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NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

NORTHERN DIVISION

In re:

ESTATE FINANCIAL, INC.,

Debtor.

THOMAS P. JEREMIASSEN,
CHAPTER 11 TRUSTEE,

Plaintiff,

v.

BRIAN CAVE LLP, a professional limited
liability partnership, and KATHERINE
M. WINDLER, an individual,

Defendants.

In re

ESTATE FINANCIAL MORTGAGE
FUND, LLC,

Debtor.

Case. Nos. 9:08-bk-11457-PC
9:08-bk-11535-PC

Adversary Nos. 9:11-ap-01147-PC
9:11-ap-01146-PC

Chapter 11

MEMORANDUM DECISION REGARDING MOTION OF BRYAN CAVE LLP TO COMPEL THE PRODUCTION OF DOCUMENTS

Date: March 12, 2015

Time: 10:00 a.m.

Place: United States Bankruptcy Court
Courtroom # 201
1415 State Street
Santa Barbara, CA 93101

BRADLEY D. SHARP
CHAPTER 11 TRUSTEE,

Plaintiff,

v.

BRIAN CAVE, LLP, a professional limited
liability partnership, and KATHERINE
M. WINDLER, an individual,

Defendants.

At the above captioned date and time, the court considered the Motion of Brian Cave LLP to Compel the Production of Documents. Having considered the record¹ and argument of counsel, the court will grant the motion, in part, and deny the motion, in part, based on the following findings of fact and conclusions of law made pursuant to F.R.Civ.P. 52(a),² as incorporated into FRBP 7052 and applied to contested matters by FRBP 9014(c).

¹ The record before the court consists of the following: (1) Notice of Motion and Motion of Brian Cave LLP to Compel the Production of Documents; Supporting Memorandum of Points and Authorities (“Motion”); (2) Declaration of Michael B. Smith in Support of Motion of Brian Cave LLP to Compel the Production of Documents (“Smith Decl.”); (3) Declaration of Christopher A. Nowlin in Support of Motion of Brian Cave LLP to Compel the Production of Documents (“Nowlin Decl.”); (4) Appendix of Unpublished Authorities in Support of Defendant Brian Cave LLP’s Motion to Compel Further Responses to Defendant’s First Set of Requests for Production of Documents; (5) Plaintiff Trustees’ Opposition to Motion of Defendant Bryan Cave LLP to Compel the Production of Documents (“Opposition”); (6) Declaration of John P. Reitman in Support of Plaintiff Trustees’ Opposition to Motion of Defendant Brian Cave LLP to Compel the Production of Documents (“Reitman Decl.”); (7) Reply Memorandum in Support of Motion of Brian Cave LLP to Compel the Production of Documents; (8) Supplemental Appendix of Unpublished Authorities in Support of Defendant Bryan Cave LLP’s Motion to Compel Further Responses to Defendant’s First Set of Requests for Production of Documents; and (9) Stipulation of Disputed Issues in Defendant Bryan Cave LLP’s Motion to Compel Further Responses to Defendant’s First Set of Requests for Production of Documents (“Stipulation”). Having considered the Plaintiff Trustees’ Request to Strike and Evidentiary Objections to Supplemental Declaration of Michael B. Smith, the court grants the request and strikes the Supplemental Declaration of Michael B. Smith in Support of Motion of Bryan Cave LLP to Compel the Production of Documents as outside the scope of LBR 9013-1(g). The evidentiary objections are overruled as moot.

² Unless otherwise indicated, all “Code,” “chapter” and “section” references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 after its amendment by the Bankruptcy Abuse

Issue 1: Whether the EFI and EFMF Trustees Can Withhold Post-Bankruptcy Documents Prepared by the Trustees’ Accountants and Financial Advisors in the Ordinary Course of Administering the Estates

On July 31, 2014, Bryan Cave served Defendant Bryan Cave LLP’s First Set of Requests for Production of Documents, Electronically Stored Information, and Tangible Things to Plaintiff Thomas P. Jeremiassen, as Chapter 11 Trustee for Estate Financial, Inc. (the “EFI Request”) pursuant to F.R.Civ.P. 34, as incorporated into FRBP 7034. Bryan Cave also served Defendant Bryan Cave LLP’s First Set of Requests for Production of Documents, Electronically Stored Information, and Tangible Things to Plaintiff Bradley D. Sharp, as Chapter 11 Trustee for Estate Financial Mortgage Fund, LLC (the “EFMF Request”). Bryan Cave asserts that the EFI Request and the EFMF Request each “sought, among other things, documents relevant to the Trustees’ causation and damage claims and Bryan Cave’s defenses thereto – including (1) **pre- and post-**bankruptcy financial statements (Request Nos. 27-28); (2) documents reflecting analyses or evaluations of EFI/EFMF’s liabilities or obligations (Request No. 36); and (3) documents related to (a) the Trustees’ damages calculations (Request No. 33), (b) the loans funded by EFI or EFMF (Request No. 26), (c) the disposition of assets by EFI or EFMF (Request Nos. 29-30), (d) the market value of assets held by EFI or EFMF at the start of the bankruptcy proceedings (Request Nos. 31-32), (e) EFI’s and EFMF’s post-bankruptcy distributions (Request Nos. 34-35); (f) the Trustees’ efforts to recover on loans funded by EFI or EFMF (Request No. 37), (g) the Trustees’ settlements with creditors/investors (Request Nos. 38-39), and (h) damages caused by the wrongdoing of others (Request No. 40).”³ The EFI Request and the EFMF Request each required a written response not later than 30 days after service of the request.⁴

Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005). “Rule” references are to the Federal Rules of Bankruptcy Procedure (“FRBP”), which make applicable certain Federal Rules of Civil Procedure (“F.R.Civ.P.”). “LBR” references are to the Local Bankruptcy Rules of the United States Bankruptcy Court for the Central District of California (“LBR”).

³ Motion, 6:20-7:5.

1 Rule 34 requires, in pertinent part, that:

2 **(B) Responding to Each Item.** For each item or category, the response must
3 either state that inspection and related activities will be permitted as requested or
4 state an objection to the request, including the reasons.

5 **(C) Objections.** An objection to part of a request must specify the part and
6 permit inspection of the rest.

7 F.R.Civ.P. 34(b)(2)(B) & (C). Following initial disclosures and a conference pursuant to Rule
8 26(f), the EFMF Trustee on September 2, 2014, served his written response to the EFMF
9 Request.⁵ The EFI Trustee served his written response to the EFI Request on September 16,
10 2014.⁶

11 With regard to the post-bankruptcy documents sought in each Request, Brian Cave
12 complains about the Trustees' written responses to its Requests and the objections and privilege
13 assertions contained in each response, particularly with respect to Bryan Cave's demand for the
14 production of all documents (including records, reports, analyses, and communications) between
15 the Trustees and the Trustee's accountants, LECG and Berkeley Research Group, LLC ("BRG),
16 and the Trustees' financial advisor, Development Specialists, Inc. ("DSI") since the petition date.

17 According to Brian Cave, "[t]he Trustees contend that all post-bankruptcy
18 communications between the Trustees and their accountants (LECG/BRG) and financial advisors
19 (DSI) are privileged, and that virtually all post-bankruptcy documents generated by those
20 professionals are privileged."⁷ Brian Cave argues that "[t]he post-bankruptcy accounting and
21 financial documents prepared by LECG/BRG and DSI in the ordinary course of business are
22 necessary so that Bryan Cave can determine the financial impact of the practices alleged by the
23 Trustees; identify the causes of the investor losses that form the basis of the Trustees' damage

24 ⁴ Nowlin Decl. Exh. 3:2; 4:2. "The party to whom the request is directed must respond in
25 writing within 30 days after being served. A shorter or longer time may be stipulated to under
26 Rule 29 or be ordered by the court." F.R.Civ.P. 34(b)(2)(A).

27 ⁵ Nowlin Decl., Exh. 8.

28 ⁶ Id. at Exh. 9.

⁷ Stipulation, 1:4-6.

1 claims; and support its in pari delicto defense.”⁸ Based upon its review of the Trustees’
2 applications to employ LECG, BRG and DSI and fee applications filed by LECG, BRG and DSI,
3 Bryan Cave argues that all documents involving LECG and BRG, other than documents and
4 communications generated under the billing category “Causes of Action Analysis (including
5 Bryan Cave),” and all documents involving DSI, other than documents and communications
6 generated under the billing category “Litigation Support,” are not privileged and are “responsive
7 to, inter alia, Brian Cave’s Request Nos. 26-40, and . . . relevant to damages and causation in
8 both adversary proceedings.”⁹

9 Trustees disagree, responding that “[t]he post-petition documents sought by Bryan
10 Cave’s Requests go far beyond those reasonably calculated to lead to the discovery of admissible
11 evidence,”¹⁰ and that “the overbreadth and scope of the requests make the review process
12 unnecessarily long and burdensome.”¹¹ By way of illustration, Trustees point to Brian Cave’s
13 Requests 18, 19 and 20:

14 **Request No. 18:**

15 All COMMUNICATIONS between YOU, on the one hand, and any third
16 party, on the other hand, RELATING TO EFI or the EFI ESTATE (whether or
17 not other third parties were privy to or part of these COMMUNICATIONS).

18 **Request No. 19:**

19 All COMMUNICATIONS between YOU, on the one hand, and any third
20 party, on the other hand, RELATING TO EFMF or the EFMF ESTATE (whether
21 or not other third parties were privy to or part of these COMMUNICATIONS).

22 **Request No. 20:**

23 All DOCUMENTS AND COMMUNICATIONS that YOU have received
24 from or provided to any third party as part of YOUR administration of the EFI

25 ⁸ Id. at 1:18-22.

26 ⁹ Motion, 24:18-19.

27 ¹⁰ Opposition, 7:27-28.

28 ¹¹ Stipulation, 2:20-21.

