reported by computerized stenotype  
18 machine at the offices of A AA Werlinger & Associates,  
19 1716 Briarcrest Drive #600, Bryan, Texas 77802, pursuant  
20 to the Texas Rules of Civil Procedure and the provisions  
21 stated on the record or attached hereto.

22

23

24

25

June 29, 2007

(979) 774-4000

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Firm Number: 328

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1

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25

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1 JAMES H. MCCULLOUGH,  
2 having been first duly sworn, testified as follows:

3 EXAMINATION

4 BY MS. VORPAHL:

5 Q. Okay. Will you state your name for the record  
6 please, sir.

7 A. James H. McCullough.

8 Q. Mr. McCullough, my name is Joanne Vorpahl. You and I  
9 met at Mr. Leamon's disposition; is that right?

10 A. Yes, sir.

11 Q. That's the first time you and I had ever met,  
12 correct?

13 A. Yes.

14 Q. You are a licensed attorney?

15 A. I am.

16 Q. You have attended depositions?

17 A. I have.

18 Q. So you understand the rules of the game, the rules  
19 that sort of govern why we are here and what we're going to  
20 do?

21 A. I do.

22 Q. Okay. If you don't understand one of my questions,  
23 will you ask me to repeat it or rephrase it?

24 A. I will.

25 Q. Great. Tell me a little bit about your background.

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1 If you will, please, tell met where you grew up and a little  
2 bit about your educational background, bringing me through the  
3 current time, if you can.

4 A. I grew up in Robertson County and went to the  
5 University of Texas, undergraduate, have a bachelor's degree,  
6 from there went to the University of Texas Law School,  
7 graduated from there, moved back to Robertson County in about  
8 19 -- from law school in about 1980.

9 Q. And have been practicing law in Robertson County  
10 since then?

11 A. Since January 14, 1980.

12 Q. Are you board-certified in any specialty?

13 A. I am not.

14 Q. Have you ever sat for a board specialization  
15 certification?

16 A. I have not.

17 Q. Have you ever practiced law with the judge in this  
18 case?

19 A. I have not.

20 Q. All right. When was -- when was Deminimus  
21 Management, L.L.C., formed, if you recall?

22 A. I think it's about '04.

23 Q. And for what purpose was it formed?

24 A. For whatever purposes that the limited liabilities  
25 can be formed, to be utilized for whatever matter that it can

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1 be utilized.

2 Q. So there was no specific purpose for which it was  
3 formed?

4 A. What do you mean by "specific purpose"? I -- the  
5 first thing it did was acquire some property that ultimately  
6 was condemned, if that's what you are asking.

7 Q. Okay. Who owned Deminimus Management when it was  
8 formed?

9 A. Members are myself and Bryan F. Russ, Jr.

10 Q. And that has been the same since the time Deminimus  
11 Management was formed?

12 A. Yes.

13 Q. All right. If I refer to it as "Deminimus," you will  
14 understand what I am talking about?

15 A. Yes.

16 Q. Who prepared the -- the special warranty deed from  
17 Deminimus to Velnon?

18 A. I did.

19 Q. And when did you prepare that?

20 A. Probably about the time it's dated. It could have  
21 been some days before, but -- I can't give you a specific  
22 date. I can tell you the date from looking at the deed.

23 Q. From what source did Deminimus derive its title?

24 A. Explain what you mean by that.

25 Q. Well, you do a lot of real estate work, don't you?

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1 A. I do.

2 Q. What interest did Deminimus have, and how did it  
3 obtain that interest?

4 A. Prior to the execution of the deed, Deminimus didn't  
5 own any interest.

6 MS. VORPAHL: Is it okay if I have labeled my  
7 own exhibits? Will this be all right?

8 COURT REPORTER: (Moving head up and down)

9 Q. (BY MS. VORPAHL) Let me show you what's been marked  
10 as Defendant's Exhibit No. 1.

11 A. Okay.

12 Q. This is the Deminimus deed to Velnon, right?

13 A. Correct.

14 Q. And you have prepared this deed, Defendant's Exhibit  
15 1?

16 A. I did.

17 Q. And Deminimus owned nothing that it conveys at the  
18 time that you drafted this deed and prepared this deed?

19 A. Nothing in this property described therein.

20 Q. All right. So Deminimus purports conveyance  
21 "undivided 90 percent of the undivided one-half interest in  
22 and to all of the oil royalty, gas royalty, royalty in  
23 casinghead gas, gasoline, and royalty in other minerals in and  
24 under and that may be produced and mined that was reserved to  
25 Jesse A. Warren and Elizabeth Warren in a deed from Jesse A.

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1 Warren and Elizabeth Warren to J.F. Morgan dated March 6,  
2 1951," recordation information, "said royalty out of  
3 156.7 acres Stephen H. Eaton Survey A-10, Robertson County,  
4 Texas." And it's your testimony that Deminimus had had no  
5 interest in oil royalty, gas royalty, royalty in casinghead  
6 gas, gasoline, and other minerals in this tract?

7 A. That's correct.

8 Q. Why did you prepare this deed?

9 A. To have a deed from Deminimus Management, L.L.C., to  
10 Velnon, L.L.C.

11 Q. Any other reason you prepared this deed?

12 A. Prepared it to do what it -- to prepare the deed. I  
13 mean -- I'm not sure I understand what you are asking.

14 Q. What did this deed purport to do?

15 A. It's a -- purports to be a conveyance of the property  
16 described.

17 Q. From Deminimus to Velnon?

18 A. Correct.

19 Q. And Deminimus owned no interest in the property that  
20 it was conveying?

21 A. That's correct.

22 Q. Who owned Velnon, L.L.C.?

23 A. Velnon, L.L.C., was a limited liability company. The  
24 members are myself and Bryan F. Russ, Jr.

25 Q. So the same -- the exact same people that owned

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1       Deminimus owned Velnon?

2           A.     The same members, basically.

3           Q.     You and Bryan Russ owned Deminimus, and you and Bryan  
4       Russ owned Velnon?

5           A.     That's correct.

6           Q.     And you prepared Defendant's Exhibit 1?

7           A.     That's correct.

8           Q.     Who signed Defendant's Exhibit 1 on behalf of  
9       Deminimus?

10          A.     Bryan F. Russ, Jr.

11          Q.     And you recognize his signature on this document?

12          A.     I do.

13          Q.     Who filed Defendant's Exhibit 1 of record in the real  
14       property records?

15          A.     I probably did.

16          Q.     And you knew when the deed was prepared that  
17       Deminimus had no interest in the royalty to convey to Velnon?

18                   MR. DICKSON:  Objection, repetitive, asked and  
19       answered.

20          Q.     (BY MS. VORPAHL)  You can answer the question.

21          A.     Tell me again what the question --

22          Q.     You knew when the deed was prepared that Deminimus  
23       had no interest in the royalty that it purported to convey in  
24       Defendant's Exhibit 1?

25          A.     That is correct.

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1 Q. And you knew when Bryan Russ signed Defendant's  
2 Exhibit 1 that Deminimus had no interest in the royalty that  
3 it purported to convey to Velnon by Defendant's Exhibit 1?

4 A. That's correct.

5 Q. And you knew when you recorded Defendant's Exhibit 1  
6 in the real property records of Robertson County, Texas, that  
7 Deminimus had no interest in the royalty interest that  
8 Defendant's Exhibit 1 purported to convey to Velnon?

9 A. That's correct.

10 Q. What did Velnon pay Deminimus for the purported  
11 transfer?

12 A. I don't know that it paid anything.

13 Q. Well, isn't it true that it paid nothing?

14 A. I don't recall it paying anything, so that's probably  
15 correct.

16 Q. Did you discuss with Bryan Russ, Jr., the fact that  
17 Deminimus had no interest to convey to Velnon by virtue  
18 Defendant's Exhibit 1?

19 A. I don't know that I did or not.

20 Q. What is the purpose of a deed?

21 A. One purpose is to convey property.

22 Q. It evidenced the transfer of ownership?

23 A. It can.

24 Q. What are the other purposes?

25 A. To place things of record.

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1 Q. That would be the purpose of recording it, right?

2 A. But you can't record a deed without having a deed.

3 Q. All right. So we said one of the purposes of a deed  
4 would be that it evidenced transfer of ownership?

5 A. Right.

6 Q. Another purpose you said of a deed would be that it  
7 puts the world on notice of the transfer of an ownership?

8 A. Or it can put the world on notice of a claim of the  
9 grantee. It doesn't necessarily have to convey what it  
10 purports to convey, or -- there are many -- various reasons  
11 for deeds, to evidence --

12 Q. Well, tell me the reasons.

13 A. I don't know that I can tell you all the reasons.

14 Q. All right. Well, tell me the reason that you filed  
15 of record in Robertson County Defendant's Exhibit 1?

16 A. It was to record this deed from Deminimus Management,  
17 L.L.C., to Velnon, L.L.C.

18 Q. But my question is: Why did you record this deed  
19 from Deminimus Management, L.L.C., to Velnon, L.L.C.,  
20 Defendant's Exhibit 1?

21 A. So that it would be recorded.

22 Q. Is that your entire answer?

23 A. As I understand your question, yeah.

24 Q. All right. Let me ask my question again to make sure  
25 you understand it. Why did you go to the Robertson County

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1 courthouse and record Defendant's Exhibit 1?

2 A. There's no notice of it without that.

3 Q. Did Deminimus have a claim to the royalty interest  
4 that it purported to transfer?

5 A. No.

6 Q. So what is it that you were trying to give notice of?

7 A. Once it's filed, Velnon has a claim.

8 Q. So it's your testimony that Velnon had a claim to the  
9 royalty interest?

10 A. That's the beginning of a claim, yes.

11 Q. And did Velnon own the royalty interest that is  
12 addressed in Defendant's Exhibit 1?

13 A. It's -- I don't know what you mean by "own." It has  
14 a claim.

15 Q. So your view as a -- as a licensed attorney is that  
16 Defendant's Exhibit 1 gave Velnon a claim to the royalty  
17 interest covered by the exhibit?

18 A. I think it does give Velnon a claim to the interest  
19 described in the property.

20 Q. Even though the owners of Deminimus and Velnon are  
21 the same people?

22 A. Yes.

23 Q. And even though the owners of Deminimus and Velnon  
24 both know that Deminimus had no claim to the property?

25 A. Yes.

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1 Q. But you knew at the time that you prepared  
2 Defendant's Exhibit 1 that Deminimus had no claim to the  
3 property.

4 MR. DICKSON: Objection, repetitive, asked and  
5 answered.

6 A. Yes.

7 Q. (BY MS. VORPAHL) And you knew at the time that you  
8 filed Defendant's Exhibit 1 in the real property records of  
9 Robertson County that Deminimus had no claim to the property  
10 that it purported to convey?

11 MR. DICKSON: Objection, repetitive, asked and  
12 answered.

13 A. Yes.

14 Q. (BY MS. VORPAHL) And Bryan Russ knew those same  
15 facts --

16 MR. DICKSON: Objection.

17 Q. (BY MS. VORPAHL) -- at the time he signed  
18 Defendant's Exhibit 1?

19 A. I don't know whether he did or not.

20 MR. DICKSON: Objection, repetitive, asked and  
21 answered.

22 Q. (BY MS. VORPAHL) You had never told Deminimus  
23 Management -- you had never told Bryan Russ that Deminimus  
24 Management did not own a royalty interest in the property?

25 A. I don't know if I did or not.

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1 Q. But you knew it?

2 A. I did.

3 Q. Have there ever been any other owners or shareholders  
4 in Velnon besides you and Bryan Russ?

5 A. The only members of Velnon are Bryan F. Russ, Jr.,  
6 and myself.

7 Q. When did you and Mr. Russ decide to file the lawsuits  
8 that we're on, styled Velnon versus Unknown Heirs of Elizabeth  
9 Warren, Et Al?

10 A. I assume about the time it was filed.

11 Q. So within a day or so when it was filed is your  
12 testimony?

13 A. What's the file -- what's the file date?

14 MR. FLATTEN: November of --

15 MR. WILSHIRE: November 22nd.

16 Q. (BY MS. VORPAHL) The lawsuit is filed November 22nd  
17 of 2005. But let me go ahead and mark this as Defendant's  
18 Exhibit 2, and I'll represent to you this is a copy of the  
19 case file.

20 A. Do you want me to look through it?

21 Q. No, you don't need to; but if you could answer my  
22 question, that would be great. And my question was: When did  
23 you and Bryan Russ, on behalf of Velnon, decide to file this  
24 lawsuit?

25 A. Sometime in November of '05, I guess. It's dated

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1 November 22nd, '05.

2 Q. And what was your purpose in filing the lawsuit?

3 A. To seek a receivership of the royalties and  
4 declaratory judgment.

5 Q. When did you first learn of the royalty interest at  
6 issue?

7 A. Probably either during the leasing of the acreage,  
8 the 550-something acres of Travis Morgan, or after it was  
9 leased. I don't know exactly the time frame of when it was --  
10 during the leasing or after. What's the date of the lease?  
11 November 8th?

12 Q. Of 2005, that's right. So you learned about -- about  
13 this property on or about November 8th of 2005 and filed a  
14 lawsuit on or about November 22nd of 2005?

15 A. I don't know that -- the lawsuit was filed on  
16 November 22nd, 2005. My -- my best guess, best estimate, was  
17 it was sometime in November.

18 Q. And how did you learn of it, of the property, the  
19 royalty interest?

20 A. As I recall, it was from the lease hound, lease guy  
21 that was leasing this property.

22 Q. Was that the person acting on behalf of Leor?

23 A. He was a lease person who was leasing for Leor. I  
24 don't know that he's works directly for Leor.

25 Q. So you don't know whether he's an employee of Leor or

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1 some kind of contractor?

2 A. Right, but he was a person who had come to the  
3 Morgans to try to get an oil and gas lease in favor of Leor.

4 Q. Did you deal with the lease hound, or did Mr. Morgan  
5 come and talk to you? How did you learn of it?

6 A. From the lease hound.

7 Q. Did you already -- were you representing Mr. Morgan?

8 A. Yes.

9 Q. All right. And you represented Mr. Morgan in  
10 entering into an oil-and-gas lease with Leor Energy covering  
11 the 552 plus or minus acres?

