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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NOT FOR PUBLICATION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.

Case No. 9:08-bk-11457-PC

Adversary No. 9:11-ap-01147-PC

Chapter 11

**MEMORANDUM DECISION
REGARDING (1) MOTION OF
PLAINTIFF, THOMAS P.
JEREMIASSEN, CHAPTER 11
TRUSTEE, TO COMPEL
PRODUCTION OF DOCUMENTS BY
DEFENDANT BRYAN CAVE LLP;
AND (2) DEFENDANT KATHERINE M.
WINDLER'S MOTION FOR
PROTECTIVE ORDER REGARDING
EFI TRUSTEE'S MOTION TO
COMPEL FURTHER PRODUCTION
OF DOCUMENTS REGARDING
MS. WINDLER BY DEFENDANT
BRYAN CAVE LLP**

Date: April 13, 2017

Time: 10:00 a.m.

Place: United States Bankruptcy Court

Courtroom # 201

1415 State Street

Santa Barbara, CA 93101

At the above captioned date and time, the court considered (1) the Motion of Plaintiff, Thomas P. Jeremiassen, Chapter 11 Trustee, to Compel Production of Documents by Defendant, Bryan Cave LLP (“Trustee Motion”)¹ and (2) Defendant Katherine M. Windler’s Motion for Protective Order Regarding EFI Trustee’s Motion to Compel Further Production of Documents Regarding Ms. Windler by Defendant Bryan Cave LLP (“Windler Motion”).² Having

¹ The record before the court with respect to the Trustee Motion consists of the following: (1) Notice of Motion and Motion of Plaintiff, Thomas P. Jeremiassen, Chapter 11 Trustee, to Compel Production of Documents by Defendant Bryan Cave LLP; Memorandum of Points and Authorities [Dkt. # 125] filed March 23, 2017; (2) Request for Judicial Notice in Support of Motion of Plaintiff, Thomas P. Jeremiassen, Chapter 11 Trustee, to Compel Production of Documents by Defendant Bryan Cave LLP (“Trustee RJN”) [Dkt. # 126] filed March 23, 2017; (3) Declaration of Larry W. Gabriel in Support of Motion to Compel filed Concurrently with Motion and Request for Judicial Notice [Dkt. # 127] filed March 23, 2017; (4) Exhibits in Support of Declaration of Larry W. Gabriel in Support of Motion to Compel [Dkt. # 129] filed March 24, 2017; (5) Corrected Exhibit Nos. 17 and 21 in Support of Declaration of Larry W. Gabriel in Support of Motion to Compel [Dkt. # 137] filed March 24, 2017; (6) Bryan Cave’s Opposition to Motion of Plaintiff, Thomas P. Jeremiassen, Chapter 11 Trustee, to Compel Production of Documents (“Bryan Cave Opposition”) [Dkt. # 145] filed March 30, 2017; (7) Declaration of Michael Dore in Support of Bryan Cave’s Opposition to Motion of Plaintiff, Thomas P. Jeremiassen, Chapter 11 Trustee, to Compel Production of Documents [Dkt. # 146] filed March 30, 2017; (8) Appendix of Unpublished Authorities in Support of Bryan Cave’s Opposition to Motion of Plaintiff, Thomas P. Jeremiassen, Chapter 11 Trustee, to Compel Production of Documents [Dkt. # 147] filed March 30, 2017; (9) Reply in Support of Plaintiff Trustee’s Motion to Compel Production of Documents by Defendant Bryan Cave LLP (“Trustee Reply”) [Dkt. # 148] filed April 6, 2017; (10) Declaration of Larry W. Gabriel in Support of Reply in Support of Plaintiff Trustee’s Motion to Compel Production of Documents by Defendant Bryan Cave LLP [Dkt. # 149] filed April 6, 2016; (11) Appendix of Unpublished Decisions in Support of Reply in Support of Plaintiff Trustee’s Motion to Compel Production of Documents by Defendant Bryan Cave LLP [Dkt. # 150] filed April 6, 2016; and (12) Joint Stipulation of Disputed Issues Pertaining to EFI Trustee’s Motion to Compel Further Production of Documents by Bryan Cave LLP (“Trustee Stipulation”) [Dkt. # 135] filed March 24, 2017.

² The record before the court with respect to the Windler Motion consists of the documents listed in footnote # 1 and the following: (1) Defendant Katherine M. Windler’s Motion for Protective Order Regarding EFI Trustee’s Motion to Compel Further Production of Documents Regarding Ms. Windler by Defendant Bryan Cave LLP; Supporting Memorandum of Points and Authorities [Dkt. # 114] filed March 23, 2017; (2) Declaration of James L. Sanders in Support of Defendant Katherine M. Windler’s Motion for Protective Order Regarding EFI Trustee’s Motion to Compel Further Production of Documents Regarding Ms. Windler by Defendant Bryan Cave LLP [Dkt. # 116] filed March 23, 2017; (3) Defendant Katherine M. Windler’s Request for Judicial Notice in Support of Defendant Katherine M. Windler’s Motion for Protective Order Regarding EFI Trustee’s Motion to Compel Further Production of Documents Regarding Ms.

considered the record and argument of counsel, the court will (1) grant the Trustee Motion, in part, and deny the Trustee Motion, in part; and (2) grant the Windler Motion, in part, and deny the Windler Motion, in part, based on the following findings of fact and conclusions of law made pursuant to F.R.Civ.P. 52(a),³ as incorporated into FRBP 7052 and applied to contested matters by FRBP 9014(c).

Issue 1: Whether Bryan Cave Must Produce Documents Regarding An Alleged “Compliance Review” for EFI.

Trustee seeks Bryan Cave’s production of “all documents (i) related to ‘the compliance review and audit performed by [Bryan Cave] for EFI and/or EFMF’ (RFP No. 61) and (ii) ‘prepared, sent, received or reviewed by WINDLER as part of the compliance review and audit

Windler by Defendant Bryan Cave LLP [Dkt. # 117] filed March 23, 2017; (4) Defendant Windler’s Appendix of Unpublished Opinions in Support of Her Motion for Protective Order Regarding EFI Trustee’s Motion to Compel Further Production of Documents Regarding Ms. Windler by Defendant Bryan Cave LLP [Dkt. # 119] filed March 23, 2017; (5) Plaintiff Trustee’s Opposition to Katherine M. Windler’s Motion for Protective Order Regarding EFI Trustee’s Motion to Compel Further Production of Documents Regarding Ms. Windler by Defendant Bryan Cave LLP in Response to Trustee’s First and Second Set of Request for Production of Documents (“Trustee Opposition”) [Dkt. # 143] filed March 30, 2017; (6) Declaration of Larry W. Gabriel in Support of Opposition to Katherine M. Windler’s Motion for Protective Order Regarding EFI Trustee’s Motion to Compel Further Production of Documents Regarding Ms. Windler by Defendant Bryan Cave LLP in Response to Trustee’s First and Second Set of Request for Production of Documents [Dkt. # 144] filed March 30, 2017; (7) Defendant Katherine M. Windler’s Reply in Support of Her Motion for a Protective Order Regarding the EFI Trustee’s Motion to Compel Further Production of Documents Regarding Ms. Windler by Defendant Bryan Cave LLP (“Windler Reply”) [Dkt. # 154] filed April 6, 2017; (8) Supplemental Declaration of James L. Sanders in Support of Defendant Katherine M. Windler’s Motion for a Protective Order Regarding EFI Trustee’s Motion to Compel Further Production of Documents Regarding Ms. Windler by Defendant Bryan Cave LLP [Dkt. # 155] filed April 6, 2017; and (9) Corrected Joint Stipulation of Disputed Issues Regarding Defendant Katherine M. Windler’s Motion for a Protective Order Regarding EFI Trustee’s Motion to Compel Further Production of Documents Regarding Ms. Windler by Defendant Bryan Cave LLP [Pursuant to Local Bankruptcy Rule 7026-1(C)] (“Windler Stipulation”) [Dkt. # 140] filed March 29, 2017.

³ 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”).

1 performed by [Bryan Cave] for EFI and/or EFMF.’ RFP No. 62.’⁴ Trustee argues that the
2 documents are relevant “to the Trustee’s professional negligence claims and focus specifically on
3 the scope of work that Bryan Cave agreed to perform on EFI’s behalf.”⁵ The court notes that the
4 Trustee’s RFP Set One does not define the term “compliance review and audit” as used in
5 conjunction with the document request.⁶ Bryan Cave concedes that it initially disputed the
6 nature and scope of the phrase “compliance review and audit,” but asserts that it later agreed to
7 produce, and in fact did produce, all non-privileged documents in its possession, custody and
8 control responsive to the request.⁷ Trustee further asserts that, even if all non-privileged
9 documents responsive to the request have been produced, the documents have not been properly
10 categorized pursuant to the Trustees’ RFP Set One and absent a properly categorized document
11 production, the Trustees have “no confidence that all documents as to this category have in fact
12 been produced.”⁸

13 According to the Trustee Stipulation, all documents in the possession of Bryan Cave or
14 subject to its control have been produced to the Trustee in response to the Trustee’s RFP Nos. 61
15 and 62 and the Trustee has produced no evidence to the contrary. The stipulation states:

16 “Notwithstanding the contrary positions of the stipulating parties” regarding the
17 Trustee’s characterization of what the “compliance review and audit” entailed,
18 “Bryan Cave represents and warrants that it has produced all Documents in its
19 possession, custody or control prior to July 31, 2008 (except those that have been
20 designated as ‘privileged’) that it has been able to locate after a diligent search,
21 that mention or refer or relate to any of EFI or EFMF’s business practices.” This
22 included any “compliance review,” however defined.⁹

23 ⁴ Trustee Motion, 10:13-17; see Trustee RJN, Exhibit 1, 11:7-12.

