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CLERK U.S. BANKRUPTCY COURT
Central District of California
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NOT FOR PUBLICATION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.

BRYAN 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: April 13, 2017

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.

BRYAN 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 Bryan Cave LLP to Compel the Production of Documents (“Motion”). 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).

Issue 1: Whether the Trustees Can Withhold Communications With Defendants and/Or The Expert Defendants Retained in the Underlying Matter.

¹ The record before the court consists of the following: (1) Notice of Motion and Motion of Bryan Cave LLP to Compel the Production of Documents; Supporting Memorandum of Points and Authorities; (2) Declaration of Michael Dore in Support of Motion of Bryan Cave LLP to Compel the Production of Documents (“Dore Decl.”); (3) Appendix of Unpublished Authorities in Support of Motion of Bryan Cave LLP to Compel the Production of Documents; (4) Plaintiff Trustees’ Opposition to Motion of Defendant Bryan Cave LLP to Compel the Production of Documents (“Opposition”); (5) Bryan Cave’s Reply in Support of Its Motion to Compel the Production of Documents (“Reply”); (6) Appendix of Unpublished Authorities in Support of Bryan Cave’s Reply in Support of Its Motion to Compel Production of Documents; (7) Supplemental Declaration of Michael Dore in Support of Motion of Bryan Cave LLP to Compel the Production of Documents (“Dore Supp. Decl.”); and (8) Stipulation on Disputed Issues in Bryan Cave’s Motion to Compel Production of Documents (“Stipulation”). Plaintiff Trustees’ Evidentiary Objections to Declaration of Michael Dore are overruled.

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

Based upon its review of the Trustees' privilege log, Bryan Cave asserts that the Trustees are improperly withholding from production at least 100 documents which are either not subject to a proper claim of attorney-client privilege or, alternatively, should be produced under the self-defense exception to the attorney client privilege. The Trustees acknowledge that the targeted documents, which the Trustees have denominated the "TPA Communications," are communications that include Bryan Cave and Guy Puccio ("Puccio"). However, the Trustees maintain that the documents are privileged as communications by or between Bryan Cave, Puccio, and EFI/EFMF attorneys other than Bryan Cave who provided legal advice on matters outside the scope of the claims made the basis of the Trustees' complaints in the above adversary proceedings.³

In its first motion to compel document production, Bryan Cave argued that the Trustees "impliedly waived the privilege as to *pre*-bankruptcy communications with attorneys other than Bryan Cave by filing complaints that put those communications at issue."⁴ Bryan Cave asserted that the Trustees should not be allowed to withhold as privileged communications between EFI's principals and other attorneys which might, for example, show "that: (1) other attorneys gave the same advice as Bryan Cave; (2) other attorneys advised Guth and Yaguda that their practices were unlawful beginning as early as 2002; and (3) Guth and Yaguda . . . routinely disregarded the advice of counsel."⁵ Bryan Cave further asserted that it "cannot mount a defense to the Trustees' claims – including demonstrating that nothing Bryan Cave said or did could have prevented Guth and Yaguda from continuing their unlawful conduct, or the harm that it caused, as well as Bryan Cave's *in pari delicto* defense – without evidence of *all* of Guth's and Yaguda's pre-bankruptcy communications with counsel."⁶ In response, Trustees pointed to the allegations

³ Opposition, 8:10-16.

⁴ See Memorandum Decision Regarding Motion of Bryan Cave to Compel the Production of Documents entered on April 8, 2015 ("Memorandum Decision"), 11:14-16 (footnote omitted).

⁵ Id. at 11:16-21 (footnote omitted).

⁶ Id. at 11:21-12:2 (footnote omitted).