1 ESTATE, including but not limited to documents received through subpoenas or
2 document requests.¹²

3 Trustees contend that “it is unreasonable for the Trustees to cull through over six years of post-
4 petition documents to produce to Bryan Cave, or to produce a privilege log of such
5 documents.”¹³ Trustees further argue that the problem is exacerbated by Brian Cave’s refusal “to
6 narrow the scope of the requests” and to exclude from its request documents which the Trustees
7 contend are “indisputably privileged post-bankruptcy communications.”¹⁴

8 Trustees assert that they have produced, or agreed to produce, “a significant portion of
9 post-petition financial analysis and databases including: (1) the EFI Master Database; (2) the
10 EFMF Master Database; (3) the Loan Tracking Database (aka Master Distribution Sheet); (4) the
11 Phase I Reconciliation Database; (5) the Phase II Reconciliation Database; and (6) the Loan
12 Analysis Folder, which contains hundreds of spreadsheets.”¹⁵ According to the Trustees,
13 “[t]hese documents and asset sale and other publicly available filings in the EFI/EFMF
14 bankruptcy cases, provide the information to enable Bryan Cave to determine the values and sale
15 prices of the EFI and EFMF estates’ assets and the damages sustained by the two estates.”¹⁶
16 Trustees reject the notion that all post-petition communications with LECG, BRG and DSI, other
17 than those billed as either Cause of Action analysis or Litigation Support, are discoverable as
18 “business records that would have been generated in the ordinary course of business regardless
19 of any litigation.”¹⁷ In their responses to the Requests, Trustees objected to the production of
20 these documents as privileged and continue to withhold production of such documents as
21 privileged.¹⁸

22
23 ¹² Nowlin Decl., Exh. 3:14; 4:14.

24 ¹³ Opposition, 34:17-19.

25 ¹⁴ Stipulation, 2:4-5; 3:1

26 ¹⁵ Id. at 2:8-12.

27 ¹⁶ Id. at 2:12-14.

28 ¹⁷ Motion, 25:1-2.

¹⁸ By letter dated November 9, 2014, Trustees advised counsel for Bryan Cave of its position that:

[C]ommunications with attorneys employed by the Trustees as professionals pursuant to 11 U.S.C. § 327(a) are privileged based on the attorney-client privilege, and attorney work product doctrine. All communications between the Trustees, and between the Trustees and their lawyers are protected by the attorney-client privilege, attorney work product doctrine, joint prosecution privilege and the common interest privilege.

Communications with other professionals employed by the Trustees, including but not limited to Berkeley Research Group, LLC, Development Specialists, Inc. and LECG, the financial advisors and accountants for the Trustees, are within the common interest privilege and other applicable privileges.

Nowlin Decl., at Exh. 17:4. With respect to analysis, review and reconciliations prepared by LECG, BRG and DSI, Trustees further advised counsel for Bryan Cave:

Berkeley Research Group (and previously LECG) are the Trustees' court approved accountants. The review, analysis and reconciliations by LECG and Berkeley Research Group are subject to various privileges including but not limited to the common interest privilege, attorney-client privilege, attorney work product doctrine and joint prosecution privilege. To the extent either of the Trustees select Berkeley Research Group as an expert witness in this adversary proceeding, the Trustees will provide that designation and an expert report within the applicable time frame pursuant to the Federal Rules of Civil Procedure. . . .

DSI is the Trustees' court-approved financial advisor. DSI's review, analysis, and reconciliations are subject to various privileges including but not limited to the common interest privilege, attorney-client privilege, attorney work product doctrine and joint prosecution privilege. To the extent either of the Trustees select DSI as an expert witness in this adversary proceeding, the Trustees will provide that designation and an expert report within the applicable time frame pursuant to the Federal Rules of Civil Procedure. . . .

The Trustees' analysis, reconciliations, and investigations are subject to various privileges including but not limited to the common interest privilege, attorney-client privilege, attorney work product doctrine and joint prosecution privilege. Bryan Cave is entitled to take the depositions of the Trustees and to ask questions that do not implicate the applicable privileges.

Id., Exh. 17:7.

1 Rule 26(b)(1) limits the scope of discovery to “any nonprivileged matter that is relevant
2 to any party’s claim or defense” and “[r]elevant information need not be admissible at trial if the
3 discovery appears to be calculated to lead to the discovery of admissible evidence.” F.R.Civ.P.
4 26(b)(1). “However, the scope of discovery is not unlimited and is committed to the sound
5 discretion of the court.” Export Worldwide, Ltd. v. Knight, 241 F.R.D. 259, 262-63 (W.D. Tex.
6 2006). For example, Rule 26(b)(2)(C) permits the court, on motion or on its own, to limit the
7 extent of discovery if it determines, among other things, that “the discovery sought is
8 unreasonably cumulative or duplicative, or can be obtained from some other source that is more
9 convenient, less burdensome, or less expensive.” F.R.Civ.P. 26(b)(2)(C)(i).

10 Rule 26 places the burden on the party seeking discovery to show clearly that the
11 information sought is relevant to the case and would lead to admissible evidence. Vardon Golf
12 Co., Inc. v. BBMG Gold Ltd., 156 F.R.D. 641, 650 (N.D. Ill. 1994). Once the party seeking
13 discovery establishes that its document request is within the scope of permissible discovery, the
14 burden shifts to the party opposing production to show why discovery should not be permitted.
15 Corrigan v. Methodist Hosp., 158 F.R.D. 54, 56 (E.D. Pa. 1994).