12 A. Yes.

13 Q. And that's what we've marked as Defendant's Exhibit

14 3.

15 A. Okay.

16 Q. Is that accurate, that this is the lease that you --  
17 that you reviewed as counsel for Travis and Alma Morgan?

18 A. And it's accurate except the amount of royalties has  
19 been redone.

20 Q. And what is the amount of royalty?

21 MR. DICKSON: Objection, that's attorney/client  
22 privilege between Mrs. Morgan and my client, and we've  
23 provided the lease with that redacted earlier with the express  
24 permission of Miss Morgan if we redacted the percentage, so  
25 I'm going to object to that question and instruct you not to

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1 answer that.

2 MR. WILSHIRE: Excuse me. David, with all due  
3 respect, I would presume that Leor and Alma Morgan know what  
4 that royalty is; and how that could possibly fall within the  
5 attorney/client privilege escapes me.

6 MR. DICKSON: Well, I'm going to stay with it;  
7 but I will agree -- I will rethink it; and if I'm wrong, I  
8 will provide that information.

9 Q. (BY MS. VORPAHL) In the lawsuit that you filed,  
10 Defendant's Exhibit 2, the final result was that Flare  
11 Royalties purchased from the receiver, Nester Leamon, whatever  
12 the receiver's interest was in the royalty interest at issue;  
13 is that right?

14 A. Flare Royalties, L.P., purchased one-half of the  
15 royalties under 156.7 acres in this -- I think it's the  
16 Stephen Eaton survey.

17 Q. Is that your position --

18 A. Yes.

19 Q. -- that Flare Royalties owns one-half of the  
20 royalties as we sit here today?

21 A. It does.

22 Q. And who owns Flare Royalties, sir?

23 A. Flare Royalties, L.P., is a Texas limited partnership  
24 owned by a general partner, Flare Royalties General Partner,  
25 L.L.C., and Bryan F. Russ, Jr., as a limited partner and

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1 myself as a limited partner.

2 Q. And who owns the general partnership?

3 A. The general partnership is a limited liability  
4 company. It has two members, myself and Bryan Russ, Jr..

5 Q. And so Flare Royalties is owned by you and Bryan  
6 Russ, Jr.?

7 A. No. Flare Royalties is owned by a general partner  
8 named Flare Royalties General Partner, L.L.C., with Bryan F.  
9 Russ as a limited partner and myself as a limited partner.

10 Q. Let me go at this a different way. Is there any  
11 other person or entity besides the general partnership that  
12 you and Mr. Russ own and the limited partners, who are you and  
13 Mr. Russ, who own any interest at all in Flare Royalties?

14 A. No.

15 Q. When did you first learn that there were funds  
16 suspended at EnCana Oil & Gas attributable to the royalty  
17 interests that we're talking about here?

18 A. When they notified me, I guess.

19 Q. Well, when was that?

20 A. March or April, probably, of this year. I'm not sure  
21 of the exact date.

22 Q. March or April of 2007?

23 A. Sometime in 2007. I don't know the exact date.

24 Q. And when did you first receive the first payments  
25 from EnCana Oil & Gas attributable to this royalty interest?

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1 A. In 2006, I believe.

2 Q. When in 2006 did you receive the first payments from  
3 EnCana attributable to this royalty interest?

4 A. Probably October, late 2006, if I recall.

5 Q. And how much have you received from EnCana Oil & Gas  
6 on account of this royalty interest?

7 A. EnCana has paid Flare Royalties, L.P., about a little  
8 over a million dollars but has requested over 600,000 of that  
9 back.

10 Q. When did EnCana make the request for over \$600,000 of  
11 the money it had paid on account of this royalty interest  
12 back?

13 A. About a month ago, I think.

14 Q. Does Flare intend to return that money to EnCana?

15 A. I don't know.

16 Q. Well, who will make that decision?

17 A. It's general partner.

18 Q. That would be you and Mr. Russ, as the owners of the  
19 general partner?

20 A. We are the members of the general partner.

21 Q. Have you discussed with Mr. Russ whether you are  
22 going to turn that money back to EnCana?

23 A. Probably.

24 Q. Tell me about those discussions you've had with  
25 Mr. Russ about EnCana's demand for return of over \$600,000 of

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1 the million dollars it's paid you. Tell me about those  
2 conversations.

3 A. I think they are covered by privilege.

4 Q. And why would they be covered by privilege, sir?

5 A. By attorney/client privilege.

6 Q. Is Mr. Russ your attorney?

7 A. He is on occasion, yes.

8 Q. Well, is he on this occasion your attorney with  
9 regard to the \$600,000 that EnCana has requested back from  
10 Flare Royalties?

11 A. I need to discuss it with my lawyer.

12 Q. Well, why don't we take a break; and you discuss it  
13 with your lawyer and decide whether or not Mr. Russ is  
14 representing you on that matter.

15 (Break taken from 10:03 a.m. to 10:22 a.m.)

16 MS. VORPAHL: Okay. Will you read back the last  
17 question and discussion.

18 (The record was read as requested.)

19 MR. DICKSON: For the record, I just want to  
20 object, based on attorney-client privilege. The discussion  
21 that we had during the break between my clients and I revealed  
22 to me that on occasion, and generally over time, Mr. Russ has  
23 represented Mr. McCullough and his family. Mr. McCullough, in  
24 turn, has represented Mr. Russ and his family. What I  
25 ascertained during my conversation was that when they would

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1 talk, there's an expectation of privacy and confidentiality,  
2 as protected by the attorney/client privilege. Now, I want to  
3 make that objection for the record to explain our position  
4 here; but I'm going to go ahead and tell the client to try to  
5 answer the question.

6 MS. VORPAHL: Let me make sure I understand your  
7 objection. Is it that they enjoyed an attorney/client  
8 privilege or that there was an expectation of privacy, like  
9 that of an attorney/client privilege?

10 MR. DICKSON: That they enjoyed an  
11 attorney-client privilege.

12 Q. (BY MS. VORPAHL) Okay. I understand your lawyer has  
13 told you to answer the question.

14 A. Which question?

15 MS. VORPAHL: Do you want to read it back?

16 (The record was read as requested.)

17 A. Mr. Dickson represents me, but conversations between  
18 myself and Mr. Russ, I believe, are also covered by  
19 attorney/client privilege.

20 Q. I understand your lawyer has authorized you to answer  
21 questions with regard to the conversations that you've had  
22 with Mr. Russ, so tell me, if you will, please, what  
23 conversations you've had with Mr. Russ regarding EnCana's  
24 demand for return of over \$600,000 of the money it's paid to  
25 you.

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1           A.    The best I can tell you -- can answer the question,  
2    based on our privileges, is that we've had discussions and  
3    that we have not made a decision as to what to do about that,  
4    whether to pay money back or not.

5           Q.    Well, what discussions have you had? And if you  
6    haven't made a decision, surely you've discussed the pros and  
7    cons of returning or not returning the money?

8           A.    I think it's protected by attorney/client privilege.

9                   MR. DICKSON: Objection, attorney/client  
10   privilege.

11                  MS. VORPAHL: And you are instructing the  
12   witness not to answer?

13                  MR. DICKSON: Yes.

14           Q.    (BY MS. VORPAHL) So as to the issue of EnCana's  
15   demand for return of over \$600,000 of the million dollars that  
16   Flare Royalties has been paid, it's your sworn testimony that  
17   Mr. Russ represents you in that matter?

18           A.    It's my testimony that I have an attorney/client  
19   privilege with Mr. Russ in that matter.

20           Q.    And that's because he served as your attorney?

21                  MR. WILSHIRE: Objection, nonresponsiveness.

22           A.    Yes.

23           Q.    (BY MS. VORPAHL) All right.

24           A.    He's not my only lawyer; but yes, he is the lawyer  
25   for me in that regard.

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1 Q. And so is it likewise your testimony that, with  
2 regard to that same matter, whether -- EnCana's demand and  
3 whether Flare is going to return the over \$600,000 that EnCana  
4 has demanded, you represent Mr. Russ?

5 A. I think -- as I understand, he has an expectation of  
6 the conversations between he and I are covered by  
7 attorney/client privilege or seeking advice as lawyers.

8 Q. Objection, nonresponsive.

9 MR. WILSHIRE: Objection, nonresponsive.

10 Q. (BY MS. VORPAHL) The question is: Do you represent  
11 Mr. Bryan Russ, Jr., with regard to EnCana's demand for return  
12 of money?

13 A. I believe, as regards to those conversations between  
14 he and I regarding that matter, that I am his lawyer, too.

15 Q. All right. What other matters that have to do with  
16 the lawsuit that Velnon filed against the unknown heirs of  
17 Elizabeth Warren do you represent Mr. Russ in?

18 A. I don't know how to answer that, other than you have  
19 to -- you're going to have to ask me questions about what you  
20 are talking about and me answer them. If I've got matters  
21 that are covered by attorney/client privilege, I can't  
22 disclose what those matters are.

23 Q. So -- so you'll decide as I ask you about a  
24 substantive area whether or not you served as Bryan Russ,  
25 Jr.'s lawyer in that regard?

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1 A. That's the only way I know how to do it.

2 Q. All right. But certainly with regard to whether or  
3 not you and Mr. Russ, as the -- as the sole beneficial owners  
4 of interest in Flare, certainly as -- as regards Flare's  
5 dispute with EnCana, you serve as Mr. Russ' lawyer and  
6 Mr. Russ serves as your lawyer; and that's your testimony?

7 A. As to the conversations that he and I have had, yes,  
8 I think that's true.

9 Q. Well, as to the conversations you've had, or as to  
10 the dispute with EnCana, or both?

11 A. I think both. Mr. Dickson represents me, also,  
12 but...

13 Q. How about Burlington? When did you first learn that  
14 there were funds suspended at Burlington?

15 A. I don't know.

16 Q. Do you represent Burlington?

17 A. No.

18 Q. Have you ever?

19 A. I don't think so. Not that I recall.

20 Q. Okay. I'm sorry. Did you tell me when you first  
21 learned that there were funds suspended at Burlington  
22 attributable to this royalty interest?

23 A. I don't know. I mean, it would have been after they  
24 started production on the Carleton Unit, but I don't know a  
25 time frame of when it was.

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1 Q. How did you learn that Burlington Resources was  
2 suspending funds transcribe attributable to this royalty  
3 interest?

4 A. I assume because they didn't pay.

5 Q. So you don't recall that anyone ever told you that?

6 A. They probably did, but I can't tell you -- I don't  
7 recall when exactly it was.

8 Q. What has Flare received from Burlington Resources?

9 A. Nothing.

10 Q. Has Flare requested payment from Burlington Resources  
11 attributable to this royalty interest?

12 A. Probably.

13 Q. In writing?

14 A. I suspect so.

15 Q. Who keeps the files for Flare Royalties?

16 A. I do.

17 Q. And where -- where are they kept?

18 A. In my office.

19 Q. Have any of Flare's records been destroyed?

20 A. No.

21 Q. Misplaced?

22 A. Not that I know of.

23 Q. Lost?

24 A. Not that I know of.

25 Q. Secreted?

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1 A. No.

2 Q. How about Velnon? Where are Velnon's corporate  
3 records located?

4 A. My office.

5 Q. Same question. Have any of Velnon's corporate  
6 records been destroyed?

7 A. No.

8 Q. Secreted?

9 A. No.

10 Q. Misplaced?

11 A. Not that I know of.

12 Q. Lost?

13 A. Not that I know of.

14 Q. How about Deminimus' corporate records? Where are  
15 they located?

16 A. My office.

17 Q. Same questions. Have they been destroyed, misplaced,  
18 lost, or secreted?

19 A. No.

20 Q. And you intend to protect and maintain those records  
21 in your office pending a ruling the motion for a new trial?

22 A. I don't have any intention of doing anything  
23 otherwise.

24 Q. How much does -- how much does Burlington Resources  
25 have suspended, if you know?

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1 A. I do not know.

2 Q. All right. But Burlington hasn't paid you anything  
3 on account of the royalty interests at issue?

4 A. They have not.

5 Q. And Burlington hasn't paid Flare anything?

6 A. (Moving head side to side) When you said "me," I  
7 thought you meant "Flare."

8 MS. VORPAHL: All right. That's good. You know  
9 what? It's time we should stop and do this. I should have  
10 done it to begin with. I'm assuming that these gentlemen are  
11 here in their individual capacities and as corporate  
12 representative for each of Deminimus, Velnon, and Flare. Is  
13 that accurate?

14 MR. DICKSON: That's correct. Mr. McCullough,  
15 do you and Mr. Russ understand that?

16 THE WITNESS: I do.

17 Q. (BY MS. VORPAHL) So you are testifying both in your  
18 individual capacity and as the corporate rep. for each of  
19 those three entities.

20 A. Yes.

21 Q. All right.

22 MR. RUSS: I don't consider myself a corporate  
23 rep.

24 MS. VORPAHL: All right. We can deal with that.

25 MR. RUSS: Jim is the corporate rep. I'm just

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1 here individually.

2 A. I'm the one with most of the knowledge about these  
3 entities.

4 Q. All right. All right. And I'm sorry to repeat  
5 myself so many times, but just so the record is clear here:  
6 You are here in your individual capacity and as corporate rep.  
7 for each of Deminimus, Velnon, and Flare?

8 A. Yes.

9 Q. And you're answering -- all of the questions you've  
10 answered to this point are being answered in that regard and  
11 with that understanding?

12 A. Yes.

13 Q. And same with the questions you'll answer from now to  
14 the end of the deposition?

15 A. Yes.

16 Q. All right. You said that Flare had received over a  
17 million dollars from EnCana on account of the royalty  
18 interests here at issue. How much have you, Mr. McCullough,  
19 personally received of that million dollars?

20 A. When do you mean, "personally"?

21 Q. Well, how much has Flare distributed to you? Either  
22 by way of a dividend or by repayment of debt or in any form.

23 A. I need to consult with my lawyer before I answer the  
24 question.

25 Q. Well, you are not entitled to consult with your

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1 lawyer unless it's a matter of privilege?

2 A. It may be.

3 Q. If you are asserting --

4 A. It may be, so that's why I'm consulting with my  
5 lawyer.

6 MS. VORPAHL: All right. Will you note the  
7 time?

8 THE WITNESS: This won't take long.

9 MS. VORPAHL: Will you note the time?

10 (Break taken from 10:35 a.m. to 10:36 a.m.)