24 ⁵ Id. at 10:17-18.

25 ⁶ Trustee RJN, Exhibit 1.

26 ⁷ See Bryan Cave Opposition, 9:11-15.

27 ⁸ Trustee Motion, 13:18-20.

28 ⁹ Trustee Stipulation, 15:11-17.

1 To the extent Bryan Cave locates additional documents within the scope of the request, Bryan
2 Cave has a continuing duty to timely supplement its response pursuant to Rule 26(e)(1).

3 With respect to the issue of categorization, Rule 34(b)(2)(E) states:

4 Unless otherwise stipulated or ordered by the court, these procedures apply to
5 producing documents or electronically stored information:

- 6 (i) A party must produce documents as they are kept in the usual course of
7 business or must organize and label them to correspond to the categories
8 in the request;
- 9 (ii) If a request does not specify a form for producing electronically stored
10 information, a party must produce it in a form or forms in which it is
11 ordinarily maintained or in a reasonably usable form or forms; and
- 12 (iii) A party need not produce the same electronically stored information in
13 more than one form.

14 F.R.Civ.P. 34(b)(2)(E). Trustee's RFP Set One does not specify a form for producing
15 electronically stored information in response to the request. According to the Stipulation, Bryan
16 Cave produced electronically stored documents responsive to the request "on an electronic
17 database called 'Relativity,' which has search and sorting tools that allow a user to organize
18 documents by custodian, date, type of document and myriad other categories."¹⁰ The court finds
19 that Bryan Cave's response satisfies Rule 34(b)(2)(E). The Trustee Motion as to Issue # 1 is
20 denied.

21 **Issue 2: Whether Bryan Cave Must Produce Documents Regarding Its Employment
22 and Supervision of Attorneys.**

23 Trustee's RFP No. 86 seeks "All DOCUMENTS and COMMUNICATIONS that
24 comprise, are part of, mention, discuss, refer to or analyze YOUR *procedures for the supervision*
25 of associate or 'Counsel' attorneys, at any time from October 1, 2006 to the date of YOUR
26 response."¹¹ Trustee's RFP No. 87 further seeks "[a]ll DOCUMENTS and

27 ¹⁰ Id. at 16:1-5 (emphasis added).

28 ¹¹ Trustee RJN, Exhibit 1, 14:23-26 (emphasis added).

1 COMMUNICATIONS that mention, discuss, refer to or analyze YOUR *supervision* of
2 WINDLER in the representation of EFI and EFMF.”¹²

3 Trustee is seeking damages in excess of \$100 million from Bryan Cave and Windler for
4 alleged professional negligence stemming from “Bryan Cave and Windler’s services rendered in
5 regard to the Compliance Review; EFI’s and EFMF’s real estate mortgage business and
6 securities offerings; Bryan Cave and Windler’s [alleged] breaches of their duties of loyalty given
7 the [alleged] conflict of interest that existed as to their joint representation of EFI and EFMF; and
8 Bryan Cave’s [alleged] negligent supervision of Winder’s professional activities.”¹³ In the
9 Complaint’s Fourth Claim for Relief, Trustee alleges that “Bryan Cave’s conduct in failing to
10 assign competent attorneys with the requisite skills and expertise [to] both perform the work
11 required for the EFI engagement, and supervise the EFI engagement, was a direct and proximate
12 cause of and a substantial factor in causing harm to EFI and resulted in EFI’s damages in excess
13 of \$100 million.”¹⁴ Trustee further alleges that “[i]n allowing Windler to conduct and supervise
14 the Compliance Review and later prepare the application and the offering circular for the May
15 2007 permit, independently and without supervision by an attorney with the appropriate
16 expertise for the engagement and work product, and given Windler’s lack of appropriate skill
17 and expertise for the engagement, Bryan Cave breached its duty of due care owed to EFI to
18 competently represent EFI with lawyers with the skills, expertise, and diligence exercised by
19 other specialists of ordinary skill and capacity specializing in securities law and real estate
20 regulatory matters in the same or similar area.”¹⁵ The court finds that Bryan Cave’s policies and
21 procedures governing the supervision of its attorneys in the representation of EFI/EFMF during
22 the period of time it represented EFI/EFMF are highly relevant to the claims made the basis of
23 Trustee’s Complaint, particularly his Fourth Claim for Relief.

24
25 ¹² Id., Exhibit 1, 15:1-3 (emphasis added).

26 ¹³ Trustee Opposition, 8:25-9:2.

27 ¹⁴ Complaint, 61:18-21.

28 ¹⁵ Id. at 61:8-14.

1 Bryan Cave asserts that it has “produced documents reflecting policies potentially
2 pertaining to any supervision of its ‘Counsel’ attorneys (such as Ms. Windler) during the EFI
3 representation from October 2006 to June 2008,” but it declines to produce “Bryan Cave’s
4 policies applicable *after* the representation of EFI ended” on the grounds of relevance.¹⁶ Bryan
5 Cave also objects to the temporal scope of Trustee’s RFP Nos. 86 and 87 which is open-ended.
6 Bryan Cave argues that the temporal scope of these requests and others is not proportional to the
7 needs of the case given the importance of the issues at stake, the amount in controversy, the
8 parties’ relative access to relevant information, the parties’ resources, and the importance of the
9 discovery in resolving the issues. The burden and expense of the proposed discovery, according
10 to Bryan Cave, outweighs its likely benefits when analyzed in the context of the causes of action
11 set forth in the Trustee’s Complaint.

12 “California case law recognizes the theory that an employer can be liable to a third
13 person for negligently hiring, supervising, or retaining an unfit employee.” John Doe v. Capital
14 Cities, 50 Cal.App.4th 1038, 1054 (1996); see Evan v. Hughson United Methodist Church, 8
15 Cal.App.4th 828, 836 (1992) (“[A]n employer may be liable to a third person for negligently
16 hiring an incompetent or unfit employee”). “[A]ctual knowledge can be inferred from the
17 circumstances only if, in light of the evidence, such inference is not based on speculation or
18 conjecture.” Uccello v. Laudenslayer, 44 Cal.App.3d 504, 514 n. 4 (1975). Only where the
19 circumstances are such that the defendant ‘must have known’ and not ‘should have known’ will
20 an inference of actual knowledge be permitted.” Id. Evidence of prior bad acts is not admissible
21 to show that a person acted in conformity therewith, but it is admissible if probative of some
22 other issue, such as knowledge. F.R.Evid. 404(b)(2).

23 The issue in this case is two-fold: (1) Whether Windler possessed the requisite skill,
24 experience and competence to properly represent EFI/EFMF on the matters for which Bryan
25 Cave was retained; and (2) if not, whether Bryan Cave must have known that Windler lacked the
26 requisite skill, experience and competence to properly represent EFI/EFMF when she was
27

28 ¹⁶ Bryan Cave Opposition, at 11:12-16 (emphasis in original).

1 assigned by Bryan Cave, her employer, to represent EFI/EFMF on the matters for which Bryan
2 Cave was retained. Given the standard that must be applied by the court to find negligent
3 supervision, the only relevant inquiry is whether Bryan Cave had actual knowledge of Winder's
4 alleged lack of competence prior to or during the period that she was assigned by Bryan Cave to
5 render legal services on EFI/EFMF matters.

6 Trustee does not explain adequately in either the motion or stipulation why any
7 amendments, revisions, or additions to such policies and procedures made by Bryan Cave after
8 June 2008, when its representation of EFI/EFMF ceased, are relevant to its claim that Bryan
9 Cave allegedly failed "to assign competent attorneys with the requisite skills and expertise [to]
10 both perform the work required for the EFI engagement, and supervise the EFI engagement."¹⁷

11 Bryan Cave's objection to the temporal scope of Trustee's RFP Nos. 86 and 87 is well
12 taken. The Trustee's claims are based on Bryan Cave's representation of EFI which began in the
13 fall of 2006 and ceased in mid-2008. Granted "courts allow discovery to extend to events before
14 and after the period of actual liability so as to provide context." In re New Century, 2009 WL
15 9568860, * 2 (C.D. Cal. 2009). However, the temporal scope of Trustee's discovery requests is
16 unrestricted, open-ended, and not limited by time or context. It is not proportional to the needs
17 of the case given the nature of the Trustee's claims, the privacy issues at stake, and the burden
18 the proposed discovery places on Bryan Cave and Windler. Furthermore, the court fails to see
19 the relevance of many of the documents sought given the claims made the basis of the Trustee's
20 Complaint. To the extent the Trustee seeks to discover whether such policies and procedures
21 were amended, revised, or supplemented as a "remedial measure," the court notes that evidence
22 of subsequent measures taken that would have made an earlier injury or harm less likely to occur
23 is not admissible to prove negligence or culpable conduct. F.R.Evid. 407.

24 Accordingly, the court will require Bryan Cave to produce the following non-privileged
25 documents in its possession, custody or control:

26 Trustee's RFP No. 86 – All DOCUMENTS and COMMUNICATIONS that
27 comprise, are part of, mention, discuss, refer to or analyze YOUR procedures for

28 ¹⁷ See footnote # 14.