1 of the complaints, arguing that “[t]he damages that the Trustees seek to recover result from the
2 defective advice of Bryan Cave and Windler and no other attorneys.”⁷ The court rejected Bryan
3 Cave’s argument, holding (1) that “the ‘at issue’ waiver [did] not warrant production of pre-
4 petition documents and communications between EFI/EFMF and lawyers other than Bryan
5 Cave; and (2) that the Trustees by filing their complaints did not impliedly waive the attorney-
6 client privilege with respect to such documents and communications.”⁸ In so holding, the court
7 noted that:

8 The Trustees sued Bryan Cave alleging breach of contract, professional
9 negligence, breach of fiduciary duty, negligence, aiding and abetting breach of
10 fiduciary duty, and fraudulent deceit by concealment. The court agrees with the
11 Trustees that “[n]one of the Trustees’ claims or allegations in their Complaints
12 raises an issue touching directly on the substance or content of a privileged
13 communication with lawyers other than Bryan Cave.” The Trustees do not allege
14 that EFI or EFMF relied on the advice of any other counsel in connection with
15 Bryan Cave’s engagement nor does it appear that the Trustees intend to rely on
16 any such evidence to prove their claims.⁹

17 The court further noted that:

18 Trustees acknowledge that “Bryan Cave is entitled to discovery of certain
19 privileged communications in order to defend itself in this litigation,” but assert
20 that “the scope of the self-defense exception to the attorney-client privilege . . . is
21 strictly limited to communications between the client and the attorney accused of
22 malpractice.” Trustees concede that Bryan Cave will have access to “(i) non-
23 privileged sources of information . . . and (ii) all formerly privileged
24 communications between Bryan Cave and EFI/EFMF that have now been placed
25 at issue and became discoverable.”¹⁰

26 Bryan Cave’s request was denied by order entered on April 8, 2015.¹¹

27 ⁷ Id. at 12:3-5 (footnote omitted).

28 ⁸ Id. at 13:19-23 (emphasis added).

⁹ Id. at 12:17-24 (footnote omitted; emphasis added).

¹⁰ Id. at 13:14-19 (footnote omitted; emphasis added).

¹¹ Order on Motion of Bryan Cave LLP to Compel the Production of Documents (“Discovery Order”), 2:16-22.

1 Bryan Cave now asserts that nothing in the Discovery Order, which denied Bryan Cave's
2 claim that the Trustees had impliedly waived the attorney-client privilege with respect to pre-
3 petition documents and communications between EFI/EFMF and lawyers other than Bryan Cave,
4 permits the Trustees to withhold from production "communications with lawyers from Bryan
5 Cave, even if 'lawyers other than the Defendant' were also included."¹² Bryan Cave argues that
6 these communications are not privileged because they were never confidential, citing Palmer v.
7 Westfield Ins. Co., 2006 WL 2612168 (M.D. Fla. 2006) and In re Lernout & Hauspie Sec. Litig.,
8 218 F.R.D. 348 (D. Mass. 2003), adopted and amended to correct clerical error, 2004 WL
9 3217802 (D. Mass. 2004). Alternatively, Bryan Cave argues that the documents at issue should
10 be produced based upon the self-defense exception to the attorney-client privilege. Bryan Cave
11 reasons that the Trustees, who commenced these lawsuits against Bryan Cave and Windler, hold
12 the privilege and "have no legitimate basis to withhold these materials because they include
13 someone else *in addition to* Bryan Cave attorneys and/or Puccio."¹³ According to the
14 Stipulation, "Katherine Windler sent, received, or was copied on every one of them except for a
15 handful that include Mr. Puccio and not Ms. Windler."¹⁴ Bryan Cave further reasons that "the
16 Court never gave the Trustees license to withhold Bryan Cave's *own communications with EFI*
17 whenever a lawyer from another firm also happened to be included in those communications."¹⁵

18 "The attorney-client privilege is the oldest of the privileges for confidential
19 communications" and "[i]ts purpose is to encourage full and frank communication between
20 attorneys and their clients and thereby promote broader public interests in the observance of law
21 and administration of justice." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). "The
22 privilege is . . . narrowly and strictly construed." United States v. Gray, 876 F.2d 1411, 1415

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24 ¹² Motion, 4:15.

25 ¹³ Id. at 7:21-23 (emphasis in original).

26 ¹⁴ Stipulation, 3:27-28.

27 ¹⁵ Reply, 3:21-23 (emphasis in original). "Bryan Cave apparently does not have a number of
28 these communications because they likely were deleted under Bryan Cave's email retention
policy put in place years before the Trustees threatened suit." Stipulation, 3:21-23.