11 MR. DICKSON: Would you read the question back,  
12 please.

13 (The record was read as requested.)

14 A. As -- approximately half of the money that Flare  
15 Royalties, L.P., received was distributed to me as a  
16 partner -- a limited partner in that entity.

17 Q. (BY MS. VORPAHL) Tell me, if you can, David, what is  
18 the assertion of privilege is related to there?

19 MR. DICKSON: I didn't.

20 A. We didn't assert a privilege.

21 MR. WILSHIRE: Could you read back his last  
22 answer, please? I didn't hear the last half of it.

23 (The record was read as requested.)

24 Q. (BY MS. VORPAHL) So you've gotten, personally, in  
25 excess of \$500,000?

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1           A.    It was distributed to me as a limited partner and  
2   utilized for various things -- pay debts, pay IRS.

3           Q.    All right. It was paid to you individually?

4           A.    Yes. It had to come to me as a limited partner.

5           Q.    And how much has Mr. Bryan Russ, Jr., received?

6           A.    A like amount.

7           Q.    Does Flare Royalties have -- have any cash currently?

8           A.    Probably has about 4,000 or so dollars in a checking  
9   account.

10          Q.    And why did you leave that money in Flare Royalties?

11          A.    We have a checking account open.

12          Q.    Because that was the minimum amount they would let  
13   you leave?

14          A.    No, the minimum amount is less than that.

15          Q.    Right. Well, what other assets does Flare Royalties  
16   own or claim to own?

17          A.    It has that checking account and royalty interest.

18          Q.    And the royalty interests we're here on?

19          A.    Correct.

20          Q.    Those are the only assets?

21          A.    Correct.

22          Q.    Have you -- have you tried to -- to sell any limited  
23   partnership interests to anybody besides yourself and

24   Mr. Russ?

25          A.    No.

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1 Q. All right. Did you or Mr. Russ pay anything for the  
2 limited partnership interest that you've got?

3 A. Probably some funds to create the entity.

4 Q. Would that have been done by check?

5 A. Probably.

6 Q. And those would be in the file, I'm sure.

7 A. Probably.

8 Q. I asked you a while ago if you had ever represented  
9 Burlington, and I wanted -- I'll show you why. I'm going to  
10 mark something as Defendant's Exhibit 4 and ask you if you've  
11 seen that before. I see that Mr. Russ has pointed to  
12 something on the document for you.

13 A. It says the Designation of Pool Unit T-Bar-X/Carleton  
14 Gas Unit.

15 Q. Is that your signature on the third page in?

16 A. No.

17 Q. It's not your signature?

18 A. No.

19 Q. Do you know who Kelly Krone is?

20 A. I have no clue.

21 Q. You have no idea who Kelly Krone is?

22 A. No.

23 Q. Okay. And so you didn't sign this document?

24 A. No.

25 Q. You didn't authorize somebody to sign this document

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1 on your behalf?

2 A. No.

3 Q. You see the little -- there's a little notation down  
4 below your -- your name, where it's -- where your name is  
5 signed?

6 A. It's not my name.

7 Q. Well, it does say -- your name is James D.  
8 McCullough, right?

9 A. No.

10 Q. Oh, who is this, then?

11 A. I have no idea.

12 Q. Okay. You don't know who James D. McCullough is?

13 A. No. I assume he's the attorney in fact for Broad  
14 G.P., Inc., the sole general partner of Burlington Resources  
15 gas company --

16 Q. Okay.

17 A. -- but I have no idea.

18 Q. All right. That's great. Thank you. This is not  
19 you?

20 A. No.

21 Q. All right. What is your middle initial?

22 A. H.

23 Q. All right.

24 A. Stands for Howard. It's my grandfather's middle  
25 name.

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1 Q. Who is your accountant?

2 A. Who is my accountant? I don't have an accountant.

3 Q. You don't have an accountant?

4 A. No.

5 Q. Who does -- who does accounting work for you and the  
6 businesses that you own?

7 A. We don't have an accountant for those entities. I do  
8 it. Whatever checks are written or whatever it is, I do it.

9 Q. So you do not have a personal accountant?

10 A. I do not.

11 Q. And none of the entities that you're involved with as  
12 an owner has an accountant?

13 A. Flare, Deminimus?

14 Q. I'm talking about any of the entities that you're  
15 involved with; and I would be happy to read you a list, if you  
16 would like.

17 A. Sure.

18 Q. Let's start with Flare, Deminimus, and Velnon. Do  
19 they have accountants?

20 A. No.

21 Q. How about Robertson County Industrial Development  
22 Corporation. Does it have an accountant?

23 A. I don't know.

24 Q. Do you own an interest in Robertson County Industrial  
25 Development Corporation?

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1 A. Not that I know of.

2 Q. You're the registered agent, right?

3 A. I may be.

4 Q. But as far as you know, you have no ownership or

5 beneficial interests in Robertson County Industrial

6 Development Corporation?

7 A. No.

8 Q. How about McCullough Land & Cattle Company, Inc.?

9 A. Yes.

10 Q. You have an ownership interest?

11 A. Yes.

12 Q. All right. And what is your interest in McCullough

13 Land & Cattle Company, Inc.?

14 A. I -- I'm a shareholder.

15 Q. What percentage of the shares of McCullough Land &

16 Cattle Company, Inc., do you own?

17 A. I fail to see the relevance of this.

18 Q. Is that your answer?

19 A. Yeah.

20 MS. VORPAHL: David, I'm entitled to this  
21 information. Relevance is not a good objection. We need to  
22 move this deposition along. I can get this done pretty  
23 quickly, but not unless the witness is going to cooperate.

24 MR. DICKSON: Okay. He's already answered.

25 MS. VORPAHL: By saying he fails to understand

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1 the relevance?

2 MR. DICKSON: Well, that's the response he gave.

3 Let me talk to my client one second in the hall.

4 THE WITNESS: It won't take long.

5 (Break taken from 10:45 a.m. to 10:45 a.m.)

6 MR. DICKSON: Read the last question again.

7 (The record was read as requested.)

8 A. Approximately 16.67 percent.

9 Q. Is that a family corporation?

10 A. It is.

11 Q. All right. Other members of your family own the rest  
12 of it?

13 A. They do.

14 Q. All right. Your immediate family or?

15 A. Yes -- well, let me make sure. What do you mean by  
16 "immediate family"?

17 Q. I mean your children and your wife.

18 A. No.

19 Q. All right. So members of your extended family own  
20 all but the 16-point whatever percentage you said you owned?

21 A. That is correct.

22 Q. All right. LK&P, Limited. Who owns LK&P, Limited?

23 A. My wife and I.

24 Q. What's the purpose of that company?

25 A. It's a limited liability company that has owned

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1 various things at various times, I guess.

2 Q. What does it own right now?

3 A. I don't know if it owns anything right now. I can't  
4 recall anything offhand. It's owned some notes in the past, I  
5 think.

6 Q. Cude Place, L.L.C. Who owns Cude Place, L.L.C.?

7 A. It's a Texas limited liability company owned by  
8 Mackie Lee McCullough and Mable McCullough.

9 Q. And who are Mackie Lee and Mable McCullough?

10 A. They are my parents.

11 Q. You don't have an interest in Cude Place, L.L.C.?

12 A. I do not.

13 Q. Have you ever had an interest in Cude Place, L.L.C.?

14 A. I do not, have not.

15 Q. Torehead, L.L.C. Who owns that?

16 A. It's a Texas limited liability company owned by my  
17 wife and I.

18 Q. Let me go back to Cude Place. What does Cude Place  
19 own?

20 A. Some land, a bank account, maybe vehicles. I'm not  
21 necessarily conversant on all of its assets.

22 Q. All right. You've represented Cude Place from time  
23 to time, right?

24 A. Sure.

25 Q. Torhead [phonetic] L.L.C., who owns that?

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1 A. My wife and I.

2 Q. Oh, that's the one we're talking about. Excuse me.

3 What does Torhead own right now?

4 A. Probably bank accounts, stock.

5 Q. Anything else?

6 A. That's all I recall right now.

7 Q. Macru, L.L.C. -- spelled M-a-c-r-u, all one word --

8 who owns that?

9 A. Bryan F. Russ, Jr. and myself are the members of  
10 the -- that limited liability company.

11 Q. You each own 50 percent?

12 A. That is correct.

13 Q. What does Macru, L.L.C., own?

14 A. Some notes, some real estate.

15 Q. Some notes and some real estate is what Macru,

16 L.L.C., owns?

17 A. Correct.

18 Q. What has it owned in the past?

19 A. It's owned notes and real estate.

20 Q. Okay. When you say "real estate," do you include

21 royalty interests and oil and gas interests in that?

22 A. Yes. It has owned some mineral interests. And does  
23 own some mineral interests.

24 Q. Okay. And Oaks & Diamonds, what is Oaks & Diamonds?

25 A. It's a limited liability company.

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1 Q. Who owns it?

2 A. Bryan F. Russ, Jr. and myself.

3 Q. Macru and Oaks & Diamonds have -- have worked  
4 together in litigation in a fashion similar to Deminimus and  
5 Velnon, working together in the litigation that we're here on;  
6 is that right?

7 A. I don't know that they've worked together.

8 Q. You don't know that?

9 A. I wouldn't describe it that way.

10 Q. So you wouldn't describe Deminimus and Velnon's  
11 relationship as having worked together --

12 A. No.

13 Q. -- with regard to the deed?

14 A. No.

15 Q. You wouldn't. Okay. But you and Bryan Russ own both  
16 Macru and Oaks & Diamonds in 50/50 shares?

17 A. We own membership interests that are 50 percent  
18 membership interests.

19 Q. In each of those two entities?

20 A. That is correct.

21 Q. Just like you do in Deminimus and Velnon?

22 A. That is correct.

23 Q. MacLand, L.L.C. -- M-a-c-L-a-n-d, all one word --  
24 what is that?

25 A. It's a limited liability company.

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1 Q. Who owns it?

2 A. Family members.

3 Q. Not your immediate family, but others?

4 A. Siblings.

5 Q. Your siblings. And what does MacLand, L.L.C., own?

6 A. Real estate. And -- it has a bank account.

7 Q. The 2003 McCullough Family Partnership, L.L.P. -- or

8 L.P. -- excuse me -- that is a family limited partnership?

9 A. It is.

10 Q. Members of your extended family?

11 A. Correct.

12 Q. The April 2004 McCullough Real Estate Manager, L.P.,

13 what is that?

14 A. Tell me again.

15 Q. April 2004 McCullough Real Estate Manager, L.P.

16 A. I don't think there's such an entity.

17 Q. You don't know anything about it?

18 A. There is an April 2004 McCullough Real Estate, L.P.

19 that's also a family entity.

20 Q. Right. I'm going to guess -- but I don't know --

21 that April 2004 McCullough Real Estate Manager, L.P., might be

22 the G.P. to the L.P. that you've just described.

23 A. It's an L.L.C.

24 Q. Okay.

25 A. I think that's the name of the general partner.

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1 Q. All right. Paragon Project Constructors, L.L.C., who  
2 owns that?

3 A. I don't know.

4 Q. Franklin Hospitality, who owns that?

5 A. It's a limited -- is it Franklin Hospitality?

6 Q. L.L.C.?

7 A. It is a L.L.C. It's a limited liability company.

8 The members are Bryan F. Russ, Jr.; Jerry Baxter; and myself.

9 Q. Who is Jerry Baxter?

10 A. He's a man who lives in Franklin.

11 Q. And Franklin Hospitality Partnership, L.P., is a  
12 limited partnership that has Franklin Hospitality, L.L.C., as  
13 its general partner?

14 A. That's correct.

15 Q. Owned by the same three individuals?

16 A. Franklin Hospitality Partnership, L.P.?

17 Q. Yes.

18 A. It's owned by Franklin Hospitality, L.L.C., as the  
19 general partner and Jerry Baxter, Bryan Russ, and myself as  
20 limited partners.

21 Q. Trocki Pipeline Corridor, L.L.C., who owns that?

22 T-r-o-c-k-i.

23 A. I think it's owned by a trust.

24 Q. Do you have any interest in the trust that owns it?

25 A. Yeah, about a third.

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1 Q. What trust owns it?

2 A. It's just a trust.

3 Q. Who are the other beneficiaries of the trust?

4 A. Bryan F. Russ, Jr., and Stephen Boykin.

5 Q. Who is Stephen Boykin?

6 A. A man who lives in Franklin.

7 Q. Hearne Hospitality, L.L.C.

8 A. Yeah?

9 Q. Who owns that?

10 A. The Texas limited liability company owned by Bryan F.

11 Russ, Jr.; Jerry Baxter; and myself.

12 Q. What does Hearne Hospitality own?

13 A. Owns some land and bank account and a franchise

14 license with Holiday Inn Express.

15 Q. What is ReDel Land, L.L.C.? It's R-e capital D-e-l.

16 A. It's a limited liability company.

17 Q. And who are the owners?

18 A. Myself and my siblings.

19 Q. What does it own?

20 A. Some real estate. And it probably has a checking

21 account, but I'm not sure about it -- yeah, I think it does;

22 it has some bank accounts.

23 Q. Are there any other companies that you own an

24 interest in that -- that you can think of that I did not list?

25 A. Not that I recall.

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1 Q. And do you do the accounting for all of the entities  
2 that we discussed that you indicated you had an ownership  
3 interest in?

4 A. To the -- to the extent you're talking about  
5 preparing tax returns, for example, I think I have for all of  
6 those that you are describing, in the past.

7 Q. You have at one or time or another prepared their tax  
8 returns, or you do it on an annual basis?

9 A. I think -- I'm going through your list of names.

10 Q. Well, I'll be happy to give you a list to take a look  
11 at.

12 A. Sure. Thank you. Of these that I -- that I  
13 testified about that I have an interest in, I think I've  
14 prepared tax returns on those. There are some you have listed  
15 in here that I don't have anything to do with it.

16 Q. And you testified you didn't have anything to do with  
17 those, right. And have all the entities that you filed tax  
18 returns for actually filed tax returns for each year that they  
19 were in existence?

20 A. If they -- probably not. There are probably some of  
21 them that did not have any activity in a year; and therefore,  
22 they would not have filed a tax return.