1 the supervision of associate or ‘Counsel’ attorneys, at any time from January 1,
2 2006 to July 31, 2008.”

3 There is no evidence that Bryan Cave has withheld from the Trustee non-privileged documents
4 reflecting Bryan Cave’s policies and procedures governing the supervision of its attorneys during
5 the period of time it represented EFI/EFMF. To the extent Bryan Cave locates additional
6 documents within the narrowed scope of the request, Bryan Cave has a continuing duty to timely
7 supplement its response pursuant to Rule 26(e)(1).

8 All other relief requested in the Trustee Motion with respect to Issue # 2 is denied.¹⁸

9 **Issue 3: Whether Bryan Cave Must Produce Documents Relating to Windler’s**
10 **Employment History.**

11 Trustee’s Complaint seeks damages based upon, among other claims, four claims for
12 relief predicated upon Bryan Cave’s alleged professional negligence. By way of example,
13 Trustee alleges in conjunction with his First Claim for Relief that “[i]n rendering legal services
14 to EFI, Bryan Cave and Windler breached their duty of due care owed to EFI to exercise
15 reasonable care and skill in representing the interests of EFI as specialists in the areas of
16 securities laws and regulations, real estate regulatory matters, corporate law, insolvency and
17 creditors rights, by failing to exercise the skill, prudence, and diligence exercised by other
18 specialists of ordinary skill and capacity specializing in the same fields practicing in a similar
19 area or location.”¹⁹ Issue # 3 focuses on the following documents requested by the Trustee
20 which the Trustee believes are relevant and crucial its claims of professional negligence against
21 Bryan Cave:

22 Trustee’s RFP No. 46 -- All DOCUMENTS and COMMUNICATIONS that
23 YOU prepared, considered, or sent to or received from any PERSON in
24 connection with YOUR hiring of WINDLER or the terms and/or conditions of
25 hiring.

26
27 ¹⁸ Trustee’s RFP No. 87 which seeks all documents regarding Bryan Cave’s supervision of
28 Windler in the representation of EFI/EFMF is addressed under Issue No. 3.

¹⁹ Complaint, 49:8-13.

1 Trustee's RFP No. 47 – All DOCUMENTS and COMMUNICATIONS that
2 mention, discuss or refer to any of the terms and/or conditions of WINDLER's
association with YOU as "Counsel."

3 Trustee's RFP No. 48 – All DOCUMENTS and COMMUNICATIONS that YOU
4 prepared, considered, or sent to or received from any PERSON in connection with
5 the termination of WINDLER'S association with YOU as "Counsel" or the terms
and/or conditions of such termination.

6 Trustee's RFP No. 49 – All DOCUMENTS and COMMUNICATIONS that
7 mention, discuss or refer to the termination of WINDLER'S association with you
8 as "Counsel" or the terms and/or conditions of such termination.

9 Trustee's RFP No. 50 – All DOCUMENTS and COMMUNICATIONS that
10 mention, discuss or refer to any threatened or imposed Court sanctions against
11 YOU, any of YOUR clients or WINDLER in any legal proceeding in which
WINDLER acted as an attorney of record for such clients.

12 Trustee's RFP No. 51 – All DOCUMENTS and COMMUNICATIONS that
13 mention, discuss or refer to any internal investigations of or reports on
WINDLER'S job performance as "Counsel" at BRYAN CAVE.

14 Trustee's RFP No. 52 – All DOCUMENTS and COMMUNICATIONS that
15 comprise YOUR employee file for WINDLER.²⁰

16 Bryan Cave responds that it has "*agreed to produce all non-privileged documents responsive to*
17 *these requests that relate directly to the EFI representation*," but contends that the request is
18 overbroad in that it "seeks documents Bryan Cave already produced, documents clearly covered
19 by the attorney-client privilege or outside the scope of the EFI Trustee's claims, and/or
20 documents covered by Ms. Windler's right of privacy that is the subject of her concurrently-filed
21 motion for protective order."²¹ Windler seeks a protective order because "[d]ocuments
22 responsive to these requests would include private information such as Ms. Windler's personal
23 medical information, personal financial information, general performance evaluations, and other,
24 similar confidential information that is disclosed to or created by an employer in connection with
25 employment."²²

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27 ²⁰ Trustee Stipulation, 25:10-28:21.

28 ²¹ Id. at 35:11-17 (emphasis in original).

1 “Federal courts expressly recognize a constitutionally-based right of privacy that can be
2 asserted in response to discovery.” Bickley v. Schneider Nat’l, Inc., 2011 WL 1344195, *2
3 (N.D. Cal. 2011). “An employee’s personnel records and employment information are protected
4 by the constitutional right of privacy.” Id. While the scope of discovery must be sufficiently
5 broad to provide both sides with ability to secure all information necessary to fully litigate the
6 relevant issues, “there is a strong public policy against the public disclosure of personnel files.”
7 Cason v. Builders FirstSource-Southeast Group, Inc., 159 F.Supp.2d 242, 247 (W.D.N.C. 2001).
8 “[E]ven where strong public policy against disclosure exists, as in the case of personnel files,
9 discovery is nevertheless required if (1) the material sought is ‘clearly relevant,’ and (2) the need
10 for discovery is compelling because the information sought is not otherwise readily obtainable.”
11 Blount v. Wake Elec. Membership Corp., 162 F.R.D. 102, 106 (E.D. N.C. 1993); see Goss v.
12 Crossley (In re Hawaii Corp.), 88 F.R.D. 518, 524 (D. Hawaii 1980). “The party or person
13 whose privacy is affected may either object to the discovery request or seek a protective order.”
14 Soto v. City of Concord, 162 F.R.D. 603, 616 (N.D. Cal. 1995). “Resolution of a privacy
15 objection or request for a protective order requires a balancing of the need for the information
16 sought against the privacy right asserted.” Id. See Board of Trustees v. Superior Court, 119
17 Cal.App.3d 516, (1981) (“[E]ven when discovery of private information is found directly
18 relevant to the issues of ongoing litigation, it will not automatically be allowed; there must then
19 be a ‘careful balancing’ of the ‘compelling public need’ for discovery against the ‘fundamental
20 right of privacy.’”). The impact of disclosure on privacy rights can be minimized by a carefully
21 drafted protective order. Soto, 162 F.R.D. at 616.

22 “In an action based upon negligent or otherwise improper performance of an employee’s
23 duties, the relevance requirement is generally satisfied by the fact that the personnel file and
24 employee evaluations should indicate the training, experience, work record, and qualifications of
25 the employee.” Blount v. Wake Elec. Membership Corp., 162 F.R.D. 102, 106 (E.D. N.C.
26 1993); see Weller v. Am. Home Assurance Co., 2007 WL 10978836, *6 (N.D.W.Va. 2007);
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²² Windler Motion, 7:1-4.

1 Goss v. Crossley (In re Hawaii Corp.), 88 F.R.D. 518, 522 (D. Hawaii 1980). The personnel file
2 may also reveal that the employer “failed to hire qualified employees, negligently delegated tasks
3 to underqualified, untrained or inexperienced employees or did not adequately supervise
4 employees . . . [and] may even contain descriptions of specific instances of negligence by this
5 employee.” Blount, 162 F.R.D. at 106; see Hawaii Corp., 88 F.R.D. at 522.

6 On January 14, 2015, the court entered an order approving a stipulation between the
7 Trustee, Bryan Cave and Windler for entry of a Protective Order Regarding Discovery and Use
8 of Confidential Information.²³ In the Protective Order, the parties acknowledged that:

9 [D]iscovery in this adversary proceeding will involve the production of business,
10 commercial or financial information protected by privacy laws, and other
11 confidential information, as contemplated by Federal Rule of Civil Procedure 26
12 and applicable California law, including the Constitution of the State of California
13 and California Civil Code §§ 1798.80-1798-84. At least some of the documents
14 and information that may be sought through discovery in this adversary
proceeding may qualify as sensitive, personal business, commercial or financial
information or non-public information that would justify sealing, redaction or
protection from production beyond the scope of this adversary proceeding.

15 The Trustee, Bryan Cave and Windler sought and received the Protective Order early in the
16 litigation specifically to protect “confidential information,” as defined in Section A(1) of the
17 Protective Order. Section A(1)(a) expressly protects as “confidential information” any
18 “information subject to federal and state privacy rights.” The Protective Order is tightly drawn,
19 contains specific provisions restricting the use and disclosure of confidential information by the
20 parties, and is sufficient to protect Windler’s privacy rights with respect to information contained
21 documents produced by Bryan Cave from its personnel files pursuant to the Trustee’s requests
22 for production.

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26 ²³ Order Approving Chapter 11 Trustee’s Motion for Protective Order and to Establish
27 Discovery Procedures to Protect Confidential Information in the Adversary Proceeding [Dkt. #
28 87] entered January 14, 2015. The Protective Order Regarding Discovery and Use of
Confidential Information (“Protective Order”) is attached as Exhibit 1 to the Stipulation
Regarding Entry of Protective Order and to Establish Discovery Procedures to Protect
Confidential Information in the Adversary Proceeding [Dkt. # 81] filed December 8, 2014.