(9th Cir. 1989). It “protects confidential disclosures made by a client to an attorney in order to obtain legal advice, . . . as well as an attorney’s advice in response to such disclosures.” United States v. Chen, 99 F.3d 1493, 1501 (9th Cir. 1996) (citation omitted). “The party asserting the attorney-client privilege has the burden of proving that the privilege applies to a given set of documents or communications. In re Grand Jury Investigations, 974 F.2d 1068, 1070 (9th Cir. 1992). That burden can be met by means of a privilege log which contains the following information: “(a) the attorney and client involved, (b) the nature of the document, (c) all persons or entities shown on the document to have received or sent the document, (d) all persons or entities known to have been furnished the document or informed of its substance, and (e) the date the document was generated, prepared, or dated.” Id. at 1071. “[M]erely copying or ‘cc-ing’ legal counsel, in and of itself, is not enough to trigger the attorney-client privilege.” Phillips v. C.R. Bard, Inc., 290 F.R.D. 615, 630 (D. Nev. 2013).

Federal courts recognize a self-defense exception to the attorney-client privilege. See, e.g., In re Nat’l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig., 120 F.R.D. 687, 692 (C.D. Cal. 1988) (“The Court finds . . . that the federal common law of privilege should recognize a self defense exception to the attorney client privilege in the circumstances of these cases.”); First Fed. Sav. & Loan Ass’n v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557, 566 (S.D.N.Y. 1986) (“[T]he exception for attorney self-defense is recognized and accepted by the courts, albeit with varying degrees of warmth.”). The self-defense exception serves a legitimate purpose:

First, if an attorney is sued for alleged misconduct in representing a client, it is self-evident that he has a compelling interest in being able to defend himself. Second, that interest may well outweigh the interest of the client in maintaining the confidentiality of his communications, particularly if disclosure of those communications will not imperil the legal interests of the client. . . . Third, such disclosure will serve the truth-finding function of the litigation process, and is thus consistent with the general principle of narrowly construing evidentiary privileges.

First Fed. Sav. & Loan, 110 F.R.D. at 565 (citations omitted). For the exception to apply the attorney must be charged with wrongdoing by the client or a third party in which the client’s conduct is implicated; and under such circumstances, the attorney may disclose without client

1 consent otherwise privileged attorney-client communications but only to the extent reasonably
2 necessary to defend against the claim. First Fed. Sav. & Loan, 110 F.R.D. at 567 (“[D]isclosure
3 is authorized for those items that, as a practical matter, seem likely to provide significant
4 assistance to [the attorney’s] defense.”).

5 In this case, the Trustees in response to Bryan Cave’s document request claimed that the
6 TPA Communications are protected from disclosure by the attorney-client privilege. Trustees
7 established a privilege log, identified the documents claimed to be privileged, and explained their
8 reasons for claiming the privilege. The Trustees explained that each of the documents
9 comprising the TPA Communications involve communications by or between Bryan Cave,
10 Puccio, and EFI/EFMF attorneys other than Bryan Cave who provided legal advice on matters
11 outside the scope of the claims made the basis of the Trustees’ complaints in the above
12 proceedings. The court agrees with the Trustees that “[n]either Palmer nor Lernout supports
13 Bryan Cave’s argument that it is entitled to [production of the] privileged communications
14 between EFI/EFMF and third party lawyers who represented EFI/EFMF simply because Windler
15 and/or Puccio have already seen these communications.”¹⁶ Nor does the fact that Bryan Cave
16 was a party to a TPA Communication necessarily mean that the legal advice, counseling or
17 assistance given relates to the claims “at issue” in this litigation.

18 The court declined Bryan Cave’s earlier request for a blanket ruling that the Trustees had
19 impliedly waived the attorney-client privilege as to a broad category of prepetition documents
20 and communications between EFI/EFMF and lawyers other than Bryan Cave by ostensibly
21 placing them “at issue.” Bryan Cave now seeks a similar blanket ruling that all 100 or more of
22 the TPA Communications are excepted from the attorney-client privilege as reasonably
23 necessary to its defense of the Trustees’ claims in these adversary proceedings. The court
24 declines to enter such an order.

25 If, in the process of conducting an in camera review, the court was confronted with one or
26 more documents that, notwithstanding the Trustees’ privilege claim, it determined Bryan Cave
27

28 ¹⁶ Opposition, 6:8-11.

