

CAUSE NO. 2013-05455

CARL HENRY BRUNSTING,
INDEPENDENT EXECUTOR OF THE
ESTATES OF ELMER H. BRUNSTING
AND NELVA E. BRUNSTING

§ IN THE DISTRICT COURT OF
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§ HARRIS COUNTY, TEXAS
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§
§ 164TH JUDICIAL DISTRICT

V.

CANDACE L. KUNZ-FREED AND
VACEK & FREED, PLLC f/k/a
THE VACEK LAW FIRM, PLLC

**DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO COMPEL DISCOVERY
RESPONSES AND PRODUCTION OF DOCUMENTS**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Defendants Candace L. Kunz-Freed and Vacek & Freed, PLLC f/k/a The Vacek Law Firm, PLLC, and file this their Response to Plaintiff's Motion to Compel Discovery Responses and Production of Documents and, in support thereof, Defendants respectfully shows unto the Court the following:

**I.
BACKGROUND INFORMATION**

1. Plaintiff Carl Henry Brunsting, Independent Executor of the Estates of Elmer H. Brunsting and Nelva E. Brunsting ("Carl") brought this legal malpractice case against Defendants Candace L. Kunz-Freed and Vacek & Freed, PLLC f/k/a The Vacek Law Firm, PLLC (collectively referred to as "V&F") for negligence, negligent misrepresentation, breach of fiduciary duty, aiding and abetting the current trustees' breaches of fiduciary duty, fraud, conversion, and violations of the Texas Deceptive Trade and Practices Act stemming from their representation of Elmer and Nelva, both individually and in their capacities as trustees of the Family Trust.

2. Specifically, Carl alleges that V&F assisted the Current Trustees¹ in implementing a scheme to change the terms of the Family Trust, to ultimately remove Nelva from her position as trustee of the Family Trust, and to improperly remove assets from Elmer and Nelva's estates and from the Family Trust. Carl contends because of the actions of V&F, the Current Trustees were able to alter Elmer and Nelva's wishes, resulting in an improper transfer of assets to Anita, Amy, and Carole, all to Carl's detriment.

3. Carl further alleges that despite V&F's representations to Elmer and Nelva that the Family Trust would preserve their plans for the estate, V&F took direction from the Current Trustees, with the result being just the opposite. Carl believes that V&F not only failed to inform Nelva that they had established a relationship with the Current Trustees, which put them in a conflict of interest with regard to their representation of Nelva's interest, but that V&F actually ignored the terms of the Family Trust in ways which it is believed that Nelva did not have capacity to change and/or did not understand or want. In his petition, Carl pleads that V&F took steps to undermine and even remove Nelva's control of her own assets, of the assets of Elmer's estate, and of the Family Trust assets, thereby placing those assets at risk of loss to Anita, Amy, and Carole and facilitating the loss which actually occurred. Moreover, Carl has alleged that V&F assisted the Current Trustees in various ways intended to prevent Nelva from even understanding that documents were being prepared by V&F at the Current Trustee's request, why those documents were being prepared, and what legal impact those documents had.

4. As a result, Carl is seeking actual damages, exemplary damages, treble damages under the DTPA, disgorgement and attorneys' fees. Defendants have provided Plaintiff with a timely response to his discovery requests, in accordance with the spirit and ultimate purpose of

¹ Anita and Amy Brusting are the current trustees. While they are implicated as co-conspirators throughout the pleadings, they have not been named a party to this litigation.

the TEXAS RULES OF CIVIL PROCEDURE. Accordingly, this Court should sustain Defendants' objections to the discovery at issue, and deny Carl's Motion to Compel.

II.
RESPONSE TO MOTION TO COMPEL

5. Defendants do not believe the Court's intervention is needed as they have properly objected to the improper discovery requests propounded by Carl. Additionally, they have provided full complete responses and produced all relevant documents based on all information reasonably available to Defendants and their attorney. See TEXAS RULE OF CIVIL PROCEDURE 193.1.