1 The court is satisfied that many of the documents sought regarding Windler's
2 employment at Bryan Cave are relevant and further, that the need for discovery is compelling
3 and outweighs the potential intrusion of Windler's right of privacy, particularly under the
4 limitations contained in the existing Protective Order. Windler is a party to this adversary
5 proceeding. The central issue in this case is whether Windler possessed the requisite education
6 and professional experience to render competently the legal services necessitated by the
7 EFI/EFMF matters for which Bryan Cave was retained. The information sought by the Trustee
8 is not readily obtainable from another source. "[P]ersonnel files possess an inherent reliability
9 which cannot now be duplicated through any other source." Blount, 162 F.R.D. at 106. "The
10 files contain a contemporaneous evaluation and description of [the employee's] work . . . made
11 without litigation in mind, giving the personnel files an inherent reliability which cannot now be
12 duplicated by any other source of evidence. Hawaii Corp., 88 F.R.D. at 525.

13 However, the court agrees with Bryan Cave that the Trustee's requests lack
14 proportionality. The Trustee's claims are based on Bryan Cave's representation of EFI between
15 October 2006 and July 2008. As previously stated, the primary inquiry is whether Bryan Cave
16 had actual knowledge of Windler's alleged lack of competence prior to or during the period that
17 she was assigned by Bryan Cave to render legal services on EFI/EFMF matters. While discovery
18 may be extended before and after the period of actual liability to provide context, the discovery
19 sought is not proportional to the needs of the case given the nature of the Trustee's claims.
20 Documents after July 31, 2008 have little bearing on whether Bryan Cave committed malpractice
21 or failed to adequately supervise Windler as she rendered legal services as an employee of Bryan
22 Cave on EFI/EFMF matters between October 2006 and July 2008. To the extent that the
23 Trustee's open-ended requests may be calculated to lead to the discovery of admissible evidence,
24 the burden and expense of production on Bryan Cave and the intrusion on Windler's privacy
25 interests outweigh the likely benefits of such discovery.

26 The Trustee relies heavily on Lopez v. Watchtower Bible & Tract Soc'y of N.Y., Inc.,
27 246 Cal.App.4th 566 (2016) for the proposition that post-incident acts are relevant to a cause of
28 action for damages proximately caused by negligent supervision. Post-incident documents were

determined to be relevant in Lopez because the plaintiff asserted a claim for punitive damages on a related issue of willful and conscientious disregard. Id. at 177-78. Lopez is inapplicable to this case because the Trustee has not sought punitive damages in conjunction with any of the four claims for professional negligence alleged in his Complaint.

In sum, the court will order with respect to the specific discovery requests under Issue # 3, the following:

As to Trustee's RFP Nos. 46, 47, 51, 52 and 87, Bryan Cave must produce all non-privileged documents in its possession, custody or control pertaining (1) Bryan Cave's hiring of Windler; (2) Windler's training, experience, and qualifications; and (3) Windler's work record, including any promotion, complaint, disciplinary action, employee evaluation, performance review, and/or performance work plan for the period beginning from the date of Windler's employment at Bryan Cave to and including July 31, 2008. Trustee is not entitled to the discovery of documents or information regarding Windler's personal health or medical records, taxes, benefits, insurance, or financial records, including the amount of Windler's compensation or rate of pay, other than the (1) document describing the discretionary fee bonus that was available to counsel and (2) Windler's offer letter (with salary and dollar figures redacted) which was previously offered by Bryan Cave to the Trustee in an effort at compromise.

With respect to Trustee's RFP Nos. 48 and 49, Bryan Cave has already agreed to produce all non-privileged documents in its possession, custody or control regarding Windler's departure from Bryan Cave in 2013 that relate to the EFI representation. As to Trustee's RFP No. 50, Bryan Cave must produce all non-privileged documents in its possession, custody or control regarding any threatened or imposed Court sanctions within the scope of the request for the period beginning with the date of Windler's employment with Bryan Cave to and including July 31, 2008.

The documents produced by Bryan Cave in response to the Trustee's RFP Nos. 46, 47, 48, 49, 50, 51, 52 and 87 shall be deemed "confidential information," as defined in Section A(1) of the Protective Order, and such documents shall be subject to the provisions of such Protective

Order. Bryan Cave has a continuing duty to supplement its responses to Trustee's RFP Nos. 46, 47, 48, 49, 50, 51, 52 and 87 pursuant to Rule 26(e)(1).

All other relief requested in the Trustee Motion with respect to Issue # 3 is denied.

Issue 4: Whether Bryan Cave Must Produce Documents Related to Windler's Background, Training and Professional Experience.

Issue # 4 focuses on the following documents requested by the Trustee:

Trustee's RFP No. 55 -- All DOCUMENTS and COMMUNICATIONS that mention, discuss or refer to WINDLER'S training or experience in securities laws, rules and/or regulations.

Trustee's RFP No. 56 -- All DOCUMENTS and COMMUNICATIONS that mention, discuss or refer to WINDLER'S training or experience in performing legal compliance reviews as to securities laws, rules and/or regulations or advising clients with respect thereto.

Trustee's RFP No. 57 -- All DOCUMENTS and COMMUNICATIONS that mention, discuss or refer to WINDLER'S training or experience in real estate laws, rules and/or regulations.

Trustee's RFP No. 58 -- All DOCUMENTS and COMMUNICATIONS that mention, discuss or refer to WINDLER'S training and/or expertise in performing legal compliance reviews as to real estate laws, rules and regulations or advising clients with respect thereto.

Trustee's RFP No. 85 -- All DOCUMENTS and COMMUNICATIONS that comprise, are part of, mention, discuss or analyze WINDLER'S proposed or actual presentations to members of the public or at continuing legal education seminars, webinars or marketing events concerning real estate or securities issues.

Trustee claims that all of the documents sought are relevant to the claims made the basis of his complaint. Bryan Cave disagrees, arguing that the Trustee's requests are "hopelessly overbroad" and suffer from a temporal infirmity because they are not limited by "time or context."²⁴

The court believes that the Trustee's inquiry is relevant, but the temporal scope of each request is overbroad. As previously stated, the Trustee's claims are based on Bryan Cave's

²⁴ Trustee Stipulation, 46:13, 27-28; 47:9-10.

1 representation of EFI/EFMF which began in the fall of 2006 and ceased in mid-2008 and the
2 only relevant inquiry is whether Bryan Cave had actual knowledge of Windler's alleged lack of
3 competence prior to or during the period that she was assigned by Bryan Cave to render legal
4 services on EFI/EFMF matters. Neither party having proposed any alternative language, the
5 court will order Bryan Cave to produce in response to Trustee's RFP Nos. 55, 56, 57, 58 and 85
6 the following non-privileged documents to the extent such documents are in its possession,
7 custody or control:

8 Trustee's RFP No. 55 – All DOCUMENTS and COMMUNICATIONS that
9 discuss the nature, scope, breadth and/or depth of WINDLER'S training or
10 experience in performing legal compliance reviews as to securities laws, rules
11 and/or regulations for the period beginning with the date of Windler's
employment at Bryan Cave to and including July 31, 2008.

12 Trustee's RFP No. 56 – All DOCUMENTS and COMMUNICATIONS that
13 discuss the nature, scope, breadth and/or depth of WINDLER'S training or
14 experience in performing legal compliance reviews as to securities laws, rules
15 and/or regulations or advising clients with respect thereto for the period beginning
with the date of Windler's employment at Bryan Cave to and including July 31,
2008.

16 Trustee's RFP No. 57 – All DOCUMENTS and COMMUNICATIONS that
17 discuss the nature, scope, breadth and/or depth of WINDLER'S training or
18 experience in real estate laws, rules and/or regulations for the period beginning
19 with the date of Windler's employment at Bryan Cave to and including July 31,
2008.

20 Trustee's RFP No. 58 – All DOCUMENTS and COMMUNICATIONS that
21 discuss the nature, scope, breadth and/or depth of WINDLER'S training and/or
22 expertise in performing legal compliance reviews as to real estate laws, rules and
23 regulations or advising clients with respect thereto for the period beginning with
the date of Windler's employment at Bryan Cave to and including July 31, 2008.

24 Trustee's RFP No. 85 – All DOCUMENTS and COMMUNICATIONS that
25 discuss or analyze WINDLER'S proposed or actual presentations to members of
26 the public or at continuing legal education seminars, webinars or marketing events
concerning real estate or securities issues for the period beginning with the date of
Windler's employment at Bryan Cave to and including July 31, 2008.

27 Bryan Cave has a continuing duty to supplement its responses to Trustee's RFP Nos. 55, 56, 57,
28 58 and 85 pursuant to Rule 26(e)(1).

All other relief requested in the Trustee Motion with respect to Issue # 4 is denied.

Issue 5: Whether Bryan Cave Must Produce Documents Regarding Potential Conflicts of Interest Arising From Its Alleged Representation of EFI and EFMF.