16 Based on the foregoing, the court will deny Brian Cave’s Motion insofar as it seeks (a) to
17 compel the Trustees to produce post-petition documents and communications in response to the
18 Requests; (b) a deadline for the production of post-petition documents and communications in
19 response to the Requests; and (c) a deadline for the production of a privilege log with respect to
20 such post-petition documents and communications. While much of the information sought by
21 Bryan Cave might pass muster under Rule 26 as calculated to lead to the discovery of admissible
22 evidence, the court agrees with the Trustees’ objections that the discovery requests with respect
23 to post-petition documents and communications are overly broad, burdensome and oppressive.
24 Many of the documents responsive to Bryan Cave’s Requests are available on PACER. To the
25 extent that such documents are not readily available on PACER or other public source, the
26 Trustees have agreed to produce certain nonprivileged documents in their possession or subject
27 to their control responsive to the Requests, including a significant portion of the post-petition
28 financial analysis and databases. The Trustees previously produced a computation of damages

pursuant to Rule 26(a)(1)(A)(iv). Given the current breadth of Bryan Cave’s Requests, it would be burdensome, time-consuming, and expensive for the Trustees to locate, assemble and produce for inspection and copying all nonprivileged documents responsive to the Requests and to compile a comprehensive privilege log identifying each post-petition document withheld from discovery on the grounds of privilege. The court will not attempt to adjudicate any dispute regarding the Trustees’ privilege claims as to post-petition documents and communications without a privilege log. Before the court delves into any dispute as to whether the information sought by Brian Cave regarding LECG, BRG or DSI is privileged, Brian Cave must narrow the scope of its Requests to specific documents or categories of documents not previously produced by the Trustees or otherwise readily available from a source, such as PACER, that are relevant to the pending adversary proceedings or calculated to lead to the discovery of admissible evidence.

Issue 2: Whether the EFI Trustee Can Reverse His Express Waiver of Pre-Bankruptcy Attorney-Client Privilege

The attorney-client privilege protects confidential communications between attorneys and clients made for the purpose of giving legal advice. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). The party asserting the privilege has the burden of establishing the relationship and privileged nature of the communication. United States v. Bauer, 132 F.3d 504, 507 (9th Cir. 1997). The party claiming the privilege “must identify specific communications and the grounds supporting the privilege as to each piece of evidence over which the privilege is asserted.” United States v. Martin, 278 F.3d 988, 1000 (9th Cir. 2002) (citation omitted). “Voluntary disclosure of privileged communications constitutes waiver of the privilege for all other communications on the same subject.” United States v. Richey, 632 F.3d 559, 566 (9th Cir. 2011).

“Issues concerning the application of the attorney-client privilege in the adjudication of federal law are governed by federal common law.” United States v. Ruehle, 583 F.3d 600, 608 (9th Cir. 2009) (citation omitted). Under federal common law, the burden of proof is on the party seeking to establish that the privilege applies. Id. at 609. The attorney-client privilege is strictly construed under federal law and the party claiming privilege must “establish the

1 privileged nature of the communications and, if necessary, segregate the privileged information
2 from the non-privileged information.” Id.

3 Brian Cave asserts that the EFI Trustee expressly waived any privilege with respect to the
4 production of documents involving EFI prior to the filing of the bankruptcy case. Michael B.
5 Smith (“Smith”) testified that Larry Gabriel (“Gabriel”), counsel for the EFI Trustee, stated
6 during a Rule 26(f) conference on July 31, 2014, “that the EFI Trustee was waiving privilege as
7 to communications with lawyers working for EFI prior to the bankruptcy.”¹⁹ Gabriel does not
8 deny this statement. John P. Reitman (“Reitman”), counsel for the EFMF Trustee, testified that
9 “[a]t the Rule 26(f) meeting [he] made it clear that the EFMF Trustee had not decided how he
10 would proceed with respect to asserting applicable privileges.”²⁰ By letter dated August 6, 2014,
11 Douglas Fuchs (“Fuchs”) of Gibson Dunn sought confirmation from Gabriel and Reitman
12 regarding a waiver of privilege for pre-bankruptcy documents and communications, stating:

13 We were encouraged by your suggestion that you do not intend to withhold as
14 privileged any communications between either Estate Financial, Inc. (“EFI”) or
15 Estate Financial Mortgage Fund (“EFMF”) and their pre-bankruptcy legal
16 counsel. Can you please confirm that for both EFI and EFMF, you will not be
asserting the attorney-client privilege, work product protection, or any other form
of privilege with respect to these pre-bankruptcy communications with counsel?²¹

17 There is no evidence that either Gabriel or Reitman responded to Fuchs’ letter. However, on
18 September 16, 2016, Gabriel served Plaintiff’s Response to Request for Production from
19 Defendant Bryan Cave, LLP, Set One which stated, in pertinent part:

20 The Trustee does not intend to raise the attorney-client privilege objection to any
21 documents involving EFI prior to the filing of the bankruptcy case. The Trustee
22 will and does assert both the attorney-client privilege and the attorney-work
23 product privilege, as well as a joint prosecution privilege, as between the EFI
24 Trustee and his counsel and professionals, and the Estate Financial Mortgage
Fund, LLC (“EFMF”) Trustee (now Liquidating Trustee, Bradley M. Sharp) (the
“EFMF Trustee”) and his counsel and professionals. In addition, the Trustee will

26 ¹⁹ Smith Decl., 1:8-10.