1 might reasonably have to rely upon to support its affirmative defenses in this litigation, the court
2 would have been in a position to address the self-defense exception issue with respect to each
3 such document on a case by case basis. No such request was made by Bryan Cave. Nor is there
4 a showing that, notwithstanding the claimed privilege, any particular TPA Communication or
5 category of communications are, in fact, reasonably necessary to Bryan Cave's defense of the
6 claims made the basis of the Trustees' complaints. The Trustees have conceded that Bryan Cave
7 is entitled to "all formerly privileged communications between Bryan Cave and EFI/EFMF that
8 have now been placed at issue," other than the TPA Communications, and have either produced
9 or agreed to produce such documents. Accordingly, Bryan Cave's request for an order
10 compelling the production of the TPA Communications will be denied.

11 **Issue 2: Whether the Trustees Can Withhold As Privileged Any Communications**
12 **Disclosed To Third Parties Outside The Attorney-Client Privileged**
13 **Relationship.**

14 Bryan Cave seeks the production of written communications between Karen Guth
15 ("Guth") and Josh Yaguda ("Yaguda"), the sole principals of EFI/EFMF, and attorneys for Guth,
16 Yaguda and/or entities other than EFI (the "Guth/Yaguda Communications"). The Trustees
17 decline to produce the Guth/Yaguda Communications, asserting that "Guth and Yaguda have not
18 expressly waived their attorney-client privilege for communications with their personal attorneys
19 or attorneys that represented their other entities" and the Trustees do not have the authority to do
20 so.¹⁷ The Trustees reason that "[t]o the extent that any communications between Guth and
21 Yaguda and their individual attorneys are included in the files and records in the possession of
22 the Trustees, the Trustees' possession of such communications resulted from Guth and Yaguda's
23 inadvertent disclosure" and that "Guth and Yaguda should be given an opportunity to protect
24 their privileged communications, as provided by Fed.R.Evid. 502(b)."¹⁸

25 According to the Trustees "Guth and Yaguda, EFI's sole owners, occasionally used EFI's
26 email for purposes unrelated to EFI/EFMF business operations and had no reason to believe such

27 ¹⁷ Stipulation, 11:28-12:1.

28 ¹⁸ Id. at 12:12-16.

1 email communications will be subject to third party disclosure.” “An express waiver occurs
2 when a party discloses privileged information to a third party who is not bound by the privilege,
3 or otherwise shows disregard for the privilege by making the information public.” Bittaker v.
4 Woodford, 331 F.3d 715, 719 (9th Cir. 2003) (emphasis added). “For the privilege to apply, the
5 client must have a reasonable expectation that the communications are confidential and will be
6 kept confidential.” Aventa Learning, Inc. v. K12, Inc., 830 F.Supp.2d 1083, 1108 (W.D. Wa.
7 2011). The attorney-client privilege is rarely extended to employees using a work email system
8 to communicate confidential information for the purpose of seeking legal advice. See e.g.,
9 Hanson v. First Nat’l Bank, 2011 WL 5201430, *5 (S.D.W.Va., October 31, 2011) (“When an
10 employee emails their attorney from their workplace computer, the employee may be deemed to
11 have impliedly waived confidentiality of the communication afforded by the attorney-client
12 privilege if the employer has a policy which eliminates any expectation of privacy.”); Alamar
13 Ranch, LLC v. County of Boise, 2009 WL 3669741, * 4 (D. Idaho, November 2, 2009)
14 (“Kirkpatrick did not attempt to protect the confidentiality of the messages by using a web-based
15 password-protected e-mail account . . . [and] waived the privilege for those messages she sent
16 from her work computer.”).

17 Even when privileged documents are seized pursuant to a search warrant, the privilege is
18 waived “if the privilege holder fails to pursue all reasonable means of preserving the
19 confidentiality of the privileged matter.” U.S. v. De la Jara, 973 F.2d 746, 750 (9th Cir. 1992).
20 Assuming the attorney-client privilege attached despite Guth and Yaguda’s use of EFI’s email
21 system, the Guth/Yaguda Communications were inadvertently disclosed to the Trustee nearly
22 nine years ago. There is no evidence that either Guth or Yaguda took any steps during such time
23 to prevent disclosure or to rectify such inadvertent disclosure.