Trustee's Complaint alleges that Bryan Cave's dual representation of EFI and EFMF created a conflict of interest and Bryan Cave "failed to disclose this potential or actual conflict of interest to EFI, and to advise Guth and Yaguda of the need for EFI or EFMF to retain independent counsel and management so as to appropriately address any conflicts that existed or may have existed as a result of [Bryan Cave's] ... Compliance Review."²⁵ Trustee further alleges that Bryan Cave "also failed to advise EFI of the implications raised as a result of the conflict of interest as to the relationship as between EFI and EFMF and EFI's Investors" and that it "continued to represent EFI and EFMF well after [Bryan Cave] knew that there were actual and potential conflicts of interest and conflicting fiduciary considerations without disclosure of the same."²⁶ Issue # 5 focuses on the following documents requested by the Trustee which the Trustee believes are relevant to Bryan Cave's alleged conflict of interest:

Trustee's RFP No. 78 – All DOCUMENTS and COMMUNICATIONS that mention, discuss or analyze any potential or actual conflict of interest in YOUR proposed or actual representation of EFI, EFMF, GUTH or YAGUDA.

Trustee's RFP No. 88 – All DOCUMENTS and COMMUNICATIONS that comprise, are part of, mention, discuss, refer to or analyze YOUR procedures for identifying and/or determining potential or actual conflicts of interests in representing prospective or existing clients, at any time from October 1, 2006 to the date of YOUR response.

Trustee's RFP No. 89 – All DOCUMENTS and COMMUNICATIONS that comprise, are part of, mention, discuss, refer to or analyze any conflicts checks performed in connection with YOUR proposed or actual representation of EFI, EFMF, GUTH or YAGUDA.²⁷

²⁵ Complaint, 9:17-20.

²⁶ Id. at 9:21-24.

²⁷ Trustee Stipulation, 47:18-49:9.

Attorneys are required to avoid representing clients with conflicting interests. See Flatt v. Superior Court, 9 Cal.4th 275, 282 (1994) (“An attorney’s duty of loyalty to a client is not one that is capable of being divided”). Rule 3-310 of the Rules of Professional Conduct of the State Bar of California prohibits an attorney, absent informed written consent, from “[a]ccept[ing] representation of more than one client in a matter in which the interests of the clients potentially conflict; or [a]ccept[ing] or continu[ing] representation of more than one client in a matter in which the interests of the clients actually conflict.” Cal. Rules of Professional Conduct Rule 3-310(C)(1)&(2). “[T]he rule of disqualification in simultaneous representation cases is a per se or ‘automatic’ one.” Flatt, 9 Cal.4th at 284; see Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1387 (2d Cir. 1976) (“Where the relationship is a continuing one, adverse representation is prima facie improper . . .”).

Given the allegations regarding improper dual representation in the Trustee’s Complaint, the court agrees with the Trustee that the documents sought regarding Bryan Cave’s alleged conflicts of interest and Bryan Cave’s procedures for identifying such conflicts of interest are relevant to the Trustee’s malpractice claims, and therefore are subject to discovery. With regard to Trustee’s RFP Nos. 78 and 89, Bryan Cave denies that it represented both EFI and EFMF asserting that it was retained by “EFI alone (not EFMF) for the administratively titled ‘Compliance Review’ matter”²⁸ However, notwithstanding such denial, Bryan Cave maintains with respect to the Trustee’s RFP Nos. 78 and 89 that it “***has not withheld any document on the basis of its position that it did not represent EFMF.***”²⁹

Admissions made in documents filed with this court belie the notion that Bryan Cave did not represent simultaneously both EFI and EFMF. The court takes judicial notice of (1) Bryan Cave’s Proof of Claim # 21-1 filed in the EFMF bankruptcy case on March 31, 2010, asserting an unsecured claim in the amount of \$281,684.25 for “services rendered and costs incurred by Bryan Cave to or for the benefit of [EFMF] or its related party, chapter 11 debtor Estate

²⁸ Id. at 53:11-13.

²⁹ Id. at 54:10-11 (emphasis in original).

1 Financial, Inc., Case No. 9:08-11457-RR”³⁰ and (2) Bryan Cave’s Proof of Claim # 69-1 filed in
2 the EFI bankruptcy case on March 31, 2010, asserting an unsecured claim in the amount of
3 \$281,684.25 for “services rendered and costs incurred by Bryan Cave to or for the benefit of
4 [EFI] or its related party, chapter 11 debtor Estate Financial Mortgage Fund, LLC, Case No.
5 9:08-11535-RR.”³¹ At this juncture, the court need not decide whether Bryan Cave
6 simultaneously represented EFI and EFMF, and if so, whether such dual representation resulted
7 in an impermissible conflict of interest. Bryan Cave maintains that it “has not withheld any
8 document on the basis of its position that it did not represent EFMF.”³² There is no evidence that
9 Bryan Cave has withheld from the Trustee any non-privileged documents responsive to the
10 Trustee’s RFP Nos. 78 and 89. To the extent Bryan Cave locates additional documents within
11 the scope of the Trustee’s RFP Nos. 78 and 89, Bryan Cave must timely supplement its response
12 pursuant to Rule 26(e)(1).

13 With regard to Trustee’s RFP No. 88, “*Bryan Cave has said that it will produce any*
14 *responsive documents that it can locate that reflect procedures in place during its*
15 *representation of EFI.*”³³ The court agrees with Bryan Cave that the temporal scope of this
16 discovery request should be reduced because the Trustee’s claims for malpractice are based on
17 Bryan Cave’s representation of EFI between the fall of 2006 and mid-2008. The court finds that
18 limiting the discovery to the period of October 1, 2006, to July 31, 2008 is proportional to the
19 needs of the case given the nature of the Trustee’s claims and the burden the proposed discovery
20 places on Bryan Cave. To the extent the Trustee seeks to discover whether Bryan Cave’s
21 conflict check policies and procedures were amended, revised, or supplemented as a “remedial
22 measure” after the completion of EFI’s representation, the court notes again that evidence of
23 subsequent measures taken that would have made an earlier injury or harm less likely to occur is

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25 ³⁰ Trustee RJN, Exhibit 1.

26 ³¹ Id. at Exhibit 2.

27 ³² Trustee Stipulation, at 54:10-11.

28 ³³ Id. at 54:15-17 (emphasis in original).

not admissible to prove negligence or culpable conduct. F.R.Evid. 407. Accordingly, Bryan Cave must produce in response to Trustee's RFP No. 88 only those documents and communications that comprise, are part of, mention, discuss, refer to or analyze Bryan Cave's procedures for identifying and/or determining potential or actual conflicts of interests in representing prospective or existing clients, at any time from October 1, 2006 to July 31, 2008.

All other relief requested in the Trustee Motion with respect to Issue # 5 is denied.

Issue 6: Whether Bryan Cave Must Produce Documents Regarding Windler's "Potential Criminal Conduct or Exposure."

Issue # 6 focuses on the following documents requested by the Trustee:

Trustee's RFP No. 69 – All DOCUMENTS and COMMUNICATIONS that mention, discuss or analyze any potential criminal conduct or exposure of WINDLER in regard to her actions in representing EFI, EFMF, GUTH or YAGUDA.³⁴

Bryan Cave insists that it "*has no responsive, non-privileged documents responsive to this request.*"³⁵ Specifically, Bryan Cave avers that "no analysis of Ms. Windler's 'exposure' in connection with the EFI representation was undertaken at any time during the course of the EFI representation in 2006, 2007, or 2008" and that "Bryan Cave confirmed to the EFI Trustee that it does not possess any document reflecting any internal investigation of the representation of EFI or EFMF . . . through at least June 2010."³⁶ Trustee claims that he is entitled to the production of such documents even though they may have been generated after the date Bryan Cave ceased representing EFI, citing Thelan Reid & Priest LLP v. Marland, 2007 WL 578989 (N.D. Cal. 2007) and In re SonicBlue, Inc., 2008 WL 170562 (Bankr. N.D. Cal. 2008). The court disagrees. Thelen and SonicBlue require the disclosure of a law firm's internal communications made during the representation. See Landmark Screens, LLC v. Morgan, Lewis & Bockius LLP, 2010 WL 289858, *2 (N.D. Cal. 2010) ("[T]he documents listed on MLB's log would not require

³⁴ Id. at 55:5-7.

³⁵ Id. at 56:4-5 (emphasis in original).

³⁶ Id. at 56:18-22.

1 disclosure under Thelen because Landmark was not a current client when these communications
2 took place.”). Neither Thelen nor SonicBlue sanction the discovery of privileged documents that
3 post-date a client’s representation.

4 Accordingly, in response to Trustee’s RFP No. 69, the court will require Bryan Cave to
5 produce only those non-privileged documents and communications in its possession, custody or
6 control which mention, discuss or analyze any potential criminal conduct or exposure of Ms.
7 Windler in regard to her actions in representing EFI, EFMF, Guth or Yaguda that were created
8 by Bryan Cave or came within its possession, custody or control during the period of
9 representation from October 1, 2006 through July 31, 2008. The court will not require Bryan
10 Cave to disclose any documents in response to Trustee’s RFP No. 69 which post-date EFI’s
11 representation. To the extent Bryan Cave locates any documents within the narrowed scope of
12 Trustee’s RFP No. 69, Bryan Cave must timely supplement its response pursuant to Rule
13 26(e)(1).