27 ²⁰ Reitman Decl., 4:3-4.

28 ²¹ Nowlin Decl., Exh. 7 (emphasis added).

1 assert the joint prosecution privilege, and/or attorney work product privilege,
2 and/or settlement communication privilege as to any and all communications with
the law firm of Foley Bezek Behle & Curtis, LLP, or with Tom Foley.²²

3 EFI and EFMF each assert that no documents involving either EFI or EFMF prior to the petition
4 date which are considered privileged have been disclosed in response to Bryan Cave's requests.
5 There is no evidence to the contrary.

6 A written promise to waive the attorney-client privilege without an actual disclosure of
7 privileged information does not constitute a waiver of the privilege. Tennenbaum v. Deloitte &
8 Touche, 77 F.3d 337, 341 (9th Cir. 1996); see United States v. Anderson, 79 F.3d 1522, 1527 n.7
9 (9th Cir. 1996); Sec. & Exch. Comm'n v. Arvco Capital Research, LLC, 2014 WL 5106100, *12
10 (D. Nev. 2014). Accordingly, the court finds that the EFI Trustee did not expressly waive the
11 attorney-client privilege with respect to the production of documents involving EFI prior to the
12 filing of the bankruptcy case.

13 **Issue 3: Whether the Trustees Impliedly Waived Pre-Bankruptcy Attorney-Client**
14 **Privilege by Filing Their Complaints**

15 Bryan Cave argues that, even absent an express waiver, Trustees "impliedly waived the
16 privilege as to *pre*-bankruptcy communications with attorneys other than Bryan Cave by filing
17 complaints that put those communications at issue."²³ Bryan Cave insists that the Trustees
18 should not be allowed to withhold as privileged communications between EFI's principals and
19 other attorneys which might, for example, show "that: (1) other attorneys gave the same advice
20 as Bryan Cave; (2) other attorneys advised Guth and Yaguda that their practices were unlawful
21 beginning as early as 2002; and (3) Guth and Yaguda . . . routinely disregarded the advice of
22 counsel."²⁴ Bryan Cave argues that it "cannot mount a defense to the Trustees' claims –
23 including demonstrating that nothing Bryan Cave said or did could have prevented Guth and
24 Yaguda from continuing their unlawful conduct, or the harm that it caused, as well as Bryan

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26 ²² Id. at Exh. 9, 2:18-26 (emphasis added).

27 ²³ Motion, 12:11-13.

28 ²⁴ Stipulation, 5:23-6:3.

1 Cave's *in pari delicto* defense – without evidence of *all* of Guth's and Yaguda's pre-bankruptcy
2 communications with counsel."²⁵

3 Trustees, on the other hand, point to the allegations of the complaint, arguing that "[t]he
4 damages that the Trustees seek to recover result from the defective advice of Bryan Cave and
5 Windler and no other attorneys."²⁶

6 In the Ninth Circuit, "[t]he standard for determining when an implied waiver of the
7 attorney-client privilege occurs is set out in Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D. Wash.
8 1975)." Home Indem. Co. v. Lane Powell Moss & Miller, 43 F.3d 1322, 1326 (9th Cir. 1995).
9 "[A]n implied waiver of the attorney-client privilege occurs when (1) the party asserts the
10 privilege as the result of some affirmative act, such as filing suit; (2) through this affirmative act,
11 the asserting party puts the privileged information at issue; and (3) allowing the privilege would
12 deny the opposing party access to information vital to its defense." Id. "[A]n overarching
13 consideration is whether allowing the privilege to protect against disclosure of the information
14 would be 'manifestly unfair' to the opposing party." Id. (citation omitted).

15 Here, Trustees are asserting the privilege as a result of filing a complaint in each of the
16 above referenced adversary proceedings. However, the court is not convinced that the Trustees
17 put the privileged information at issue in doing so. The Trustees sued Bryan Cave alleging
18 breach of contract, professional negligence, breach of fiduciary duty, negligence, aiding and
19 abetting breach of fiduciary duty, and fraudulent deceit by concealment. The court agrees with
20 the Trustees that "[n]one of the Trustees' claims or allegations in their Complaints raises an issue
21 touching directly on the substance or content of a privileged communication with lawyers other
22 than Bryan Cave."²⁷ The Trustees do not allege that EFI or EFMF relied on the advice of any
23 other counsel in connection with Bryan Cave's engagement nor does it appear that the Trustees
24 intend to rely on any such evidence to prove their claims. In fact, its Bryan Cave's defensive
25

26 ²⁵ Id. at 6:3-7.

27 ²⁶ Id. at 6:16-17.