24 In sum, the court agrees with Bryan Cave that Guth and Yaguda waived any privilege
25 claim as to the Guth/Yaguda Communications to the extent such emails were ever privileged.
26 The Trustees will be ordered to produce the Guth/Yaguda Communications.
27
28

Issue 3: Whether the Trustees Can Selectively Withhold Certain Responsive, Post-Petition Documents While Producing Others.

The court denied Bryan Cave's prior motion to compel the Trustees to produce requested post-petition communications with EFI and EFMF personnel, holding that "Bryan Cave must narrow the scope of its Request 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."¹⁹ Bryan Cave claims that it has narrowed its request since entry of the Discovery Order. Trustees disagree, although it is apparent that the Trustees have endeavored to produce some documents and communications in response to Bryan Cave's request.

Rule 26(b)(1) defines the scope of discovery absent an order of the court otherwise limiting discovery. It states:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within the scope of discovery need not be admissible in evidence to be discoverable.

F.R.Civ.P. 26(b)(1). Bryan Cave seeks the production of communications involving the Trustees and EFI's then-current or former employees, including Guth, Yaguda, EFI's former escrow officer Shauna Bishop, and EFI's former loan officer Laura Paulsen through September 3, 2014. Bryan Cave argues that such documents are relevant to its defense of the Trustees' causes of action which "include unclean hands and *in pari delicto* defenses."²⁰ Trustees believe that "the vast majority of the post-petition communications and documents are simply irrelevant."²¹

¹⁹ Memorandum Opinion, 9:8-11. The court also stated that it would not delve into "any dispute regarding the Trustees' privilege claims as to post-petition documents and communications without a privilege log." *Id.* at 9:5-7.

²⁰ Motion, 12:22.

²¹ Opposition, 12:9-10.

1 “Bryan Cave’s so-called ‘tailored’ request,” according to the Trustees, “casts far too wide a net
2 and does not focus on information either relevant to the subject matter of the litigation or likely
3 to elicit information that would lead to the discovery of admissible evidence.”²²

4 On June 25, 2008, EFI was the subject of an involuntary chapter 11 petition filed in the
5 above referenced case. On July 16, 2008, the court converted the case to a voluntary chapter 11
6 and, shortly thereafter on July 23, 2008, ordered the appointment of a chapter 11 trustee. On
7 July 25, 2008, an order was entered approving the appointment of Thomas P. Jeremiassen, as
8 chapter 11 trustee. EFMF filed its voluntary chapter 11 petition on July 1, 2008, the court
9 ordered the appointment of a chapter 11 trustee on July 23, 2008, and Bradley D. Sharp’s
10 appointment as trustee was approved on July 25, 2008. Having reviewed the papers and in light
11 of the foregoing, the court concludes that production of the requested post-petition
12 communications to and including July 31, 2008, is proportional to the needs of the case given the
13 nature of the Trustees’ claims. Reducing the temporal scope of the request balances the
14 importance of the discovery to Bryan Cave’s defense strategy with the burden and expense of
15 production on the Trustees.²³

16 Accordingly, the court will order the Trustees, not later August 18, 2017 (1) to produce
17 all non-privileged written communications between the Trustees and former EFI/EFMF
18 employees (including Karen Guth, Joshua Yaguda, Shauna Bishop, and Laura Paulsen) for the
19 period starting from the petition date in each of the cases and ending July 31, 2008, to the extent
20 such documents have not already been produced and to the extent such documents are not readily
21 available on PACER or other public source; or (2) to confirm in writing to Bryan Cave that the
22 Trustees have already produced all such documents.

23
24 ²² Id. at 12:11-14.

25 ²³ The court’s deadline of July 31, 2008, which shortens the period covered by the document
26 request from six years to 36 days, is consistent with the date set forth in paragraph (4) of Michael
27 H. Dore’s email to Larry Gabriel dated June 24, 2016. See Dore Supp. Decl., Ex. A, at 12-13.
28 Having limited the scope of the request for post-petition communications to 36 days, the court
concludes that it is not necessary to further narrow the scope of the request to specific documents
or categories of documents.

CONCLUSION

In sum, Bryan Cave's Motion will be granted, in part, and denied, in part. A separate order will be entered consistent with this memorandum.

###

Date: July 5, 2017

A handwritten signature in black ink, consisting of a large, stylized 'P' followed by a horizontal line.

Peter H. Carroll
United States Bankruptcy Judge