14 All other relief requested in the Trustee Motion with respect to Issue # 6 is denied.

15 **Issue 7: Whether Bryan Cave Must Produce Documents Regarding Windler’s**
16 **Compensation.**

17 Trustee’s Complaint alleges that “Bryan Cave allowed Windler to control and supervise
18 the EFI representation without supervision and guidance by Bryan Cave partners with expertise
19 in the areas of securities and real estate laws, rules and regulations.”³⁷ Trustee also alleges that
20 “the advice and counseling [Bryan Cave] provided ... was contrary to the interests of EFI and its
21 investors, and was given with a goal of keeping Guth and Yaguda in control of EFI and EFMF
22 and Windler in control of the legal relationship and the legal fees that would be generated as a
23 result thereof.”³⁸ “[O]ne of Windler’s over-riding concerns” according to the Complaint, “was to
24 continue to represent EFI so that she could continue to generate billings and create new business
25 opportunities from this representation.”³⁹

26 ³⁷ Complaint, 11:14-16.
27

28 ³⁸ Id. at 42:16-19.

Issue # 7 focuses on the following documents requested by the Trustee which the Trustee believes are relevant to such allegations:

Trustee's RFP No. 100 – All DOCUMENTS that show or mention compensation paid by YOU to WINDLER as a result of services performed for or at the request of EFI or EFMF.

Trustee's RFP No. 103 – All DOCUMENTS that show, discuss, mention or refer to compensation paid by YOU to WINDLER as a result of services performed for or at the request of GUTH or YAGUDA.⁴⁰

In its response to the Trustee's inquiry, Bryan Cave contends that "Windler's compensation has no relevance to the claims or defenses in this action and is not likely to lead to the discovery of admissible evidence."⁴¹ Windler, on the other hand, in a concurrently-filed motion for protective order, objects to the Trustee's inquiry into her compensation on the grounds that it violates her right of privacy.

Trustee is not entitled to the discovery of documents or information regarding Windler's personal health or medical records, taxes, benefits, insurance, or financial records, including the amount of Windler's compensation or rate of pay, other than the (1) document describing the discretionary fee bonus that was available to counsel and (2) Windler's offer letter (with salary and dollar figures redacted) which was previously offered by Bryan Cave to the Trustee in an effort at compromise. However, the court believes that the compensation model for counsel at Bryan Cave may be relevant to demonstrate Windler's motive, if any, to maintain control over EFI's representation even though she allegedly may have lacked the requisite expertise.

"[M]otive can be a relevant consideration, and personal financial gain may weigh heavily in favor of a scienter inference." Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 310 (2007); see also CDX Liquidating Trust ex rel. CDX Liquidating Tr. v. Venrock Assocs., 411

³⁹ Id. at 43:14-16.

⁴⁰ Trustee Stipulation, 57:24-26; 58:13-15.

⁴¹ Id.

1 B.R. 591, 604 (N.D. Ill. 2009) (holding that evidence of monetary distribution based on profits is
2 relevant to show defendants' motive to breach fiduciary duties).

3 The court rejects Bryan Cave's argument that "as a general matter, a lawyer's
4 compensation cannot be used to argue that she was incentivized to breach any duties to her
5 client."⁴² Bryan Cave's reliance on Jalali v. Root, 109 Cal. App. 4th 1768 (2003) is misplaced.
6 Jalali involved a malpractice suit against Root, an attorney, who inaccurately advised Jalali, his
7 client, that she would not be required to pay income tax on his contingency fee. The Jalali court
8 rejected the argument that "Root intentionally violated his fiduciary duty as an attorney"
9 because, by inference, "he himself would have benefitted from the settlement." Id. at 1769.
10 Nothing in Jalali supports the notion that evidence of compensation is not relevant or admissible
11 to show motive for a breach of fiduciary duty.

12 Bryan Cave has already offered to produce: (1) "its October 2015 offer letter to Ms.
13 Windler with her salary amount redacted at her request;" and (2) "a document describing the
14 'discretionary shared fee bonus' available to counsel at Bryan Cave such as Ms. Windler at the
15 time of her employment."⁴³ Bryan Cave argues that the description of its bonus policy should be
16 sufficient for the Trustee to conclude that Windler "had no actual financial incentive to keep
17 work on the EFI matter for herself rather than to involve other attorneys at Bryan Cave."⁴⁴
18 Trustee, however, insists on obtaining "the actual discretionary bonuses paid to Windler and the
19 calculation of said bonuses."⁴⁵

20 Trustee is not entitled to documents and information regarding Windler's actual
21 compensation, including the amount of any discretionary bonus that may have been paid to her
22 during her employment at Bryan Cave. However, the court agrees with the Trustee that the exact
23 method of calculation of any bonus paid to Windler, to the extent it pertains to EFI's

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25 ⁴² Id. at 59:24-26.

26 ⁴³ Id. at 60:3-6.

27 ⁴⁴ Id. at 60:11-12.

28 ⁴⁵ Trustee Reply, 13:14-15 (emphasis added).

representation, is relevant to the claims asserted in the Trustee's Complaint. To the extent that Bryan Cave's proffered "document describing the 'discretionary shared fee bonus' available to counsel at Bryan Cave" does not contain an explanation of the exact method used to calculate the bonus, it must be revised or supplemented to do so. To the extent any document produced by Bryan Cave in response to Trustee's RFP Nos. 100 and 103 includes a reference to salary, bonus or other compensation actually paid to Windler, the reference must be redacted. Furthermore, all documents produced by Bryan Cave in response to Trustee's RFP Nos. 100 and 103 must be treated as "confidential information" subject to the provisions of the Protective Order. Finally, Bryan Cave has a continuing duty to timely supplement its response to Trustee's RFP Nos. 100 and 103 pursuant to Rule 26(e)(1).

All other relief requested in the Trustee Motion with respect to Issue # 7 is denied.

Issue 8: Whether Bryan Cave Must Produce Documents Regarding Its Proofs of Claim.

Issue # 8 focuses on the following documents requested by the Trustee:

Trustee's RFP No. 124 – All DOCUMENTS and COMMUNICATIONS (other than DOCUMENTS or COMMUNICATIONS between YOU and GDC) that mention, discuss or refer to the proofs of claim that YOU filed in the EFI and EFMF bankruptcy cases.⁴⁶

Trustee seeks the production of documents and communications that "mention, discuss or refer to the proofs of claim" filed by Bryan Cave in the EFI and EFMF bankruptcy cases. The documents and communications sought are relevant to the Trustee's eighth and ninth claims for relief for equitable subordination and for disallowance of proof of claim, respectively.⁴⁷ The documents and communications sought are also relevant to Trustee's malpractice claims based on Bryan Cave's alleged conflict of interest in representing both EFI and EFMF. However, Trustee's RFP No. 124 is narrowly crafted. It does not request documents and communications, such as accounting records, documents and emails, that might relate to the proofs of claim. To

⁴⁶ Trustee Stipulation, 60:21-61:8.

⁴⁷ See Complaint, 47:13-48:2 and 75:7-79:3.

1 fall within the scope of the request, a document must specifically “mention, discuss or refer to”
2 one or both of the proofs of claim.

3 To the Trustee’s RFP No. 124, Bryan Cave responded that it “*does not possess any*
4 *responsive, non-privileged document or communication that mentions, discusses or refers to*
5 *the proofs of claim.*”⁴⁸ Trustee has produced no evidence to the contrary. To the extent that
6 Bryan Cave locates any documents within the scope of Trustee’s RFP No. 124, Bryan Cave has a
7 continuing duty to timely supplement its response pursuant to Rule 26(e)(1).

8 The Trustee Motion as to Issue # 8 is denied.

9 **Issue 9: Whether Bryan Cave Must Produce Alleged Documents Between Pritchard**
10 **and Windler.**

11 Paragraphs 31 and 32 of the Trustee’s Complaint state, in pertinent part:

12 31. Windler recognized she was not competent to represent EFI with respect to
13 the securities and real estate work that needed to be addressed as part of the
14 Compliance Review, even though she did not disclose that lack of competence
15 and expertise to EFI or to its officers or directors. On November 2, 2006, Windler
16 wrote to Therese Pritchard, a partner in Bryan Cave’s Washington D.C. office
17 asking for help on this project. . . .

18 32. Ms. Pritchard recommended a lawyer in Bryan Cave’s St. Louis office, Jim
19 Levey. Mr. Levey did not participate in the engagement. Further, Ms. Windler
20 did not engage any other securities lawyer to assist her with the Compliance
21 Review or with the preparation of the 2007 Offerings Manual until March 2007,
22 when she involved Mr. Randolph Katz for the limited purpose of reviewing her
23 draft of the offering circular she prepared.”⁴⁹

24 In footnote 9 of the complaint, Trustee notes that “[n]otwithstanding her expertise, Ms. Pritchard
25 had no further involvement in the EFI representation other than making a recommendation to
26 another lawyer in the firm.”⁵⁰

27 Issue # 9 focuses on the following documents requested by the Trustee which the Trustee
28 believes are relevant to his claims for professional negligence against Bryan Cave:

26 ⁴⁸ Trustee Stipulation, 62:9-10 (emphasis in original).

27 ⁴⁹ Complaint, 17:21-18:13.

28 ⁵⁰ Id. at 18 n.9.

Trustee's RFP No. 23 – All DOCUMENTS and COMMUNICATIONS that mention, discuss or refer to PRI[T]CHARD and also mention, discuss or refer to EFI, EFMF, GUTH or YAGUDA.

Trustee's RFP No. 24 – All DOCUMENTS and COMMUNICATIONS that PRI[T]CHARD provided to YOU or WINDLER that mention, discuss or refer to EFI, EFMF, GUTH or YAGUDA.