28 ²⁷ Opposition, 17:17-19.

1 strategy that seeks to put at issue privileged communications between EFI/EFMF and other
2 counsel prior to Bryan Cave’s engagement. “Invasion of the privilege is not required to
3 determine the validity of the [Trustees’] claim[s].” See Resolution Trust Corp. v. Mass. Mut.
4 Life Ins. Co., 200 F.R.D. 183, 193 (W.D.N.Y. 2001).

5 Nor is the court convinced that it would be manifestly unfair to deny Bryan Cave access
6 to such privileged communications or that such communications are vital to its defense. The fact
7 that privileged communications may be relevant to a disputed issue is not a sufficient basis for
8 invading applicable privileges. See, e.g., In re County of Erie, 546 F.3d 222, 229 (2d Cir. 2008)
9 (“[P]rivileged information may be in some sense relevant in any lawsuit. A mere indication of a
10 claim or defense certainly is insufficient to place legal advice at issue.”); Genentech, Inc. v.
11 Insmed, Inc., 236 F.R.D. 466, 468-69 (N.D. Cal. 2006) (“Advice is not in issue merely because it
12 is relevant, and does not necessarily become in issue merely because the attorney’s advice might
13 affect the client’s state of mind in a relevant manner.”). Trustees acknowledge that “Brian Cave
14 is entitled to discovery of certain privileged communications in order to defend itself in this
15 litigation,” but assert that “the scope of the self-defense exception to the attorney-client privilege
16 . . . is strictly limited to communications between the client and the attorney accused of
17 malpractice.”²⁸ Trustees concede that Bryan Cave will have access to “(i) non-privileged sources
18 of information . . . and (ii) all formerly privileged communications between Bryan Cave and
19 EFI/EFMF that have now been placed at issue and became discoverable.”²⁹ Based on the
20 foregoing, the court finds that the “at issue” waiver does not warrant production of pre-petition
21 documents and communications between EFI/EFMF and lawyers other than Bryan Cave. The
22 court further finds that the Trustees by filing their complaints did not impliedly waive the
23 attorney-client privilege with respect to such documents and communications.

27 ²⁸ Stipulation, 6:20-23.

28 ²⁹ Opposition, 18:2-5.

Issue 4: Whether the Pre-Bankruptcy Attorney-Client Privilege Asserted by the Trustees Falls Within the Crime-Fraud Exception

Bryan Cave asserts that “all pre-bankruptcy communications between Guth and Yaguda and attorneys relating to the acts and practices of EFI and its principals since at least 2002 are subject to the crime-fraud exception” to the attorney-client privilege.³⁰ Bryan Cave reasons that the crime-fraud exception applies because “[t]he Trustees have alleged (a) that EFI’s principals (Guth and Yaguda) were engaged in a pattern of fraudulent and criminal activity dating back to at least 2002; (b) that Guth and Yaguda pled guilty to 26 counts of willfully engaging in fraudulent and felonious conduct between 2002 and 2008; and (c) that Guth and Yaguda engaged in such activity in reliance upon the advice of counsel.”³¹ Bryan Cave concludes that “the Court need look no further than the allegations in the Trustees’ complaints, which describe a long-running Ponzi scheme” to determine that the fraud-crime exception should apply to the Trustees’ claims of attorney-client privilege. The court disagrees.

To pierce the attorney-client privilege under the crime-fraud exception, a party must demonstrate that (1) “‘the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel;” and (2) “that the attorney’s services were ‘utilized . . . in furtherance of the ongoing unlawful scheme.” In re Grand Jury Proceeding, 87 F.3d 377, 381 (9th Cir. 1996) (citations omitted). “The protection afforded by the attorney-client privilege does not extend to any communication ‘in furtherance of intended, or present, continuing illegality.’” Id. (citation omitted). “Thus the crime-fraud exception insures that the confidentiality enveloping the attorney-client relationship does not encompass communications ‘made for the purpose of getting advice for the commission of a fraud or crime.’” Id. (citation omitted). It is insufficient for a party “merely to allege that it has a sneaking suspicion the client was engaging in or intending to engage in a crime or fraud when it consulted the attorney.” Id. “Rather, the . . . court must find ‘reasonable cause to believe’ that the attorney’s services were ‘utilized . . . in furtherance of the ongoing unlawful scheme.’” Id. (citation omitted). “[O]therwise privileged

³⁰ Stipulation, 7:4-6.

³¹ Id. at 6:27-7:3.

1 communications can be ‘in furtherance of’ criminal activity, and therefore within the crime-fraud
2 exception, even though the attorney is unaware of the crime and takes no affirmative step that
3 actually furthers it.” Id. at 379.