III.
ARGUMENTS AND AUTHORITY

A. DEFENDANTS' OBJECTIONS ARE SUPPORTED BY THE LAW

6. Defendants have provided Carl with timely responses to every one of his discovery requests, in accordance with the spirit and ultimate purpose of the Texas Rules of Civil Procedure. Defendants have also produced a multitude of documents in response to Carl's discovery requests. As a result, Defendants' objections to Carl's discovery requests should be sustained.

7. It is well established that the discovery process should not be abused. Instead, discovery requests must be reasonably tailored to address only matters relevant to the case at hand. See *In re Am. Optical Corp.*, 988 S.W.2d 711, 712 (Tex. 1998); *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 814 (Tex. 1995); *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 180 (Tex. 1999). In addition, discovery may not be used as a fishing expedition or to impose unreasonable discovery expenses on the opposing party. See *K-Mart Corp. v. Sanderson*, 937 S.W.2d 429, 431 (Tex. 1996); *In re Alford Chevrolet-Geo*, 997 S.W.2d at 181; *In re HEB Grocery Co., LP*,

375 S.W.3d at 500 (requests for information that are not reasonably tailored as to time amount to impermissible “fishing expeditions”).

8. TEX. R. CIV. P. 192.3(b) mandates a party may obtain discovery regarding documents “that constitute or contain matters relevant to the subject matter of the action.” See TEX. R. CIV. P. 192.3(b). To this end, it is clear relevance regarding the subject matter of discovery determines the proper scope of discovery. See *In re Plains Mktg., L.P.*, 195 S.W.3d 780, 782 (Tex. App.—Beaumont 2006, orig. proceeding) (“The discovery matter requested must be relevant to the subject matter of the pending litigation.”). As a result, discovery requests may not be used simply to explore. See *Dillard Dep't Stores, Inc. v. Hall*, 909 S.W.2d 491, 492 (Tex. 1995); *Loftin v. Martin*, 776 S.W.2d 145, 148 (Tex. 1989). In fact, the Texas Supreme Court has specifically held that requests for discovery must be tailored by the requesting party to include only matters relevant to the case at hand. See *In re Am. Optical Corp.*, 988 S.W.2d at 713; *Texaco, Inc.*, 898 S.W.2d at 814 (“Discovery is limited to matters relevant to the case.”); see also *In re TIG Ins. Co.*, 172 S.W.3d 160, 164 (Tex. App.—Beaumont 2005, orig. proceeding) (“Requests must be tailored to include only matters relevant to the case.”).

9. Texas Rules of Civil Procedure provide that the discovery requested must be “relevant to the subject matter of the pending action” and the information sought must appear “reasonably calculated to lead to the discovery of admissible evidence.” TEX. R. CIV. P. 192.3(a). This Court must limit the scope of discovery to protect against irrelevant requests. See *In re Plains Marketing, L.P.*, 195 S.W.3d 780, 784 (Tex. App.—Beaumont 2006, no pet.). Information is relevant if it tends to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the information. TEX. R. EVID. 401. Evidence which is not relevant is inadmissible.” TEX. R. EVID. 402. “A central consideration in

determining overbreadth is whether the discovery request could have been more narrowly tailored to avoid including tenuous information.” *In re Williams*, 328 S.W.3d at 118 (quoting *In re CSX Corp.*, 124 S.W.3d at 153 (per curiam)). Requests that are overly broad encompass time periods or activities beyond those matters of questionable relevance. *In re Williams*, 328 S.W.3d at 118; see *In re Alford Chevrolet-Geo*, 997 S.W.2d at 180 n. 1; *In re Jacobs*, 300 S.W.3d at 44. A threshold showing of applicability must be made before this Court should order Defendant to withdraw its objections. See *In re Dana Corp.*, 138 S.W.3d 298, 301 (Tex. 2004).