Trustee's RFP No. 25 – All DOCUMENTS and COMMUNICATIONS that YOU or WINDLER provided or sent to PRICHARD [sic] that mention, discuss or refer to EFI, EFMF, GUTH or YAGUDA.⁵¹

Trustee states that “Pritchard is an acknowledged expert in securities laws” and “was a member of [Bryan Cave's] management committee at the time of the EFI/EFMF representation.”⁵² Trustee reasons that the communications between Windler and Pritchard would be relevant to show whether Bryan Cave's management team had any concerns regarding Windler's qualifications and her work on the EFI/EFMF matter. The court agrees that the requested documents and communications would be relevant for such purpose; but as previously stated, the only relevant inquiry to finding negligent supervision is whether Bryan Cave had actual knowledge of Windler's alleged incompetence during the period it represented EFI. Therefore, the court will reduce the temporal scope of Trustee's RFP Nos. 23 through 25 and require Bryan Cave to produce only those non-privileged documents and communications responsive to the requests created during the representation period from October 1, 2006 through July 31, 2008.

Bryan Cave insists that it “*has produced all responsive documents from the time period of the EFI representation and . . . currently is unaware of any other non-privileged communication between Ms. Pritchard and Ms. Windler regarding the EFI matter.*”⁵³

Specifically, Bryan Cave declares that it “searched for Ms. Pritchard's communications for the 2006 to 2008 time period and found no responsive documents that it had not already produced,”

⁵¹ Trustee Stipulation, 62:27-64:23.

⁵² Id. at 65:11-15.

⁵³ Id. at 66:13-16 (emphasis in original).

noting that “[t]his is not surprising given that Ms. Pritchard’s sole ‘involvement’ in the EFI representation was to recommend another attorney to Ms. Windler in one email who might be available to work with Ms. Windler on an EFI matter.”⁵⁴ To the extent Bryan Cave locates any documents or communications within the narrowed scope of Trustee’s RFP Nos. 23 through 25, Bryan Cave has a continuing duty to timely supplement its response pursuant to Rule 26(e)(1).

All other relief requested in the Trustee Motion with respect to Issue # 9 is denied.

Issue 10: Whether Bryan Cave Must Produce Documents Regarding Windler’s Activities That Allegedly Resulted in Sanctions and State Bar Proceedings.

Issue # 10 focuses on the following documents requested by the Trustee:

Trustee’s RFP No. 50 – All DOCUMENTS and COMMUNICATIONS that mention, discuss or refer to any threatened or imposed Court sanctions against YOU, any of YOUR clients or WINDLER in any legal proceeding in which WINDLER acted as an attorney of record for such clients.

Trustee’s RFP No. 53 – All DOCUMENTS and COMMUNICATIONS that mention, discuss or refer to any California State Bar disciplinary proceedings to which WINDLER was or is a party.

Trustee’s RFP No. 54 – All DOCUMENTS and COMMUNICATIONS that mention, discuss or refer to any Colorado State Bar disciplinary proceedings to which WINDLER was or is a party.⁵⁵

Bryan Cave seeks to narrow the scope of production to the following documents and communications: (1) With respect to Trustee’s RFP No. 50 – Documents and communications that “mention, discuss or refer to any threatened or imposed Court sanctions against Bryan Cave or Katherine Windler in connection with Bryan Cave’s representation of EFI;”⁵⁶ (2) With respect to Trustee’s RFP No. 53 – Documents and communications that “mention, discuss or refer to any California State Bar disciplinary proceedings to which Katherine Windler was or is a party, the subject of which was or is Bryan Cave’s representation of EFI;”⁵⁷ and (3) With respect to

⁵⁴ Id. at 66:21-24.

⁵⁵ Id. at 67:8-68:18.

⁵⁶ Id. at 67:19-21.

1 Trustee’s RFP No. 54 – Documents and communications that “mention, discuss or refer to any
2 Colorado State Bar disciplinary proceedings to which Katherine Windler was or is a party, that
3 relates to Bryan Cave’s representation of EFI.”⁵⁸ Bryan Cave argues that, to the extent the
4 Trustee’s request seeks additional documents, it is “an improper fishing expedition” into
5 communications “of minimal or no relevance” and constitutes “a serious encroachment on Bryan
6 Cave’s attorney-client privilege, its duty of confidentiality to other clients, and Ms. Windler’s
7 privacy rights.”⁵⁹ Windler contends that “production of documents in response to these Requests
8 . . . violate [her] right to privacy under the California Constitution, Art. I, Section I, and the U.S.
9 Constitution.”⁶⁰

10 With regard to Trustee’s RFP Nos. 53 and 54, the Trustee has offered to stipulate to
11 documents related to Windler’s suspensions from practice by the California and Colorado State
12 Bar associations which are a matter of public record.⁶¹

13 The court is not sympathetic to Bryan Cave’s argument that the scope of production
14 should be limited to documents referring to sanctions that relate only to the EFI representation.
15 The court agrees with the Trustee that the documents sought are relevant to the issue of whether
16 Bryan Cave allegedly “had knowledge that Windler had a history of being involved in
17 representations in which her integrity, honesty and professional ethics had been called into
18 question” and nonetheless hired and failed negligently to supervise her as counsel for EFI.⁶²
19 However, the temporal scope of Trustee’s inquiry must be narrowed given the fact that the only
20 relevant inquiry to finding negligent supervision is whether Bryan Cave had actual knowledge of
21 Windler’s alleged negligence or malfeasance and failed to take appropriate action during the
22

23 ⁵⁷ Id. at 68:4-6.

24 ⁵⁸ Id. at 68:17-18.

25 ⁵⁹ Id. at 70:2-7.

26 ⁶⁰ Windler Stipulation, 25:8-10.

27 ⁶¹ Id. at 31:4-6.

28 ⁶² Complaint, 12:2-4.

1 period it represented EFI. Accordingly, the court will require Bryan Cave to produce the
2 following non-privileged documents in its possession, custody or control, to the extent that they
3 are not readily available from a public source:

4 Trustee's RFP No. 50 – All DOCUMENTS and COMMUNICATIONS that
5 mention, discuss or refer to any threatened or imposed Court sanctions against
6 YOU, any of YOUR clients or WINDLER in any legal proceeding in which
7 WINDLER acted as an attorney of record for such clients, created by Bryan Cave
8 prior to July 31, 2008 or that came into the possession, custody or control of
9 Bryan Cave prior to July 31, 2008.

10 Trustee's RFP No. 53 – All DOCUMENTS and COMMUNICATIONS that
11 mention, discuss or refer to any California State Bar disciplinary proceedings to
12 which WINDLER was or is a party created by Bryan Cave prior to July 31, 2008
13 or that came into the possession, custody or control of Bryan Cave prior to July
14 31, 2008.

15 Trustee's RFP No. 54 – All DOCUMENTS and COMMUNICATIONS that
16 mention, discuss or refer to any Colorado State Bar disciplinary proceedings to
17 which WINDLER was or is a party created by Bryan Cave prior to July 31, 2008
18 or that came into the possession, custody or control of Bryan Cave prior to July
19 31, 2008.

20 The documents produced by Bryan Cave in response to the Trustee's RFP Nos. 50, 53 and 54
21 shall be deemed "confidential information," as defined in Section A(1) of the Protective Order,
22 and such documents shall be subject to the provisions of such Protective Order. Furthermore,
23 Bryan Cave has a continuing duty to timely supplement its response to Trustee's RFP Nos. 50,
24 53 and 54 pursuant to Rule 26(e)(1).

25 All other relief requested in the Trustee Motion with respect to Issue # 10 is denied.

26 **Issue 11: Whether Bryan Cave Must Produce Documents Regarding Any Bryan Cave**
27 **Internal Analysis of Its Attorneys' Work Performance.**

28 Issue # 11 focuses on the following documents requested by the Trustee:

Trustee's RFP No. 59 – All DOCUMENTS and COMMUNICATIONS that
mention YOUR analysis of the conduct, errors or omissions of any attorneys in
purportedly acting as legal counsel for EFI and/or EFMF.

Trustee's RFP No. 90 – All DOCUMENTS and COMMUNICATIONS that
comprise, are part of, mention, discuss, refer to or analyze any investigation
requested or conducted by YOU as to YOUR representation of EFI and/or EFMF.

Trustee's RFP No. 91 – All DOCUMENTS and COMMUNICATIONS that comprise, are part of, mention, discuss, refer to or analyze any investigation requested or conducted by YOU as to WINDLER's representation of EFI and/or EFMF.

Trustee's RFP No. 92 – All DOCUMENTS and COMMUNICATIONS that comprise, are part of, mention, discuss, refer to or analyze any investigation requested or conducted by YOU of the business activities of WINDLER at any time.

Trustee's RFP No. 93 – All DOCUMENTS and COMMUNICATIONS that comprise, are part of, mention, discuss, refer to or analyze any investigation requested or conducted by YOU of the non-business activities of WINDLER at any time.⁶³

Essentially, the Trustee seeks the production of "all documents and communications reflecting any internal Bryan Cave investigation or analysis of the EFI matter, from any time period 'without exception.'"⁶⁴ Windler claims that production of the documents in response to Trustee's RFP Nos. 59, 90, 91, 92 and 93 will violate her right of privacy under the California Constitution, Art. I, Section I, and the U.S. Constitution."⁶⁵

EFI was a client of Bryan Cave from October 2006 to approximately July 2008. EFI was not a client of Bryan Cave after July 2008. Bryan Cave states that it "***does not have any documents responsive to the EFI Trustee's requests that were created during Bryan Cave's representation of EFI from October 2006 through June 2008.***"⁶⁶ The temporal scope of the Trustee's RFP Nos. 59, 90, 91, 92 and 93 is open-ended and not limited by time or context. It is not proportional to the needs of the case given the nature of the Trustee's claims, the privacy issues at stake, and the burden the proposed discovery places on Bryan Cave and Windler. As previously stated, the relevant inquiry is whether Bryan Cave had actual knowledge of Windler's alleged negligence or malfeasance and failed to take appropriate action during the period it

⁶³ Trustee Stipulation, 71:7-73:21.