4 As previously stated, the party claiming the attorney-client privilege “must identify
5 specific communications and the grounds supporting the privilege as to each piece of evidence
6 over which the privilege is asserted.” United States v. Martin, 278 F.3d 988, 1000 (9th Cir.
7 2002) (citation omitted). Conversely, “[t]he party asserting the crime-fraud exception must
8 establish a prima facie case that the privileged communication was made in furtherance of a
9 crime or fraud.” Genentech, Inc. v. Inmed Inc., 236 F.R.D. 466, 470 (N.D. Cal. 2006). “This is
10 a threshold question which is hard to answer without knowing the substance of the privileged
11 communication.” Id. Upon request of the party asserting the crime-fraud exception, the court
12 has discretion to order an in camera review of documents claimed privileged but only after “a
13 showing of a factual basis to support a good faith belief by a reasonable person that in camera
14 review of the materials may reveal evidence to establish the claim that the crime-fraud exception
15 applies.” United States v. Zolin, 491 U.S. 554, 572 (1989).

16 Based largely on the allegations of the Trustees’ complaints, Brian Cave seeks a blanket
17 application of the crime-fraud exception to “all pre-bankruptcy communications between Guth
18 and Yaguda and attorneys relating to the acts and practices of EFI and its principals since at least
19 2002,” notwithstanding the Trustees’ privilege claims.³² The Trustees’ complaints allege claims
20 against Bryan Cave for breach of contract, professional negligence, breach of fiduciary duty,
21 negligence, aiding and abetting breach of fiduciary duty, and fraudulent deceit by concealment.
22 The Trustees do not allege that Bryan Cave or any other attorneys were retained to enable
23 EFI/EFMF to plan or commit a fraud or that EFI/EFMF sought advice of counsel in furtherance
24 of an illegal activity. More importantly, Bryan Cave does not identify the specific attorneys,
25 other than Stein & Lubin, ostensibly consulted by EFI/EFMF to further an alleged planned or
26 ongoing criminal or fraudulent scheme nor has it identified any specific communications or

27
28 ³² Id. at 7:4-6.

1 categories of communications ostensibly made by any attorney for which a privilege has been
2 claimed that may be “sufficiently related” to such scheme or made in furtherance of such
3 scheme. Evidence is required to establish a prima facie case for the application of the crime-
4 fraud exception. Bryan Cave has not provided evidence sufficient to support a finding of
5 reasonable cause to believe that all communications between EFI/EFMF and each attorney other
6 than Bryan Cave prior to bankruptcy were in furtherance of and sufficiently related to a crime.

7 **Issue 5: Whether the Trustees Can Withhold as Privileged Pre-Bankruptcy**
8 **Communications That Have Been Disclosed to Third Parties**

9 Bryan Cave argues that “[t]he Trustees have produced (1) a log containing 14 entries
10 from the three boxes of documents that Guy Puccio produced to the Trustees, and (2) a log of
11 documents to the Trustees by the San Luis Obispo District Attorney (“DA”), which supposedly
12 includes communications between Guth and Yaguda and their personal attorneys.”³³ Brian Cave
13 asserts that the Trustees’ privilege claims as to each of the documents identified in the two logs
14 have been waived as a result of the prior disclosure of such documents to one or more third
15 parties not bound by the privilege.³⁴ Trustees do not deny Brian Cave’s contention in their
16 Opposition.

17 “An express waiver occurs when a party discloses privileged information to a third party
18 who is not bound by the privilege, or otherwise shows disregard for the privilege by making the
19 information public.” Bittaker v. Woodford, 331 F.3d 715, 719 (9th Cir. 2003). Even when
20 privileged documents are seized pursuant to a search warrant, the privilege is waived “if the
21 privilege holder fails to pursue all reasonable means of preserving the confidentiality of the
22 privileged matter.” U.S. v. De la Jara, 973 F.2d 746, 750 (9th Cir. 1992).

23 The court finds that the Trustees’ claim of privilege with respect to the subject documents
24 has been waived and such documents must be produced in response to Bryan Cave’s document
25 request.

27 ³³ Motion, 19:27-20:1.

28 ³⁴ Id. at 20:10-11.

Issue 6: Whether the Trustees Have Waived Their Right to Assert Privilege by Failing to Timely and Properly Object

Bryan Cave argues that “[t]he Trustees failed to produce any privilege logs until mid-January, yet those perfunctory logs still have not identified at all the vast majority of documents they are withholding on the basis of ‘privilege.’”³⁵ Brian Cave reasons that “[b]ecause, over six months after the requests were served, the Trustees still have not made particularized assertions of privilege that Bryan Cave can meaningfully assess and to which Bryan Cave can respond, the Trustees have failed to meet the minimum standards for preserving a privilege objection, and as a matter of law, those objections are not valid.”³⁶ Trustees, on the other hand, assert that Bryan Cave has not established that the alleged delay in producing a comprehensive privilege log, of and by itself, resulted in a waiver of the Trustees’ right to assert the attorney-client privilege as a matter of law given the test enunciated by the Ninth Circuit in Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. of Mont., 408 F.3d 1142, 1149 (9th Cir. 2005). In Burlington, the Ninth Circuit rejected “a per se waiver rule that deems a privilege waived if a privilege log is not produced within Rule 34’s 30-day time limit.” 408 F.3d at 1149. In so holding, the Ninth Circuit stated:

Instead, using the 30–day period as a default guideline, a . . . court should make a case-by-case determination, taking into account the following factors: (1) the degree to which the objection or assertion of privilege enables the litigant seeking discovery and the court to evaluate whether each of the withheld documents is privileged (where providing particulars typically contained in a privilege log is presumptively sufficient and boilerplate objections are presumptively insufficient); (2) the timeliness of the objection and accompanying information about the withheld documents (where service within 30 days, as a default guideline, is sufficient); (3) the magnitude of the document production; and (4) other particular circumstances of the litigation that make responding to discovery unusually easy (such as, here, the fact that many of the same documents were the subject of discovery in an earlier action) or unusually hard. These factors should be applied in the context of a holistic reasonableness analysis, intended to forestall needless waste of time and resources, as well as tactical manipulation of

³⁵ Stipulation, 9:11-13.