23 Q. It's your view that they wouldn't have been obligated  
24 to file a return in that year?

25 A. That's correct.

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1 Q. So for each year they were obtained to file a return,  
2 it's your testimony that, as to the entities that you have an  
3 interest in that we just discussed, you prepared the tax  
4 returns?

5 A. I think that's correct.

6 Q. You would have signed those tax returns?

7 A. I don't know that I would have signed them. Some  
8 other person in the entity may have signed them, but -- I  
9 can't recall any one that I would not have prepared.

10 Q. And you do all of your own personal accounting work?

11 A. That is correct.

12 Q. You do not have an accountant or a bookkeeper that  
13 you rely on for your personal work?

14 A. That's correct.

15 Q. How about the law firm? Who does accounting work for  
16 your law firm?

17 A. If you are -- I'm trying to think of how to describe  
18 that. I'm responsible for preparing the tax return, for  
19 example, and file that. Mr. Palmos at our office keeps  
20 records -- writes down deposits or expenses, or other people  
21 do; but I'm the one who keeps the records.

22 Q. And so there's not an accountant or a bookkeeper who  
23 does work for your law firm?

24 A. There are people in the firm who may make bookkeeping  
25 entries, but there's not a per se bookkeeper.

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1 Q. And those would be employees of your firm that would  
2 make those entries?

3 A. Or partner, yes.

4 Q. Or partners, not some independent contractor --

5 A. That's correct.

6 Q. -- or separate company. What assets has Deminimus  
7 owned?

8 A. I think it's owned a tract of land around Hammond in  
9 Robertson County.

10 Q. Anything else?

11 A. That's all I recall.

12 Q. Does Deminimus still own that tract of land near  
13 Hammond?

14 A. I believe it was condemned by the State.

15 Q. And so Deminimus received money for it instead?

16 A. Yes.

17 Q. Is that the subject of a lawsuit?

18 A. The condemnation?

19 Q. The condemnation.

20 A. Yes.

21 Q. What about Velnon? What assets has Velnon owned?

22 A. A real estate tract in Hammond, which was also  
23 condemned.

24 Q. But a different tract than the one owned by  
25 Deminimus?

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1 A. Yes.

2 Q. All right. What else has Velnon owned?

3 A. It has a claim under that deed.

4 Q. Anything else that Velnon has owned?

5 A. That's all I can recall right now.

6 Q. Now, I think you told me earlier in your deposition  
7 that your law firm, Palmos, Russ, McCullough & Russ, has  
8 represented Travis and Alma Morgan --

9 A. Yes.

10 Q. -- and specifically represented them with regard to  
11 the EnCana lease, which is Defendant's Exhibit 3?

12 A. It's actually a lease to Leor Energy.

13 Q. You're right, and it was assigned to EnCana. So  
14 Defendant's Exhibit 3 is a lease between the Morgans and Leor,  
15 which Leor later assigned to EnCana, right?

16 A. I assume they assigned to EnCana, but I don't know  
17 that I've seen the document that does that.

18 Q. Well, EnCana is who's paid you almost a million  
19 dollars, right?

20 A. EnCana is the operator, but -- I mean, what I  
21 understand is that Leor probably owns half of that and EnCana  
22 half; but like I say, I have not seen a document that I recall  
23 that says that.

24 Q. All right. You've represented the Morgans with  
25 regard to Defendant's Exhibit 3?

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1 A. Yes.

2 Q. In what other capacities, if any, have you  
3 represented the Morgans?

4 A. I need to discuss the answer to that question with my  
5 lawyer.

6 Q. I'm not asking you for any privileged information.  
7 I'm simply asking you in what other capacities you have  
8 represented Travis and Alma Morgan.

9 A. There are other capacities other than a lawyer?

10 Q. No, other than with regard to Defendant's Exhibit 3.

11 A. Not capacities, but matters.

12 Q. All right. In what other matters? That's fine.

13 A. I need to discuss that with my lawyer, if you want me  
14 to see if I can answer that.

15 Q. What's your difficulty?

16 A. I think it's covered by attorney/client privilege.

17 Q. The other matters you've represented the Morgans is a  
18 matter covered by privilege?

19 A. I think so, yes.

20 Q. Okay. That's your view. Well, let's go on, then.  
21 You understand if I say "your firm," I'm talking about your  
22 law firm, Palmos, Russ, McCullough & Russ?

23 A. Correct.

24 Q. Okay. Your law firm -- well, let me show you this  
25 document. What are we to? Five? I've marked for you

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1 Defendant's Exhibit 5.

2 MR. DICKSON: Thank you.

3 Q. (BY MS. VORPAHL) Do you recognize this document?

4 A. I do.

5 Q. It's entitled Confirmation of Royalties; is that  
6 right?

7 A. Correct.

8 Q. Okay. You did not -- your law firm did not represent  
9 the Morgans with regard to this confirmation of royalties, did  
10 it?

11 A. Yes, we represented them at the time this occurred.

12 Q. Well, I'm asking you whether you represented the  
13 Morgans in connection with this confirmation of royalties, on  
14 this confirmation of royalties. Did you represent the  
15 Morgans? Did you represent -- your law firm represent the  
16 Morgans? Did your law firm represent Flare Royalties, General  
17 Partner; or did it represent both?

18 A. I would think that the Morgans and Flare both -- I  
19 believe we represented them.

20 Q. So your -- your testimony is that, with regard to the  
21 confirmation of royalties, your law firm represented Travis  
22 Morgan, Alma Morgan, Michael Morgan, and Flare Royalties,  
23 General Partner, L.L.C.?

24 A. I think that that would be accurate.

25 Q. This confirmation of royalties was signed August 2nd,

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1 2006; is that right?

2 A. Looks like it, yes.

3 Q. All right. Did you -- well, did you tell the Morgans  
4 that you represented everybody to this transaction?

5 A. I think so.

6 Q. You think you did?

7 A. Uh-huh.

8 Q. Okay. You think you personally did?

9 A. Yes.

10 Q. Okay. Do you recall what they said about that?

11 A. I -- it's covered by attorney/client privilege, what  
12 they told me.

13 Q. All right. So you can't tell me the answer to that;  
14 is that right?

15 A. Right.

16 Q. Okay. Have you represented the Morgans at any time  
17 since August 2, 2006?

18 A. Yes.

19 Q. And in what matters?

20 A. I can't disclose what those matters are.

21 Q. Do you represent the Morgans at the current time?

22 A. I would think so.

23 Q. Is that a "yes" or a "no"?

24 A. I think it's a yes.

25 Q. Okay. So your answer is you represent the Morgans at

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1 the current time?

2 A. Yes.

3 Q. In what matters do you represent the Morgans at the  
4 current time?

5 A. I can't disclose to you what I represent the Morgans  
6 on.

7 Q. Have you represented the Morgans at any time since  
8 August 2nd, 2006, with regard to Defendant's Exhibit 5 or the  
9 issues covered by Defendant's Exhibit 5?

10 A. Yes.

11 Q. Do you at the current time represent the Morgans with  
12 regard to the issues addressed in Defendant's Exhibit 5?

13 A. I think the answer to -- yes.

14 Q. So your answer is yes, not that you think the answer  
15 is yes?

16 A. It's the best way I can answer it, is yes.

17 Q. Have you discussed the confirmation of royalties with  
18 Mr. or Mrs. Morgan since August 2nd of 2006? I'm not asking  
19 for the substance. I'm asking you whether you have discussed  
20 Defendant's Exhibit 5 with Mr. or Mrs. Morgan since August the  
21 2nd of 2006.

22 A. When I've discussed with them is covered by  
23 attorney/client privilege.

24 Q. So it's your view that you cannot answer the question  
25 whether you have discussed Defendant's Exhibit 5 or the

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1 matters covered by Defendant's Exhibit 5 with the Morgans  
2 since August 2nd of 2006?

3 A. It's my position that my -- whether I have talked to  
4 the Morgans and when I have talked to the Morgans and if I  
5 have talked to the Morgans is covered by attorney/client  
6 privilege, my view of it.

7 Q. Do you know if Mr. Russ has discussed Defendant's  
8 Exhibit 5 or the matters covered by Defendant's Exhibit 5 with  
9 the Morgans since August 2 of 2006?

10 A. I don't know.

11 Q. Who is -- as between the two of you, who primarily  
12 represents the Morgans? You?

13 A. I do.

14 Q. You?

15 A. (Moving head up and down)

16 Q. Was that a "yes"?

17 A. Yes.

18 Q. Tell me, if you will, please, the effect of  
19 Defendant's Exhibit 5 that Flare Royalties entered into with  
20 the Morgans -- or let's see if you will agree with this:  
21 Isn't it correct that Defendant's Exhibit 5 -- in Defendant's  
22 Exhibit 5, Flare and Morgans agreed that any royalties paid  
23 pursuant to the Leor Energy lease would be treated as an  
24 entirety, meaning that they would be treated as though they  
25 were attributable to the entire leased property?

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1 A. Yes.

2 Q. All right. And those royalties would be paid to each  
3 separate royalty owner in proportion to the percentage  
4 interest in the entire leased property owned by each such  
5 royalty interest owner?

6 A. That's correct.

7 Q. So what the Morgans received in that agreement was  
8 the assurance that, no matter where any well was drilled, they  
9 would receive the percentage of the royalties that their  
10 interest bore relative to the entire leased property?

11 A. You said "assurance." I don't know that assures it.  
12 It's an agreement to do that.

13 Q. Well, what the Morgans received in Defendant's  
14 Exhibit 5, then, was Flare's agreement that, no matter where  
15 any well was drilled, the Morgans would receive the percentage  
16 of the royalties that their interest bore relative to the  
17 entire leased property?

18 A. I think that's correct.

19 Q. All right. And so if a producing well was drilled on  
20 a portion of the lease in which the Morgans owned only a  
21 50 percent of the royalty, they would nevertheless receive  
22 more than 50 percent?

23 A. That is correct.

24 Q. And likewise, if a producing well was drilled on a  
25 portion of the lease in which they owned a hundred percent of

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1 the royalty, they would receive less than a hundred percent?

2 A. That is correct.

3 Q. And that's actually called an entireties clause?

4 A. That's what I understand it is called, yes.

5 Q. Where did Flare Royalties get the money to give to  
6 the receiver for this royalty interest?

7 A. Borrowed it from State Bank, I believe.

8 Q. What kind of loan documents did you sign in  
9 conjunction with that -- that obligation?

10 A. Note, deed of trust is what I recall. Probably --  
11 there may be collateral loan documents, but those are the  
12 major ones.

13 Q. And in conjunction with borrowing that money, Flare  
14 Royalties represented to the bank that it would have good  
15 title to the royalty interests?

16 A. It represented whatever the deed of trust says. I  
17 don't know, without looking at it.

18 Q. Well, did you pay attention? You don't have any  
19 recollection of knowing at the time whether Flare Royalties  
20 represented to that lending institution that it would have  
21 good title to the interest that was subject to the deed of  
22 trust?

23 A. I don't know what it -- I don't know what the deed of  
24 trust says, without looking at it.

25 Q. Okay. Who signed the deed of trust?

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1           A..     Probably Mr. Russ, as president; but without looking  
2     at it, I can't tell you for sure.

3           Q..     All right. Do you have to guarantee the debt?

4           A..     Yes.

5           Q..     Who guaranteed the debt?

6           A..     Mr. Russ and I did.

7           Q..     You both did?

8           A..     Yes.

9           Q..     All right. And in the guaranties, did you affirm all  
10    of the facts and representations made by Flare Royalties in  
11    the other documents?

12          A..     I don't know.

13          Q..     Well, would you have been prepared to do that?

14          A..     I -- I don't know.

15          Q..     Just don't know one way or another whether you would  
16    have wanted to say that the representations that Flare  
17    Royalties made to the bank were correct or not?

18          A..     I don't know what those were, without looking at  
19    them.

20          Q..     All right. And you wouldn't be willing to say that  
21    whatever Flare Royalties said to the bank, I'm here to say  
22    that those were true statements?

23          A..     I don't know what those statements are you are  
24    talking about. So without reviewing, I can't answer your  
25    question.

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1 Q. Well, you do some lending work, don't you?

2 A. Yes.

3 Q. What sorts of representations do borrowers typically  
4 make to a bank in exchange for a loan?

5 A. Warrant title.

6 Q. And what that does that mean? Explain to the judge  
7 and jury what it means that they warrant title.

8 A. They warrant the title is good.

9 Q. All right. And so did Flare Royalties warrant title  
10 to the bank?

11 A. Probably. I suspect that's in the deed of trust.

12 Q. All right. And that's a warranty that you and --  
13 well, that you -- you'd also be willing to give to the bank in  
14 exchange for this -- this loan?

15 A. I don't know whether we did or not.

16 Q. I'm not asking whether you did. Is it one that you  
17 would have been willing to give --

18 A. I don't know.

19 Q. -- that Flare Royalties had good title?

20 A. I don't know.

21 MR. DICKSON: Objection, speculation. Go ahead.

22 Q. (BY MS. VORPAHL) All right. You -- you don't  
23 know -- he did answer. Thank you, though. You don't know  
24 whether you would be willing to represent to the bank that  
25 Flare Royalties had good title to the royalty interests that

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1 we are here about?

2 A. I don't know what the deed of trust said, so I -- as  
3 to what I would have done or not done at the time is just  
4 speculation on my part. I may very well have. It may very  
5 well be in the document. I don't know.

6 Q. Would you represent to anybody that Flare Royalties  
7 has good title to this royalty interest?

8 A. I believe that Flare Royalties had a deed that was  
9 valid at the time it took the deed. What you mean by "good  
10 title"? I'm not sure I know.

11 Q. You don't know what the term "good title" means?

12 A. I don't know what -- it can mean a lot of different  
13 things to a lot of different people. It could be insurable  
14 title with a title insurance company. It could be marketable  
15 title. It could be something less than that. So I don't know  
16 how you define that for this transaction.

17 Q. Well, did Flare Royalties have insurable title?

18 A. I don't know. That's up to a title company as to  
19 whether they would insure it.

20 Q. Did it have marketable title?

21 A. I -- I think so, but I'm not -- I've not looked at  
22 the law relating to that as to give you a legal opinion.

23 Q. Okay. And as a lawyer, you don't know what it means  
24 if I say, Does Flare Royalties have good title to this royalty  
25 interest?