⁶⁴ Id. at 75:7-9.

⁶⁵ Windler Stipulation, 35:2-4.

⁶⁶ Trustee Stipulation, at 75:13-15 (emphasis in original).

1 represented EFI. The burden and expense of production on Bryan Cave and the intrusion on
2 Winder's privacy interests outweigh the likely benefits of such discovery when viewed in the
3 context of the claims made the basis of the Trustee's Complaint. Therefore, the court will reduce
4 the temporal scope of the Trustee's RFP Nos. 59, 90, 91, 92 and 93 as follows:

5 Trustee's RFP No. 59 – All DOCUMENTS and COMMUNICATIONS that
6 mention YOUR analysis of the conduct, errors or omissions of any attorneys in
7 purportedly acting as legal counsel for EFI and/or EFMF created by Bryan Cave
8 prior to July 31, 2008 or that came into the possession, custody or control of
Bryan Cave prior to July 31, 2008.

9 Trustee's RFP No. 90 – All DOCUMENTS and COMMUNICATIONS that
10 comprise, are part of, mention, discuss, refer to or analyze any investigation
11 requested or conducted by YOU as to YOUR representation of EFI and/or EFMF
12 created by Bryan Cave prior to July 31, 2008 or that came into the possession,
custody or control of Bryan Cave prior to July 31, 2008.

13 Trustee's RFP No. 91 – All DOCUMENTS and COMMUNICATIONS that
14 comprise, are part of, mention, discuss, refer to or analyze any investigation
15 requested or conducted by YOU as to WINDLER's representation of EFI and/or
EFMF created by Bryan Cave prior to July 31, 2008 or that came into the
possession, custody or control of Bryan Cave prior to July 31, 2008.

16 Trustee's RFP No. 92 – All DOCUMENTS and COMMUNICATIONS that
17 comprise, are part of, mention, discuss, refer to or analyze any investigation
18 requested or conducted by YOU of the business activities of WINDLER created
19 by Bryan Cave prior to July 31, 2008 or that came into the possession, custody or
control of Bryan Cave prior to July 31, 2008.

20 Trustee's RFP No. 93 – All DOCUMENTS and COMMUNICATIONS that
21 comprise, are part of, mention, discuss, refer to or analyze any investigation
22 requested or conducted by YOU of the non-business activities of WINDLER
created by Bryan Cave prior to July 31, 2008 or that came into the possession,
custody or control of Bryan Cave prior to July 31, 2008.

23 Neither Thelen or SonicBlue sanction the discovery of privileged documents that post-date a
24 client's representation. Nevertheless, Bryan Cave further states that "it has ***no such documents***
25 ***created before June 2010 – two years after both EFI's bankruptcy petition and the conclusion***
26 ***of Bryan Cave's representation of EFI.***"⁶⁷ Additionally, "[t]he work product doctrine, codified
27

28 ⁶⁷ Id. at 75:15-17 (emphasis in original).

1 in Federal Rule of Civil Procedure 26(b)(3), protects from discovery documents and tangible
2 things prepared by a party or his representative in anticipation of litigation.” In re Grand Jury
3 Subpoena (Mark Torf/Torf Envtl. Mgmt.), 357 F.3d 900, 906 (9th Cir. 2004) (citations omitted).
4 Such documents may only be ordered produced upon an adverse party's demonstration of
5 “substantial need [for] the materials” and “undue hardship [in obtaining] the substantial
6 equivalent of the materials by other means.” Fed.R.Civ.P. 26(b)(3). Here, the Trustee has
7 articulated neither a “substantial need” for the post-June 2010 documents analyzing EFI’s
8 representation nor an “undue hardship” that would result from obtaining the sought information
9 from alternative sources. Trustee’s reliance on Roberts v. Heim, 123 F.R.D. 614, 631 (N.D. Cal.
10 1988) and other cases for the proposition that the Trustee has stepped into the shoes of EFI as
11 Bryan Cave’s client and “the work product doctrine does not apply to the situation in which a
12 client seeks access to documents or other tangible things created or amassed by his attorney
13 during the course of the representation” is unavailing.⁶⁸ In this litigation, the Trustee is an
14 adversary of Bryan Cave and cannot overcome the protection of the work-product doctrine
15 “[b]ecause the purpose of the work product doctrine is to prevent disclosure of privileged
16 documents to an adversary” In re Superior Nat. Ins. Gr., 518 B.R. 562, 575 (Bankr. C.D.
17 Cal. 2014). Therefore, any documents related to Bryan Cave’s investigation of EFI’s
18 representation, which were created in anticipation of litigation after the Trustee had threatened
19 suit in June 2010, are protected by the attorney work-product doctrine and the court will not
20 order their disclosure by Bryan Cave.

21 All documents produced by Bryan Cave in response to Trustee’s RFP Nos. 59 and 90
22 through 93 must be treated as “confidential information” subject to the provisions of the
23 Protective Order. To the extent Bryan Cave locates any non-privileged documents within the
24 narrowed scope of Trustee’s RFP Nos. 59 and 90 through 93, Bryan Cave has a continuing duty
25 to timely supplement its response pursuant to Rule 26(e)(1).

26 All other relief requested in the Trustee Motion with respect to Issue # 11 is denied.
27
28

⁶⁸ Trustee Motion, 33:12-21.

Issue 12: Whether Bryan Cave Waived the Attorney Client-Attorney Work Product Privilege.

Sometime after Bryan Cave's representation of EFI terminated in July 2008, Trustee demanded that Bryan Cave return EFI's client files.⁶⁹ Bryan Cave responded by providing the Trustee with 42 boxes of documents and a disc containing additional information. In so doing, Bryan Cave inadvertently produced 80 documents in which the names of other clients of Bryan Cave were not redacted.⁷⁰ Bryan Cave did not discover the mistake until October 2014, when the Trustee propounded his first request for production of documents.⁷¹ Bryan Cave then re-produced the 80 documents in redacted form, identified them on a privilege log and asked the Trustee to return the originally produced unredacted copies.⁷² Trustee refused to return the 80 documents, arguing that Bryan Cave's pre-litigation production constituted a waiver of the attorney-client and work-product privileges. Trustee asks the court to "require Bryan Cave to produce all documents it identified as privileged and all intra-firm documents and communications regarding its relationship with EFI, EFMF and their principals Guth and Yaguda, without exception."⁷³

"The client, not his attorney, is the holder of the privilege; only the client can waive the privilege by voluntarily disclosing the protected information or consenting to its disclosure." In re Carter, 62 B.R. 1007, 1014 (Bankr. C.D. Cal. 1986). "[W]aiver' does not include accidental, inadvertent disclosure of privileged information by the attorney." State Comp. Ins. Fund v. WPS, Inc., 70 Cal. App. 4th 644, 654 (1999); see also Cunningham v. Connecticut Mut. Life Ins., 845 F. Supp. 1403, 1412 (S.D. Cal. 1994) ("no waiver occurs simply because an attorney inadvertently discloses attorney-client communications").

⁶⁹ Trustee Stipulation, 80:11-12.

⁷⁰ Id. at 80:12-16.

⁷¹ Id. at 80:16-18.

⁷² Id. at 80:18-20.

⁷³ Id. at 79:16-19.

1 “Unlike the attorney-client privilege, the work-product privilege is not automatically
2 waived by any disclosure to third persons.” Meoli v. Am. Med. Serv. of San Diego, 287 B.R.
3 808, 817 (S.D. Cal. 2003). “Rather, courts generally find a waiver only if the disclosure
4 substantially increases the opportunity for potential adversaries to obtain the information.” Id.

5 The court finds that Bryan Cave’s inadvertent disclosure of the 80 documents did not
6 waive either the attorney-client privilege or the work product privilege. Bryan Cave’s clients
7 other than EFI hold the attorney-client privilege as to the 80 documents at issue and only those
8 clients can waive the attorney-client privilege or consent to disclosure. There is no evidence that
9 they have done so. To the extent that Bryan Cave has asserted the work-product privilege as to
10 the 80 documents, there is no evidence before the court indicating that Bryan Cave’s inadvertent
11 disclosure increased the opportunity for potential adversaries to obtain protected information.
12 Accordingly, Bryan Cave’s accidental disclosure of confidential information does not constitute
13 a waiver of the attorney-client privilege or the work-product privilege. Trustee must return the
14 80 unredacted documents to Bryan Cave.

15 All other relief requested in the Trustee Motion with respect to Issue # 12 is denied.

16 CONCLUSION

17 In sum, the Trustee Motion will be granted, in part, and denied, in part, and the Windler
18 Motion will be granted, in part, and denied, in part. A separate order will be entered consistent
19 with this memorandum.

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24 Date: July 5, 2017



25 Peter H. Carroll
26 United States Bankruptcy Judge
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