³⁶ Id. at 9:13-17.

1 the rules and the discovery process. They should not be applied as a mechanistic
2 determination of whether the information is provided in a particular format.

3 Id. (emphasis added). Burlington does not require the court to give particular weight to any one
4 or more of its non-exclusive factors in determining waiver in a particular case. Id. According to
5 the Stipulation:

6 The Trustees made express claims of applicable privileges with respect to each
7 category of privileged information, as required by Federal Rules of Civil
8 Procedure, and continued to assert applicable privileges in the course of all
9 subsequent meet and confer communications with Bryan Cave.

10 The Trustees have agreed to provide a privilege log to Bryan Cave as to pre-
11 petition documents despite the massive amount of documents sought by Bryan
12 Cave, including what amounts to all pre-petition communications, books and
13 records of EFI/EFMF. On January 14 and 20, 2015, the Trustees provided
14 privilege logs for the San Luis Obispo District Attorney's documents (the "DA
15 Documents") and documents turned over to the Trustee by S. Guy Puccio (Puccio
16 Documents"). The Trustees' attorneys are currently in the process of reviewing
17 EFI/EFMF pre-petition hard drives, including e-mail records. The Trustees'
18 attorneys have not completed their review and cataloging of the electronic records
19 to identify potentially privileged documents and documents subject to the work-
20 product doctrine, although they have so far expended more than 230 hours in
21 doing so. To date, they have identified more than 10,000 potentially privileged
22 pre-Trustee appointment documents and more than 3,800 of those electronically
23 stored documents (most of which likely will have multiple subparts and or
24 attachments) remain to be reviewed. The Trustees are reviewing the voluminous
25 pre-petition records as quickly as possible. The Trustees will then provide access
26 to the non-privileged documents to Bryan Cave, and will provide a privilege log
27 as to the privileged documents.³⁷

28 The record reflects that the magnitude of Bryan Cave's document request and the scope
of the Trustees' respective privilege claims have been the focus of the parties informal efforts to
resolve this discovery dispute since Bryan Cave served its Requests. Given the facts of this case,
the court finds that the Trustees have not waived their right to assert a privilege solely due to the
delay in producing a privilege log. The sheer volume of documents requested, Bryan Cave's
reluctance to narrow the scope of the documents sought, and the Trustees' prompt and repeated
assertion of privilege weigh against a waiver. Moreover, the fact that the Trustees must identify

³⁷ Id. at 9:23-10:9.

specific communications and the grounds supporting a privilege as to each communication for which the privilege is asserted makes compilation of a privilege log, given the volume of documents sought, difficult, time-consuming, and expensive. There is no credible evidence that the Trustees have delayed in reviewing documents responsive to Bryan Cave’s request, categorizing such documents, and compiling a comprehensive privilege log with respect to such documents as a “tactical manipulation of the discovery rules and the discovery process” or to otherwise forestall Bryan Cave’s legitimate discovery efforts.

Issues 7: Whether the Court Should Set a Deadline for Completion of the Trustees’ Production

“Brian Cave requests that the Court set a deadline for the completion of the Trustees’ production within 10 days of the granting of [its] Motion.”³⁸ The court will order the EFI Trustee to make available for inspection and copying all remaining non-privileged pre-petition documents and communications responsive to the EFI Request in his possession or subject to his control not later than June 12, 2015. The court will order the EFMF Trustee to make available for inspection and copying all remaining non-privileged pre-petition documents and communications responsive to the EFMF Request in his possession or subject to his control not later than June 12, 2015.

Issues 8: Whether the Court Should Set a Deadline for the Trustee’s Production of a Complete Privilege Log

“Brian Cave requests that the Court set a deadline by which the Trustees must produce a privilege log of every document they are withholding on the basis of any privilege or protection that has not been waived.”³⁹ The court will order the EFI Trustee to provide a comprehensive privilege log identifying each pre-petition document and communication responsive to the EFI Request in his possession or subject to his control for which a privilege is asserted not later than June 12, 2015. The court will also order the EFMF Trustee to provide a comprehensive privilege

³⁸ Id. at 10:21-22.

³⁹ Id. at 12:25-27.

1 log identifying each pre-petition document and communication responsive to the EFI Request in
2 his possession or subject to his control for which a privilege is asserted not later than June 12,
3 2015.

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24 Date: April 8, 2015

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26 _____
27 Peter H. Carroll
28 United States Bankruptcy Judge