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1 A. I don't know exactly what you mean, no.

2 Q. Okay. Do you know generally what I mean?

3 A. Yes. I think so.

4 Q. And then in a general sense, did Flare Royalties good  
5 have good title -- does Flare Royalties have good title to  
6 this royalty interest?

7 A. I think, under some -- under some views of good  
8 title, yes.

9 Q. What views would those be?

10 A. Do you have a deed from a validly appointed receiver,  
11 is consideration paid, monies paid in the registry of the  
12 court.

13 Q. And others would take a contrary view?

14 A. They might. I mean, I --

15 Q. And what would their view be?

16 A. I don't know. You'd have to ask them.

17 Q. You don't have any idea what the contrary view would  
18 be?

19 A. I don't want to speculate what somebody else may  
20 think.

21 Q. All right. But you think that Flare Royalties has  
22 good title to this royalty interest?

23 A. Under the terminology that I'm talking about, yes.

24 Q. And tell me again what terminology that is.

25 A. That it had a validly executed deed, consideration

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1 paid, by a receiver that was duly appointed by the Court.

2 Q. Who chose the receiver?

3 A. The Court.

4 Q. The Court did?

5 A. Appointed the receiver.

6 Q. Okay. And the Court selected Nester Leamon?

7 A. Nester Leamon regularly acts as a receiver, so  
8 that's -- he was appointed.

9 Q. Who did Nester Leamon regularly act as a receiver  
10 for?

11 A. He's acted receiver, I assume, for various people.  
12 He's acted receiver in lawsuits I've been involved in, other  
13 lawyers.

14 Q. What others lawyers has he acted as receiver in  
15 lawsuits for?

16 A. As I recall, he's been in one where Stephen Boykin  
17 was the attorney of record, Bill Youngkin was the attorney of  
18 record. There may be others. I mean, I've seen him act as  
19 receiver on the third floor of the courthouse in Franklin.

20 Q. He's acted as receiver on numerous occasions for you  
21 or companies you own, right?

22 A. He's acted as receiver for the Court in things that  
23 I've been involved in.

24 Q. And it's your sworn testimony that you did not select  
25 Nester Leamon in this cause of action that we're here on?

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1           A.    If you are asking me -- you say "select." I don't  
2   have the authority to select a receiver. The Court has the  
3   authority to select a receiver. Did I prepare orders that had  
4   Nester Leamon's name in them as receiver? Yes. Because from  
5   my understanding, that's who the Court normally appoints.

6           Q.    All right. So you proposed him? Will you agree with  
7   that?

8           A.    It was in the order that I submitted to the Court.

9           Q.    Right. In fact, that brings me to a question. Take  
10   a look at the Court's file, which is Defendant's Exhibit 2;  
11   and if you will, please, take my pen and mark an X on any page  
12   that you or members of your law firm did not prepare in this  
13   file. And we can go off the record for a moment.

14                   (Break taken from 11:17 a.m. to 11:26 a.m.)

15          Q.    Who prepared the pleadings that you've indicated were  
16   prepared in your office out of Defendant's Exhibit 2?

17          A.    I did.

18          Q.    And you've signed the petition in Defendant's Exhibit  
19   2?

20          A.    Yes.

21          Q.    And Bryan Russ, Jr., verified the original petition  
22   that you signed, right?

23          A.    Yes.

24          Q.    In signing the petition in this case, you certified  
25   to the Court that the matters in the pleading were not

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1 presented for an improper purpose?

2 A. That's correct.

3 Q. You certified that the claims and legal contentions  
4 that Velnon made were warranted by existing law or by a  
5 nonfrivolous argument for the extension, modification, or  
6 reversal of existing law?

7 A. I think that's correct.

8 Q. And you represented to the Court that each allegation  
9 or factual contention had evidentiary support?

10 A. I think that's true.

11 Q. And you think that's what you did in the plaintiff's  
12 original petition that is part of Defendant's Exhibit 2?

13 A. I think so.

14 Q. Did Judge Stem know that you and Bryan Russ owned  
15 Deminimus?

16 A. I don't know.

17 Q. Did Judge Stem know that you and Bryan Russ owned  
18 Velnon?

19 A. I don't know.

20 Q. Did Judge Stem know that you and Bryan Russ were the  
21 beneficial owners of Flare Royalties?

22 A. I don't know.

23 Q. You did not tell Judge Stem that you owned an  
24 interest in any of those entities?

25 A. I don't know. I don't know what's necessarily

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1 conversations -- I know that the deeds reflect that they  
2 were -- for example, the deed to Velnon shows that it is  
3 signed by Mr. Russ as president. The offer, I think, from  
4 Flare Royalties is signed by Mr. Russ, as I recall, so that --  
5 I mean, that's part of the record.

6 Q. But you don't know whether Judge Stem knew that you  
7 and Bryan Russ owned all of Velnon, Deminimus, and Flare  
8 Royalties?

9 A. I don't know.

10 Q. And you didn't think it was important to tell Judge  
11 Stem that the same two people that owned Deminimus also owned  
12 Velnon?

13 A. No, I don't think it was important. He may have  
14 already known. Like I said, there was a condemnation suit  
15 with Velnon and Deminimus, so. And I think it was before  
16 this, so he may have already known.

17 Q. Because he knew in that condemnation suit that you  
18 and Bryan Russ were Deminimus and you and Bryan Russ were  
19 Velnon?

20 A. He may. I don't know.

21 Q. You just don't know one way or the other. And among  
22 the representations that you made to Judge Stem in the  
23 plaintiff's original petition, which is marked as DEF 000 --  
24 the entire petition starts at 000466. I've just marked it for  
25 identification, and it is a part of Defendant's Exhibit 2.

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1 You represented to the Court at DEF page 469 that the  
2 plaintiff, Velnon, claims an interest in the royalty property,  
3 the royalty that we've been talking about; is that right?

4 A. Correct.

5 Q. And you represented that the plaintiff's claimed that  
6 interest pursuant to the deed from Deminimus to Velnon?

7 A. Correct.

8 Q. And you prepared that portion of this pleading, as  
9 well as all the rest of the pleadings in this lawsuit, with  
10 the exception of whatever you've marked with an X?

11 A. I think that's correct.

12 Q. So you don't know whether Judge Stem knew or not,  
13 when he signed the order appointing the receiver in this  
14 lawsuit, that both Deminimus and Velnon were owned by you and  
15 Bryan Russ?

16 A. I don't know whether he did or not.

17 Q. You didn't inform him of that fact at any time during  
18 the pendency of a lawsuit?

19 A. I don't know that that's correct, either. I may  
20 have.

21 Q. Did you think it was a fact Judge Stem should have  
22 known?

23 A. I don't know that it mattered.

24 Q. And so you wouldn't know, either, whether Judge Stem  
25 knew when he signed the order appointing the receiver in this

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1 lawsuit that both Deminimus and Velnon were owned by you and  
2 Bryan Russ?

3 A. I don't know. He may very well have known. He may  
4 not. I can't tell you what he knew or didn't know.

5 Q. But you don't think that it was a fact that he should  
6 have known?

7 A. I probably don't.

8 Q. And when Judge Stem signed the order appointing the  
9 receiver in this lawsuit -- sorry. Strike that. Did Judge  
10 Stem know, when he signed the order approving the sale, that  
11 Flare Royalties was owned by you and Bryan Russ?

12 A. I don't know. It -- did have a signature by, I  
13 think, Mr. Russ as an officer; but --

14 Q. But you didn't inform him of that fact?

15 A. I don't know whether I did or not.

16 Q. And you didn't think it was a fact he should have  
17 known?

18 A. No, not really.

19 Q. You knew when you filed your original petition that  
20 Velnon did not have a valid claim to the royalty interest at  
21 issue?

22 A. No, they had a claim.

23 MR. WILSHIRE: I didn't hear his answer.

24 THE WITNESS: I think it had a claim.

25 MR. WILSHIRE: I'm sorry. Just have her read

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1 that back.

2 (The record was read as requested.)

3 Q. (BY MS. VORPAHL) That wasn't my question. You knew  
4 when you filed your original petition that Velnon did not have  
5 a valid claim to the royalty interest as issue?

6 A. I don't agree.

7 Q. So you believe, when you filed -- when you filed your  
8 original petition, that Velnon had a valid claim to the  
9 royalty interest at issue?

10 A. Yes.

11 MR. WILSHIRE: Excuse me, Mr. McCullough.  
12 You'll have to keep your voice up. The coffee pot is --

13 A. Yes.

14 Q. (BY MS. VORPAHL) You represented to the Court that  
15 no person had paid taxes on the royalty interest; is that  
16 right? That's one of the things you represented in the  
17 lawsuit?

18 A. That's correct.

19 Q. What taxes should have been paid?

20 A. Real estate taxes.

21 Q. On the royalty interest?

22 A. Yes.

23 Q. Okay. When -- when should they have been paid?

24 A. From the inception of the severance, in my opinion.

25 Q. Did Deminimus pay those taxes?

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1 A. No.

2 Q. Did Velnon pay those taxes?

3 A. No.

4 Q. Did Flare Royalties pay those taxes?

5 A. No.

6 Q. How much is owed?

7 A. I don't know. There will be monies -- taxes owed  
8 probably this year on whatever the appraisal taxes it at. I  
9 don't know what it is.

10 Q. What's owed for last year?

11 A. None that I know of.

12 Q. What's owed for the year before that?

13 A. None.

14 Q. So 2007 is the first year that there will be taxes  
15 that should be paid on this interest?

16 A. No, I don't agree with that. I think that there is a  
17 taxable interest that should have been taxed at the time of  
18 the severance, as I understand the tax code.

19 Q. Well, yeah, but quantify for me those taxes. They  
20 weren't ever assessed, right?

21 A. No, they were not.

22 Q. Okay. So when you say no person has paid taxes on  
23 that interest, it's because there were no taxes assessed  
24 against the interest, right?

25 A. And because no person or persons rendered the

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1 property for taxes.

2 Q. Well -- but Deminimus didn't render the property for  
3 taxes, right?

4 A. No.

5 Q. Velnon didn't render the property for taxes?

6 A. Probably not.

7 Q. And Flare?

8 A. Probably not.

9 Q. But you don't know whether it did or not? Did you?

10 A. You say --

11 Q. Velnon. Did you render the property for taxes on  
12 behalf of Velnon?

13 A. No.

14 Q. Did Mr. Russ, to your knowledge?

15 A. No.

16 Q. Did anyone else, to your knowledge?

17 A. For Velnon?

18 Q. Yes.

19 A. No.

20 Q. And Flare, has fair rendered the property for taxes?

21 A. Yes.

22 Q. And how did it do that? How did it accomplish that?

23 A. By letter to the appraisal district.

24 Q. And that would be in Flare Royalties' file?

25 A. Yes.

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1 Q. And what was the date of that?

2 A. I don't know.

3 Q. All right.

4 A. I assume it's after -- I mean, it would have been  
5 after Flare Royalties purchased the property.

6 Q. On how many prior occasions have you sought to  
7 establish ownership to property in the fashion that we've  
8 described here?

9 A. What do you mean by "the fashion" described?

10 Q. A deed created by one that you acknowledge has no  
11 interest to another that is in common or partially common  
12 ownership with the grantee and then the -- and then the filing  
13 of a lawsuit and request for appointment of receivership. On  
14 how many prior occasions have you sought to establish  
15 ownership to property in that fashion?

16 A. I apologize. You will have to read me back the  
17 question.

18 (The record was read as requested.)

19 MR. DICKSON: Objection, multifarious question.  
20 It's confusing.

21 A. I think, if I understand the question, what you are  
22 describing, is once.

23 Q. (BY MS. VORPAHL) Once in the past you've done this?

24 A. I think, if I understand your question, yes.

25 Q. All right. What about -- have you -- well, why don't

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1 you explain to me how you understood my question.

2 A. There -- there's a lawsuit brought by Oaks & Diamonds  
3 where we were contacted by a lease hound to attempt to clear  
4 up some title to mineral interests so that the company he  
5 worked for could be -- could lease it. I think that's the  
6 lawsuit brought by Oaks & Diamonds.

7 Q. Okay. My question was -- I wanted to make sure you  
8 and I were on the same page. You understand that Deminimus  
9 and Velnon are owned by exactly the same people, right?

10 A. Correct.

11 Q. Okay. On how many other occasions via a conveyance  
12 from an entity that you own, wholly or partially, to another  
13 entity that you own, wholly or partially, and the subsequent  
14 use of the receivership vehicle have you tried to establish  
15 ownership to property?

16 A. I think once.

17 Q. And it's the Oaks & Diamonds lawsuit you are telling  
18 me about --

19 A. I think that's correct.

20 Q. -- where you were hired by a lease hound for whom?  
21 Who was he lease hound for?

22 A. He was working for Broughton. I don't know the full  
23 name. Broughton.

24 Q. B-r-o-u-g-h-t-o-n?

25 A. (Moving head up and down)

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1 Q. What did you do in that lawsuit?

2 A. I think there's a deed from Oaks -- a deed to Oaks &  
3 Diamonds. Oaks & Diamonds filed a lawsuit. It was basically  
4 a -- if I recall, it's basically a situation where  
5 receivership already existed in title and to appoint a -- it's  
6 a little bit different, because if I recall, the receivership  
7 already existed and it was to appoint a new receiver for the  
8 property. So it is similar, yet it is different, if I recall.

9 Q. Is it Oaks & Diamonds versus R.M. Johnson, et al.?

10 A. Right. I think R.M. Johnson was the receiver that  
11 was already in existence; and this was basically to appoint a  
12 new receiver for this property that R.M. Johnson, as receiver,  
13 held title to.

14 Q. But Oaks & Diamonds had no interest in the royalty  
15 interests there at issue, right?

16 A. It had a claim.

17 Q. Oh, it had the same kind of claim that Velnon has  
18 here?

19 A. It had a claim pursuant to a deed, as I recall.

20 Q. Right. The same kind of deed that Velnon received in  
21 this case from Deminimus?

22 A. I -- I don't know. I have to look at the deed to  
23 see.

24 Q. Okay. Well, why don't you take a look at what's been  
25 marked as Defendant's Exhibit 6 and tell me how it is that

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1 Oaks & Diamonds got it interest in the property there.

2 A. Okay.

3 Q. Well, let me see if I can help you, Mr. McCullough.

4 On October 21st of 1999, LK&P, Limited, signed a deed to Oaks  
5 & Diamonds; is that right?

6 A. I saw it, but I lost it.

7 MR. DICKSON: Do you know the page number?

8 MS. VORPAHL: I don't.

9 MR. RUSS: It's on page 5.

10 A. October 21st, 1999. Yes, the deed from LK&P,  
11 Limited, to Oaks & Diamonds, L.L.C.

12 Q. LK&P, Limited, had no interest in the oil, gas, and  
13 mineral interest that it purported to convey in that deed,  
14 which is Document DEF 184, a part of Defendant's Exhibit 6?

15 A. That is correct.

16 Q. And you owned LK&P?

17 A. I own half interest in it.

18 Q. Right. Mr. Russ owned the other half of it?

19 A. No.

20 Q. Who owned the other half of LK&P?

21 A. My wife owns it.

22 Q. All right. And you own Oaks & Diamonds?

23 A. It's a limited liability company owned by Mr. Russ  
24 and myself.

25 Q. And LK&P owned no interest but purported, by virtue

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1 of a recorded deed, again which is Document No. DEF 185, part  
2 of Defendant's Exhibit 6, to convey an interest to Oaks &  
3 Diamonds; is that right?

4 A. It conveyed an oil and gas and mineral interest in  
5 61.85 acres.

6 Q. And Oaks & Diamonds requested that Nester Leamon be  
7 appointed the receiver in that action; is that right?

8 A. I believe he was appointed. We would have probably  
9 proposed him to the Court.

10 Q. Well, I believe the pleadings include a request by  
11 Oaks & Diamonds that Nester Leamon be appointed receiver. See  
12 if you -- do you agree with that?

13 A. This was in 1999. Let me look.

14 Q. All right.

15 A. Can you tell me where it is? I can look.

16 Q. I can help you look, but I don't have the exact page.

17 A. Yes, that's correct. We submitted that he was an  
18 appropriate person for -- Oaks & Diamonds submitted that he  
19 was an appropriate person for appointment as receiver.

20 Q. Just as Velnon did in the instant lawsuit,  
21 Defendant's Exhibit 2; is that right?

22 A. Let me see. Very similar. They said he had  
23 experience acting as receiver and that he would be an  
24 appropriate person to act as receiver.

25 Q. Well, did you, in fact, use the pleadings from

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1 Defendant's Exhibit 6 and mark them up to prepare the  
2 pleadings in the -- that became part of this court file,  
3 Defendant's Exhibit 2?

4 A. I don't know which pleadings I used to do that.  
5 There were several of them, if that's what you are asking.

6 Q. Sure.

7 A. But whether I used these specifically, I don't know.

8 Q. Or some others that you had?

9 A. I don't know.

10 Q. Don't know. And it's your sworn testimony that's the  
11 only similar lawsuit that you know of?

12 A. The question you asked me, I think so, yes.

13 Q. Both of these lawsuits were in Franklin, in Robertson  
14 County, Texas. Have you ever filed similar lawsuits in any  
15 other county in Texas?

16 A. Not that I recall, but I don't do much practice  
17 outside of Robertson County. Some, but most of our practice  
18 is in Robertson County.

19 Q. Have you ever represented Judge Stem?

20 A. No.

21 Q. Okay.

22 A. Not that I -- I don't think so.

23 Q. Have you -- have you served as his campaign manager  
24 when he was reelected or --

25 A. No.

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1 Q. How long has he been the judge in Robertson County?

2 A. Twenty-something years.

3 Q. If you can give us about one minute, I think I'm  
4 either through or two or three questions from through.

5 MR. DICKSON: Would you like for us to leave?

6 MS. VORPAHL: If you don't mind, that would help  
7 us. Thank you.

8 MR. DICKSON: We will.

9 (Recess from 11:50 A.M. to 11:54 a.m.)

10 Q. (BY MS. VORPAHL) What is your undergraduate degree  
11 in?

12 A. Accounting.

13 Q. In the lawsuit that we're here on, Defendant's  
14 Exhibit 2, part of what you asked the Court to do and what  
15 the -- what the orders that you prepared effect, is that if no  
16 one comes forward within seven years to claim the funds paid  
17 by Flare for the royalty interests that we're here at issue  
18 about, that the money goes back to Velnon; is that right?

19 A. That's correct.

20 Q. Okay. Under what -- under what authority did Velnon  
21 seek that in this lawsuit?

22 A. I don't know. I mean, it's something that I propose,  
23 the Court to hold those funds after seven years.

24 Q. What ought to happen to those funds?

25 A. They can escheat to the State or do that. When you

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1 escheat to the State, it's much more to difficult to get to  
2 those funds. If Velnon holds them, then they are easier to  
3 get to.

4 Q. Okay. Well, yes, sir, I understand during the  
5 seven-year period when you're holding them that they would be  
6 easier to get to; but this order actually says that the money  
7 is returned to Velnon after seven years.

8 A. That's correct.

9 Q. Is that right?

10 A. That's correct.

11 Q. The money ought to have escheated to the State after  
12 seven years. That's what the law provides; isn't that right?

13 A. It could, but I think Velnon could also hold those  
14 funds.

15 Q. And so my question -- my opening question to you was:  
16 Under what authority could Velnon keep that money?

17 A. I think they could keep it and hold it, or claim it.

18 Q. Oh, and that's what you meant, that when it -- when  
19 the order that you drafted said that it's ordered that the  
20 balance of the funds remain in the registry of the Court and  
21 then they are paid, including interest accrued, to Velnon, you  
22 meant that Velnon was going to hold them for the benefit of  
23 anyone who might later show up?

24 A. I think they would.

25 Q. So that was your intention?

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1 A. Yes.

2 Q. Well, let me ask you, then: Let's go back to  
3 Defendant's Exhibit 6. Did -- you proposed exactly the same  
4 thing and the judge ordered exactly the same kind of order as  
5 to Oaks & Diamonds here?

6 A. Uh-huh.

7 Q. Is that right?

8 A. Yes.

9 Q. And so has Oaks & Diamonds actually gotten the money,  
10 or did the -- or did the people that Oaks & Diamonds sued show  
11 up and make a claim to this money?

12 A. To my knowledge, no one has made a claim.

13 Q. All right. And so have you -- has Oaks & Diamonds  
14 gotten it out of the registry of the court?

15 A. No.

16 Q. Why not?

17 A. It hasn't been disbursed. It's up to the clerk.

18 Q. Well, it's been seven years. You haven't made any  
19 effort to --

20 A. No.

21 Q. Okay. And do you intend to?

22 A. When the clerk disburses it, I'll put it in the  
23 account of Oaks & Diamonds and hold it. If she doesn't  
24 disburse it, it doesn't matter to me.

25 Q. All right. Because this was only a little bit of

1 money, maybe? This was \$6,000, right?

2 A. It's \$6,000.

3 Q. Sure it is. You've understood all of my questions?

4 A. I think so.

5 Q. All right. Is there any answer you want to change  
6 now?

7 A. Not that I'm aware of.

8 MS. VORPAHL: All right. Thank you very much.

9 MR. WILSHIRE: What's everybody's preference?  
10 Press on, break for lunch? If you tell me, I'll do whatever  
11 everybody else wants to do.

12 MR. DICKSON: Let's press on for a while and  
13 reevaluate it.

14 EXAMINATION

15 BY MR. WILSHIRE:

16 Q. Mr. McCullough, we met at Mr. Leamon's deposition.  
17 Let me introduce myself to you. My name is Gene Wilshire, and  
18 I represent the children and grandchildren of one of the  
19 movants for a new trial in this case. I want to see if I can,  
20 with your help, put together a short time line so that it's  
21 clear in my mind when certain things happened, just to the  
22 best of your recollection. Okay, sir?

23 A. Sure.

24 Q. So let's start with -- as I understand it, you  
25 represented Mr. And Mrs. Morgan in connection with the

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1 negotiation of the lease to Leor?

2 A. Correct.

3 Q. Did anyone else in your firm represent them?

4 A. No.

5 Q. And what was the date of that lease?

6 A. November 8th, 2005.

7 Q. Now, can you tell me whether you learned about the  
8 unknown heirs of Jesse and Elizabeth Warren before or after  
9 November 8th, 2005?

10 A. I don't know whether it was during the negotiation of  
11 the lease or afterwards.

12 Q. Can we be pretty clear that it was within, say, two  
13 weeks before or two weeks after? In that time frame?

14 A. Yeah. I mean, it was -- I don't know how -- I don't  
15 know how long the -- I just don't remember how long the  
16 negotiation portion lasted with Leor Energy. It was -- you  
17 know, it wasn't a day, but it wasn't a year. It may have been  
18 a few weeks; but it could have come up during that, or it  
19 could have come up after.

20 Q. And at any rate, Exhibit 1, I believe, is the deed  
21 from the Deminimus to Velnon; is that correct?

22 A. From Deminimus Management, L.L.C., to Velnon, L.L.C.,  
23 correct.

24 Q. And the date of that exhibit is what, sir?

25 A. November 22nd.

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1 Q. And so is it fair to say that at least by  
2 November 22nd, 2005, you had learned of the royalty interest  
3 held -- or derived from Jesse and Elizabeth Warren?

4 A. Yes.

5 Q. And for our convenience, I'll just call that "the  
6 royalty interest" from now on, if that's okay with you?

7 A. That'll be fine.

8 Q. And on the same day as the deed, the petition in this  
9 case, the original petition for this case, was also filed?

10 A. Yes, that's correct.

11 Q. Now, do you know if there had been any drilling on  
12 the Leor lease or the EnCana lease, the same lease, between  
13 November 5 and November 22nd?

14 A. I don't think so.

15 Q. When do you first have a recollection of there being  
16 drilling on the lease?

17 A. I think it was January of '06.

18 Q. And when, to your knowledge, was there first  
19 production on the lease?

20 A. I guess it's probably August, give or take a few  
21 months, of '06.

22 Q. So we know from Exhibit 2, the court's file, that the  
23 final judgment was entered in this case on September 6th --  
24 excuse me -- February 6th, 2006; and so by that time, you're  
25 certain there had been no production?

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1 A. I think that's correct.

2 Q. Now, also in Exhibit 2, there is a receiver's report  
3 of sale signed by Mr. Leamon.

4 A. Yes.

5 Q. You were present at Mr. Leamon's deposition?

6 A. Yes.

7 Q. And did you hear him say that he made no attempt to  
8 determine the value of the royalty interest that he -- that he  
9 was selling?

10 A. I don't -- I don't recall everything he said.

11 Q. You don't recall?

12 A. No.

13 Q. Do you recall having any discussions with Mr. Leamon  
14 on or about January 19th, 2006, as to the value of the royalty  
15 interest that he was going to sell?

16 A. What date?

17 Q. On or about January 19th, 2006, which is the date of  
18 his receiver's report.

19 A. No.

20 Q. Do you recall ever having a conversation with  
21 Mr. Leamon about the value of this royalty interest?

22 A. I may have talked to him about, you know, what the  
23 bid was that we delivered to him, that it was a thousand  
24 dollars an acre, mineral royalty per acre. I may have told  
25 him that was -- that's higher than the -- the other

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1 transactions that I have seen, but I -- I can't tell you that  
2 I know that. So I don't know whether we had that discussion  
3 or not, but we could have.

4 Q. Well, how did -- how did Flare Royalties make a  
5 determination as to the amount of money it was going to bid?

6 A. It's what I thought was a fair market value.

7 Q. And that was \$78,350?

8 A. Yes.

9 Q. And tell me again how you derived that number.

10 A. It's what I thought was a fair market value.

11 Q. Bad question. Fair answer to a bad question. Let me  
12 re-ask it. Tell me why you believe that to be the fair value.

13 A. Owning royalty interest is somewhat speculative. You  
14 could own a royalty interest that ultimately is worth nothing.  
15 You could own one that's worth some, or you could own one  
16 that's worth more. There was a risk that this royalty  
17 interest that we purchased was worth nothing. There was a  
18 risk that it was worth more. You factor those things into  
19 what you want to offer as a price, in my opinion. It was  
20 substantially higher than what I had seen transactions before  
21 on nonproducing mineral interests.

22 Like I said, there are wells in Robertson County  
23 that are with dry holes. There are wells in Robertson County  
24 that produce a little bit of royalties, and there are wells  
25 that produce a lot of royalties. It could be any of those.

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1 This was -- I mean it's what I think the oil company thought  
2 was a wildcat area, so -- it's higher than I have ever paid  
3 for royalty interest, as far as -- or been involved in the  
4 sale of royalty or mineral interests, what I thought was a  
5 fair market value based on experience and what I thought it  
6 was worth to pay for it.

7 Q. So you are telling me you were just basically drawing  
8 on your general experience as an investor in oil-and-gas  
9 properties and as a lawyer representing owners of royalty?

10 A. I don't know that I would classify me as an investor  
11 in oil-and-gas properties. That may be overstating. I have  
12 been involved in transactions where you have leasing or you  
13 have purchase or sale of mineral interests or sell of real  
14 estate with or without mineral interests and, prior to this  
15 transaction, you know, a few years before, when the  
16 oil-and-gas play was not as -- where it is in '04 or now, you  
17 know, probably a hundred, 200, \$300 an acre for a mineral  
18 interest, not a royalty interest, would have been worth it;  
19 but I think the values have gone up. You had a lease that was  
20 a lease in place, a well drilling. That's what I thought the  
21 value was, based on all of those things.

22 Q. Did you -- did you consult with anybody else as to  
23 what a fair value might be?

24 A. No, not really. It's my call.

25 Q. Did you think about asking Mr. Leamon, who is a

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1 certified appraiser, to do an appraisal of the value of the  
2 royalty interest?

3 A. No.

4 Q. Had there been any other wells announced -- I mean  
5 that weren't drilling; but, as of January 19, 2006, were you  
6 aware of any other producers had announced an intention to  
7 drill additional wells that would have been encompassed in  
8 this royalty interest?

9 A. I don't know, because I don't know the timing of  
10 the -- Burlington may have had some in the Carleton Unit, but  
11 I'm not sure I know the timing of those.

12 Q. Now, I believe you said -- can you recall basically  
13 what -- excuse me. As we sit here today, what is the earliest  
14 date you can recall Burlington having announced an intent to  
15 drill on the Carleton acreage?

16 A. I -- I don't know. I mean, I don't -- I don't know  
17 that I would have even known this acreage is in the Carleton  
18 Unit until -- at some point I'm sure I saw this unit  
19 designation.

20 Q. Do you recall when that -- when the unit designation  
21 was filed?

22 A. I don't recall when it was filed. I'm not saying --  
23 I can tell you when it was filed. It says it was filed  
24 January 10th, 2006; but I don't think I was aware of it at  
25 that time.

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1 Q. Was it filed of record?

2 A. Looks like it was, yes.

3 Q. And where was it filed of record? Can you tell?

4 A. Robertson County.

5 Q. And so, as we sit here today, can you give me your  
6 best date of when -- approximate date of when you would have  
7 known of that unit designation?

8 A. Probably April, May.

9 Q. Now, then, you said that, I believe, that -- that  
10 production began on the EnCana well in August of '06?

11 A. I think it was August -- it could be August. It  
12 could have been July. I'm not sure of the exact month.

13 Q. Now, has EnCana drilled another well?

14 A. On where?

15 Q. Within the -- within the lease, within the Leor  
16 lease.

17 A. Yes.

18 Q. And do you recall when that well was placed?

19 A. No.

20 Q. Had it been begun by August of '06?

21 A. August of '06. I don't think so, but I'm not sure  
22 the date it was -- I don't know when -- I don't know the exact  
23 date. It was sometime in '06. It would have been after the  
24 completion of the Travis Morgan No. 1.

25 Q. Now, the confirmation of royalties, what exhibit is

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1     that, please, sir?

2           A.     Exhibit 5.

3           Q.     And what's the date of the confirmation of royalties?

4           A.     It's an effective date of November 8th, 2005, and  
5     signed on August 2nd, 2006.

6           Q.     Can you tell me whether or not there had been  
7     production by August 2nd, 2006, on the first well?

8           A.     I think there had.

9           Q.     So for our time line we can say July, August time --

10          A.     Right.

11          Q.     -- for production. All right. Prior to August the  
12     2nd of 2006, had Flare made a -- made a request or a demand on  
13     EnCana to be paid royalties on the first well?

14          A.     I had provided EnCana information about Flare  
15     Royalties, and their -- basically, their response was that the  
16     well was on a 206-1/2 acre tract and that the only people who  
17     were entitled to any funds were Travis Morgan and Michael --  
18     Michael Morgan.

19          Q.     So a request had been made for Flare to receive  
20     royalties; and that request from EnCana, EnCana denied?

21          A.     It was a request to outline what I understood the  
22     calculations to be as to the various interests, if you --  
23     taking into consideration the surface acreage and that sort of  
24     thing and Flare's interest in the two 50-plus acre tracts, and  
25     EnCana pointed out that there was no entirety clause and,

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1       therefore, they would only pay it to the 206-1/2 acre owners,  
2       where the Travis Morgan Well No. 1 was located.

3           Q.     Okay. And so based -- based on that position by  
4       EnCana, the Confirmation of Royalties, Exhibit No. 5, was  
5       negotiated and signed?

6           A.     It was signed.

7           Q.     Was it negotiated?

8           A.     It was discussed. I don't know what you would -- it  
9       was discussed between me and the Morgans, and it was signed.

10          Q.     Did the Morgans have any attorneys involved in that  
11       transaction, other than you?

12          A.     No.

13          Q.     Did Flare Royalties have any attorneys involved in  
14       that discussion, other than you?

15          A.     No.

16          Q.     And was that confirmation provided to EnCana?

17          A.     Yes.

18          Q.     And based on that confirmation, EnCana began to pay  
19       royalties?

20          A.     That's correct.

21          Q.     When is the first time you can recall that Flare  
22       Royalties was -- received funds -- received royalties based on  
23       the first well?

24          A.     I think it was October.

25          Q.     Of '06?

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1 A. Yes.

2 Q. And can you tell me the approximate amount?

3 A. I think the small -- I think the first check was like  
4 a small amount, 2- or \$3,000.

5 Q. And did for some period of time Flare Royalties  
6 receive royalty checks on a monthly basis after October of  
7 '06?

8 A. Yeah. Whatever date they started, they were regular  
9 monthly payments.

10 Q. And as I understand it, you said those monthly  
11 payments stopped in March of this year?

12 A. It stopped for one month; and I don't remember  
13 whether it was February, March, or -- and then they restarted.

14 Q. So between the time in October when they began and  
15 February or March of '07, when they stopped, approximately how  
16 much money did Flare receive for it, based upon the royalty  
17 interest?

18 A. Probably 3- or \$400,000.

19 Q. And then it stopped in February or March for one  
20 month?

21 A. It stopped in -- it stopped for one month. I think  
22 it was February or March; I'm not sure.

23 Q. In that time?

24 A. It was in '07.

25 Q. And why was there no payment made for that month?

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1 A. They -- EnCana suspended the royalty, is what they  
2 said.

3 Q. I'm sorry?

4 A. EnCana suspended the royalties, is what they said.

5 Q. Did they tell you why they suspended the royalties?

6 A. I think they said they received a letter from  
7 someone, whether it was you or Mr. Flatten or whom, making a  
8 claim.

9 Q. And did they suspend all of the royalties payments or  
10 only the royalty that had been paid that would otherwise have  
11 been paid to Flare?

12 A. They suspended all of the royalty payments.

13 Q. Morgan's as well as yours?

14 A. No. Excuse me. As far as I know, they just  
15 suspended Flare Royalties'.

16 Q. And at some point in time another -- another EnCana  
17 well was drilled and began producing, correct?

18 A. On the 552 acres?

19 Q. Yes.

20 A. Yes.

21 Q. And do you recall approximately when the second well  
22 was completed?

23 A. Late '06, I think, is my guess.

24 Q. Included in the 3- to \$400,000 that you estimated for  
25 me that was received prior to the one month of suspension of

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1 royalties, were there payments attributable to both wells in  
2 that 3- to \$400,000?

3 A. As I recall, there were some -- a month or more where  
4 there was a payment on Travis Morgan No. 2; but it's not --  
5 not a very substantial well, so they were relatively small  
6 amounts.

7 Q. So you -- in response to Ms. Vorpahl's questions, I  
8 understood you to say that approximately a million dollars in  
9 royalties had been received to date?

10 A. That's correct.

11 Q. And after the one month suspension, you have  
12 regularly -- Flare has regularly received its royalty checks  
13 from EnCana?

14 A. There were -- no, they -- I assume they have  
15 suspended them again. I think there were two months after  
16 that one-month suspension, as I recall.

17 Q. And now they are suspended again?

18 A. Yes.

19 Q. So of this total of approximately a million  
20 dollars -- by the way, excuse me. Let me fill in a blank  
21 here. Have you been told by EnCana why they suspended them a  
22 second time?

23 A. As I understand the -- their position is that they  
24 made a mistake in un -- in not suspending them; that they had  
25 some accounting mishap, is what they -- what I understand.

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1 Q. Let me see if I understand it. What they have  
2 conveyed to Flare is that We intended to keep these funds in  
3 suspense, but we mistakenly paid them?

4 A. Yeah, that's -- that was what was conveyed to me  
5 after the payments and they suspended them again.

6 Q. And is that the \$600,000 that they have asked Flare  
7 to refund?

8 A. Yes and no. As I understand what they are saying  
9 about the 600,000 -- it's like 614 or so -- that they are  
10 saying that they made a mistake in not suspending them and  
11 they overpaid.

12 Q. And who -- who are you communicating with at EnCana?  
13 Who is giving you -- giving Flare this information?

14 A. I got a letter from I think a Sharon Rhodes and I  
15 think a -- somebody else I don't know.

16 Q. I'm sorry? Sharon?

17 A. Sharon Rhodes.

18 Q. Rhodes?

19 A. I think I got a letter from her and somebody who  
20 probably is her supervisor. I don't remember that name.

21 Q. Did they tell you how much was overpayment?

22 A. If I understand what the letter said, about 400  
23 and -- of the 614,000, 400-something thousand is overpayment  
24 and the rest is the amount that they mistakenly did not  
25 suspend, from their standpoint. I'm not sure I understand

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1 their accounting about that, but that's what I think I  
2 understand.

3 Q. I just want your best understanding --

4 A. All right. I understand.

5 Q. -- of today. So what I am understanding your  
6 testimony to be is that there was approximately \$614,000 that  
7 they've asked you to return?

8 A. Yes.

9 Q. Is "asked" the right word? Have they asked or they  
10 demanded?

11 A. They have requested Flare Royalties to return the  
12 royalties.

13 Q. And can you tell me when that request occurred,  
14 approximately?

15 A. About three to four weeks ago.

16 Q. And this is the --

17 A. Either the first part of June or last of May, is what  
18 I recall.

19 Q. And what they told you was, without regard to whether  
20 money had been suspended, We overpaid you approximately  
21 \$400,000?

22 A. That's what they are saying.

23 Q. And in addition, the \$200,000 that you -- which was  
24 all you should have been paid was supposed to be in suspense?

25 A. I think that's their position.

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1 Q. And so as we sit here today, EnCana's position, as  
2 you understand it, is that the royalties owing, based upon the  
3 royalty interests we're litigating here, is approximately 5-  
4 to 600,000?

5 A. I think that's right, based on what I understand  
6 their --

7 Q. Because they say, Of the million we paid, \$400,000  
8 was overpayment?

9 A. I think that's correct.

10 Q. Now, at some point, Burlington drilled a producing  
11 well in their Carleton acreage, correct?

12 A. It's what I understand, yes.

13 Q. And do you know approximately when the Burlington  
14 well came online?

15 A. I do not.

16 Q. Do you have any idea -- excuse me. And to the best  
17 of your knowledge, Burlington has been suspending any  
18 royalties due to the royalty interest and has never paid?

19 A. That's correct.

20 Q. And Flare has received no monies from Burlington?

21 A. That's correct.

22 Q. Has a demand been made by Flare on Burlington to pay  
23 those royalties?

24 A. As I recall, we sent them information as to the deed  
25 and wrote them and -- because that's what they said they

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1 wanted initially, and then they suspended them. I don't -- I  
2 don't know that we've made demand in sense that we're  
3 demanding to pay it. It's more, Here's the deed that reflects  
4 the interest.

5 Q. Who have you been dealing with at Burlington?

6 A. I don't -- I don't know -- I probably wrote a letter  
7 to just somebody that was there. I don't know the particular  
8 name. I may have it, but I don't know who it would be.

9 Q. Well, who responded to you?

10 A. Somebody from Burlington. I may have gotten a letter  
11 from -- it seemed like I recall a letter from Anthony Gatti.

12 Q. Can you spell that for me?

13 A. G-a-t-t-i. That's the only name I can remember.

14 Q. And has Burlington given Flare any explanation for  
15 suspending the royalties that it would otherwise be paying?

16 A. Not that I recall. I mean, I -- like I said, they  
17 just -- they suspended them. They were looking at the title  
18 or something. I don't know exactly what they said.

19 Q. And as -- do you have any estimate of how much money  
20 Burlington has suspended?

21 A. No.

22 Q. None at all?

23 A. I don't know.

24 Q. Never made any attempt to find out?

25 A. I have looked at the Railroad Commission report on

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1 the well, but I can't tell from that how much it is. I don't  
2 know price. I don't know -- I don't know the royalty interest  
3 of the lease. It's -- you know, is it more than \$10? Yes.  
4 It's probably more than a hundred thousand dollars, based on  
5 what I see of the well production; but as to the exact amount,  
6 I have no way to know. If you knew the price and the royalty  
7 and then look at the production, then you could calculate it,  
8 I guess.

9 Q. Have -- has Flare ever just asked Burlington, How  
10 much do you owe?

11 A. No.

12 Q. Let's go back to a second for -- to Mr. Leamon's  
13 January, 2006 Receiver's Report of Sale.

14 A. Yes.

15 Q. Attached to that report is a check in the amount of  
16 \$78,350.

17 A. Okay.

18 Q. Do you see it there, sir?

19 A. Not yet. Where are you looking at?

20 Q. It's under a cover letter dated January 19, 2006.

21 A. What's the number?

22 MS. VORPAHL: He's not looking at the same copy  
23 that we are, but I know where it is. Let me see if I can find  
24 it.

25 THE WITNESS: Can we take a restroom break?

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1 MR. WILSHIRE: I'm sorry?

2 THE WITNESS: Take a restroom break?

3 MR. WILSHIRE: Oh, sure.

4 (Break taken from 12:28 p.m. to 12:33 p.m.)

5 Q. (BY MR. WILSHIRE) You now have the cover letter  
6 dated July 19th, 2006, and the attached Receiver's Report of  
7 Sale and the check from your law firm's trust account?

8 A. Uh-huh.

9 Q. And first of all, the 78,350-dollar purchase price,  
10 as I understand it, it was borrowed from the bank?

11 A. I think that's correct.

12 Q. And do you recall what bank that was?

13 A. State Bank.

14 Q. It's just called State Bank?

15 A. Uh-huh.

16 Q. Where is State Bank located?

17 A. They have a branch in north Bryan.

18 Q. And in connection with that loan, Flare Royalties  
19 gave a deed of trust to secure its note?

20 A. Yes.

21 Q. And the deed of trust was pledging its royalty  
22 interest -- it's ownership of the royalty interest?

23 A. Yes.

24 Q. And the bank -- the proceeds from the bank loan were  
25 then deposited into the trust account of Palmos, Russ,

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1 McCullough & Russ?

2 A. I think that -- that's what it look like, since the  
3 check came from there.

4 Q. And then a check was written out of the trust account  
5 to Mr. Leamon as receiver?

6 A. Yes.

7 Q. Who is that check signed by?

8 A. I signed it.

9 Q. Still in Exhibit No. 2, the judge confirmed that sale  
10 on January 30th of '06; is that correct?

11 MR. DICKSON: One second. I've got it here.

12 A. Yes.

13 Q. (BY MR. WILSHIRE) And then I believe the record  
14 would reflect that a final judgment was entered in this cause  
15 on -- on the case on February 6th of 2006; is that correct?

16 A. I believe so.

17 Q. Other than the deed of trust that was given to State  
18 Bank, has any other interest in the royalty interest been  
19 conveyed to any other person or entity?

20 A. No.

21 Q. Now, you stated that approximately half of the  
22 proceeds received had been distributed -- had been disbursed  
23 to you, approximately half to Mr. Russ?

24 A. Correct.

25 Q. First, insofar as you personally are concerned, was

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1 that directly to James H. McCullough?

2 A. Yes.

3 Q. And as far as you know, was it directly to Mr. Russ,  
4 personally?

5 A. Yes, that would have been.

6 Q. How much of those proceeds do you still retain?

7 A. Fifty thousand, hundred thousand, maybe.

8 Q. Do you happen to know how much Mr. Russ has?

9 A. I have no idea.

10 Q. Now, as I understand your testimony in response to  
11 Ms. Vorpahl's question, there is no contention made by Flare  
12 in this litigation that Deminimus had any real title to the  
13 royalty interest; is that correct?

14 A. That's correct.

15 Q. Is Flare claiming any interest in the royalty  
16 interest other than what it received from Velnon -- other than  
17 it received from the receiver?

18 A. That's its -- that's its derivation of title.

19 Q. And are you aware of -- of any claim that Velnon has  
20 that it received any interest in the royalty other than the  
21 deed that it received from Deminimus?

22 A. No.

23 Q. I'm sorry. I asked a poor question. Is Velnon  
24 claiming that it received any interest in the royalty other  
25 than the deed -- that which it received with the deed from

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1 Velnon?

2 A. You lost me.

3 Q. I know. I'm asking idiot questions. I apologize.

4 Let me see if I can rephrase.

5 MR. FLATTEN: We all know what everyone meant,

6 but it was a bad question.

7 Q. (BY MR. WILSHIRE) I want to get a good record, and I

8 ask bad questions sometimes. Velnon based its claim in this

9 litigation on the deed that it received from Deminimus, true?

10 A. True. Deminimus Management, L.L.C., correct.

11 Q. And is it also true that Velnon is not claiming to

12 have received any interest from any other source in the

13 royalty? Is that also true?

14 A. Yes.

15 Q. And despite that fact, is it still the position of

16 Velnon that it had a valid claim to the royalty interest?

17 A. Yes, it had a claim, a color of -- yes, the answer is

18 yes.

19 Q. It had a valid claim?

20 A. Yes.

21 Q. And what is the basis for the claim of validity?

22 A. It's a color of title under a deed.

23 Q. Well, Velnon was well aware that Deminimus had no

24 title to transfer, was it not?

25 A. Yes.

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1 Q. It knew that, true?

2 A. Yes.

3 Q. So when you say "colorable title," that's only  
4 colorable title if someone looked at the deed records, true?

5 A. No. It's a claim of color of title under a deed.

6 Q. Is it your position that an attorney can know for a  
7 fact that he's got a fraudulent deed and, merely because he  
8 has that deed, file a lawsuit claiming that his client has  
9 colorable title?

10 A. I don't believe the deed was fraudulent.

11 Q. Well, assume the deed was fraudulent. Do you think,  
12 based upon knowing that the deed was fraudulent, an attorney  
13 could file a suit in good faith claiming colorable title?

14 A. I think a deed from -- to an entity or a person can  
15 create color of title from a deed, and you can run adverse  
16 possessions on deeds that are filed with no title.

17 Q. Who actually made the court appearances on behalf of  
18 Velnon in this case? Who actually appeared in court?

19 A. I did.

20 Q. Did you tell Judge Stem, "Your Honor, I want you to  
21 know that, although I think Velnon has got colorable title,  
22 the only thing we've got is a deed from Deminimus and  
23 Deminimus had none to give us." Did you make that statement  
24 to him or words to that effect?

25 A. I don't know. I don't recall.

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1 Q. Do you believe Judge Stem is -- is a judge that would  
2 have entered the judgment that he entered if he had been aware  
3 that Deminimus had no title to transfer?

4 MR. DICKSON: Objection, speculation.

5 A. I don't know.

6 Q. (BY MR. WILSHIRE) Well, I've done some investigation  
7 of Judge Stem, and everything that I've learned has been  
8 favorable. I -- I've learned that he's a fair man. Would you  
9 agree with that?

10 A. I would.

11 Q. -- that he's an extremely honest man?

12 A. I would.

13 Q. And people reported to me, based upon his reputation,  
14 that he would not put his imprimatur or sign a judgment that  
15 he believed were based upon false facts. Would you agree with  
16 that?

17 A. It's probably true.

18 Q. So based on your understanding of him, do you have an  
19 opinion as to whether or not, if he had been aware that this  
20 Deminimus deed conveyed no interest, he would have entered the  
21 final judgment that he entered in this case?

22 A. I don't know.

23 Q. You have no opinion?

24 A. I think it's perfectly permissible for him to do what  
25 he did.

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1 Q. That's not quite the answer to my question.

2 A. My answer to the question was "I don't know."

3 Q. Do you feel that, as an advocate appearing before a  
4 tribunal, you had an obligation -- affirmative obligation to  
5 be certain that Judge Stem was aware that Deminimus had no  
6 title to convey?

7 A. Probably not.

8 MR. WILSHIRE: That's all I have.

9 MS. VORPAHL: I have, I think, only one  
10 question.

11 EXAMINATION

12 BY MS. VORPAHL:

13 Q. Mr. McCullough, did you -- when you prepared  
14 Exhibit 1, did you intend that it be given the same legal  
15 effect as a valid lien, or valid claim?

16 A. I don't understand your question.

17 Q. Okay. You prepared the deed, right? And you know  
18 that's Exhibit 1.

19 A. Right.

20 Q. But you knew that Deminimus had no -- no interest to  
21 convey?

22 A. Okay.

23 Q. All right. Let's talk about when you filed that.  
24 You are the one that filed the Exhibit 1?

25 A. I did.

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1 Q. When you filed it, did you intend for it to be given  
2 the same legal effect as a valid transfer?

3 A. It has the legal effect of what it has. It has the  
4 effect of a deed from Deminimus Management, L.L.C., to Velnon.

5 Q. Well, my question is different. Did you intend for  
6 it to have the same legal effect as a valid transfer?

7 A. What do you mean by "valid transfer"?

8 Q. You don't understand that?

9 A. No, because it can mean a lot of --

10 Q. A transfer -- a transfer by one who has something to  
11 transfer. That's how I'll define "valid transfer." Did you  
12 intend it to have the same legal effect as a valid transfer?

13 A. I -- I didn't have a thought about what the legal  
14 effect of it was.

15 Q. Just didn't consider it, either way?

16 A. I filed the deed and gave it to the clerk to file.

17 Q. And you just didn't think about what the legal effect  
18 of it would be?

19 A. The legal effect of it, that I believe it would have,  
20 is it would create a colorable title into Velnon.

21 MS. VORPAHL: I have nothing further.

22 EXAMINATION

23 BY MR. WILSHIRE:

24 Q. I've got one area of questioning. It won't take  
25 long. Are you aware that Patterson Oil drilled a well back in

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1 the late '90s on the property subject to this royalty?

2 A. No.

3 Q. Never heard that before I just asked the question?

4 A. Patterson Oil Company has drilled wells in Robertson  
5 County, but I'm not aware of it being on this property. I  
6 mean, I think you've claimed -- somebody has claimed that in  
7 the motions for new trial that I've read, but I don't know  
8 where it comes from.

9 Q. Tell me everything that you know that Velnon did to  
10 determine who the heirs of Jesse and Elizabeth Warren were.

11 A. I don't know that I can tell you everything. I can  
12 tell you what I'm aware of that happened.

13 Don Huebner was -- Genesis Land is the lease  
14 company that was dealing with this lease for Leor. As I  
15 understand it, they attempted to determine the heirs of  
16 Elizabeth Warren or Jesse Warren -- went to look at obituaries  
17 in San Antonio that did not name any specific persons as  
18 children, nephews; obtained a copy of a guardianship where I  
19 believe Elizabeth Warren took out a guardianship on Jesse  
20 Warren. And there's no -- nothing in that I could find in the  
21 indexes relating to Elizabeth Warren or Jesse Warren, nothing  
22 I could find at the tax offices relating to Elizabeth Warren  
23 or Jesse Warren.

24 The lease hound -- leasing company who does this  
25 regularly, from their standpoint said, We cannot find these

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1 people. They -- there's no record of them. It just ends.  
2 And like I said, that's what they did. That's what they  
3 reported to me. I believe them, because I've dealt with Don  
4 Hubner. He's a credible guy, so I believe what he told me.

5 I looked at indexes to see if I could find  
6 anything. Had I found somebody who was an heir, you know,  
7 they would not have been an unknown heir. We could not find  
8 anybody.

9 Q. Did you keep any records of your search?

10 A. Not that I recall.

11 Q. Can you estimate for me how long you spent doing it?

12 A. If it's like I normally would, I would have gone to  
13 the clerk's office on some morning and pulled indexes and  
14 looked for probably -- I think this deed was in 1951. I  
15 probably looked back to before that time, either the '30s or  
16 '40s or back maybe even to the 1900 -- probably not the  
17 1900 -- probably the '30s to '40s and then all the way up to  
18 present to see if there were ever any transactions, either  
19 before the time of this the deed and/or currently. There were  
20 no affidavits of heirship that I found in the index, no other  
21 conveyances. The only thing in the deed said that they were  
22 from Bexar County. That's why Don Huebner's people looked in  
23 Bexar County. No probate in Bexar County, is what they  
24 reported to me, nothing in Robertson County. I couldn't find  
25 anything. The tax office didn't have anything.

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1 MR. WILSHIRE: Thank you. That's all I have.

2 MS. VORPAHL: Nothing further.

3 MR. DICKSON: We'll reserve.

4 (Proceedings concluded at 12:47 p.m.)

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June 29, 2007

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1

## CHANGES AND SIGNATURE

2

PAGE LINE CHANGE

REASON

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June 29, 2007

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1 I, JAMES H. MCCULLOUGH, have read the foregoing  
2 deposition and hereby affix my signature that same is  
3 true and correct, except as noted above.

4

5

6

JAMES H. MCCULLOUGH

7

8 THE STATE OF \_\_\_\_\_)

9 COUNTY OF \_\_\_\_\_)

10

11 Before me, \_\_\_\_\_, on this day  
12 personally appeared JAMES H. MCCULLOUGH, known to me or  
13 proved to me on the oath of \_\_\_\_\_ or through  
14 \_\_\_\_\_ (description of identity card  
15 or other document) to be the person whose name is  
16 subscribed to the foregoing instrument and acknowledged  
17 to me that he/she executed the same for the purpose and  
18 consideration therein expressed.

19 Given under my hand and seal of office on this \_\_\_\_\_  
20 day of \_\_\_\_\_, \_\_\_\_\_.

21

22

23

NOTARY PUBLIC IN AND FOR

24

THE STATE OF \_\_\_\_\_

25

My Commission Expires: \_\_\_\_\_

June 29, 2007

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1 CAUSE NO. 05-11-17388-CV  
2 VELNON, L.L.C. ) IN THE DISTRICT COURT  
Plaintiff, )  
3 )  
vs. ) ROBERTSON COUNTY, TEXAS  
4 )  
UNKNOWN HEIRS OF )  
5 ELIZABETH WARREN, ET AL., )  
Defendants. ) 82ND JUDICIAL DISTRICT

6  
7  
8 REPORTER'S CERTIFICATE  
9 ORAL DEPOSITION OF JAMES H. MCCULLOUGH  
10 June 29, 2007  
11

12 I, Laura A. Bailey, Certified Shorthand Reporter in  
13 and for the State of Texas, hereby certify to the  
14 following:

15 That the witness, JAMES H. MCCULLOUGH, was duly  
16 sworn and that the transcript of the deposition is a  
17 true record of the testimony given by the witness;

18 That the deposition transcript was duly submitted on  
19 \_\_\_\_\_ to the witness or to the attorney for  
20 the witness for examination, signature, and return to me  
21 by \_\_\_\_\_.

22 That pursuant to information given to the deposition  
23 officer at the time said testimony was taken, the  
24 following includes all parties of record and the amount  
25 of time used by each party at the time of the

June 29, 2007

1 deposition:

2 Ms. Joanne Vorpahl (2h23m)

Attorney for Defendants

3 Mr. Eugene B. Wilshire (0h45m)

Attorney for Movants for New Trial

4 Mr. J. David Dickson (0h0m)

Attorney for Plaintiffs

5

6 That a copy of this certificate was served on all  
7 parties shown herein on \_\_\_\_\_ and filed  
8 with the Clerk.

9 I further certify that I am neither counsel for,  
10 related to, nor employed by any of the parties in the  
11 action in which this proceeding was taken, and further  
12 that I am not financially or otherwise interested in the  
13 outcome of this action.

14 Further certification requirements pursuant to  
15 Rule 203 of the Texas Code of Civil Procedure will be  
16 complied with after they have occurred.

17 Certified to by me on this \_\_\_\_\_ day of  
18 \_\_\_\_\_, \_\_\_\_\_.

19

20

21

Laura A. Bailey, CSR

Texas CSR 4475

22

Expiration: 12/31/2008

A AA Werlinger & Associates

23

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24

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25

June 29, 2007

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A AA Werlinger & Associates

Firm Number: 328

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1 FURTHER CERTIFICATION UNDER TRCP RULE 203

2

3 The original deposition was/was not returned to the  
4 deposition officer on \_\_\_\_\_.5 If returned, the attached Changes and Signature  
6 page(s) contain(s) any changes and the reasons therefor.7 If returned, the original deposition was delivered  
8 to Ms. Joanne Vorpahl, Custodial Attorney.9 \$\_\_\_\_\_ is the deposition officer's charges to the  
10 Defendant for preparing the original deposition and any  
11 copies of exhibits;12 The deposition was delivered in accordance with Rule  
13 203.3, and a copy of this certificate, served on all  
14 parties shown herein, was filed with the Clerk.

15 Certified to by me on this \_\_\_\_\_ day of

16 \_\_\_\_\_, \_\_\_\_\_.

17

18

19

20

21

Laura A. Bailey, CSR

Texas CSR 4475

22

Expiration: 12/31/2008

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