10. The requesting party has the responsibility to tailor its discovery requests and Carl has utterly failed in this regard. Furthermore, reasonably tailoring discovery requests is not the responsibility of the Court or the responding party. See *In re TIG*, 172 S.W.3d at 168 (the burden to propound discovery complying with the rules of discovery should be on the party propounding the discovery, not the courts); *In re Sears Roebuck & Co.*, 146 S.W.3d 328, 333 (Tex. App.—Beaumont 2004, orig. proceeding) (“responding party does not have the burden to tailor a reasonable discovery request for the requesting party”). Carl has not demonstrated how gleaning the requested information could lead to the discovery of admissible evidence, nor has he established how such information relates to his claims. *Id.* Carl has sought information from Defendants without tying the discovery to any issue related to the lawsuit. If this Court were to compel Defendants to produce the requested documents it would be ordering Defendants to produce information that is neither relevant to the subject matter of this case, nor reasonably calculated to lead to the discovery of admissible evidence. *In re Houstonian Campus, L.L.C.*, 312 S.W.3d 178, 181 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

11. When considering the trial court’s discretion as to the permissible scope of discovery requests, the court is guided by the overarching principal – discovery requests must be

limited by time, place, and subject matter. See *In re Xeller*, 6 S.W.3d 618, 626 (Tex. App.—Houston [14th Dist.] 1999, no pet.). In addition, “[a]lthough the scope of discovery is broad, requests must demonstrate a reasonable expectation of obtaining information that will aid the dispute’s resolution.” See *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003). It is not the responsibility of Defendants to show documents requested are irrelevant to the pending action. See *In re Mobil Oil Corp.*, 2006 WL 3028063, *2 (Tex. App.—Beaumont 2006, orig. proceeding) (not designated for publication). To the contrary, the requesting party has the initial responsibility of drafting discovery requests tailored to include only matters relevant to the case. See *Id.*; *Am. Optical Corp.*, 988 S.W.2d at 713; *In re TIG*, 172 S.W.3d at 168. In this instance, as Carl’s discovery requests are irrelevant to the allegations at issue, Defendants’ objections to Plaintiff’s First Set of Interrogatories and First Request for Production of Documents should be sustained.

(i) **INTERROGATORY NUMBER 1**

12. It is inconceivable that this Court should even consider permitting Carl to subpoena Defendants’ personal cell phone. Not only does this violate Defendants’ privacy, but it potentially violates attorney-client privileged communications not related to this case. The information sought by Carl through a subpoena of Defendants’ cell phone records, can and has been obtained through less intrusive means. Specifically, Defendants have previously identified the date of every telephone conference any representative of V&F had with any person relevant to Carl’s claims. Permitting Carl access to the actual cell phone records is not only unduly burdensome but purely harassing. Defendants request that the Court deny Carl’s Motion to Compel.

(ii) **INTERROGATORY NUMBER 3**

13. Similar to Carl's request for access to Defendants' personal cell phone records, Interrogatory Number three requesting access to Defendants' work email appears just as asinine. Without a doubt, permitting Carl unfretted access to Defendants' work email violates the attorney-client privilege of Defendants' clients. Defendants have produced all non-privileged emails between any representative of V&F and any person relevant to Carl's claims. Carl cannot justify the need to actually subpoena Defendants' personal and work emails. It is hard to imagine how interrogatory number three is not harassing, unduly burdensome, and equates to a fishing expedition. The Court should sustain Defendants' objections and deny Carl's request for access to Defendants' personal and work email accounts.

(iii) **INTERROGATORIES NUMBER 15, 16, 17, AND 18**

14. After Nelva Brunsting's resignation (making her become merely a beneficiary of the trust), the Current Trustees retained Defendants to provide legal services in regards to the Family Trust. The trustee who retains an attorney to advise him or her in administering the trust is the real client, not the trust beneficiaries. *See Thompson v. Vinson & Elkins*, 859 S.W.2d 617 (Tex. App.—Houston [1st Dist.] 1993, writ denied). Carl seeks to discover attorney-client privileged communications between Defendants and the Current Trustees. Carl cites no authority for his position that such documents are discoverable in this case. On the contrary, there is extensive case law which indicates the Court should sustain Defendants' objections to Interrogatory Number 15.

15. The attorney-client privilege protects from disclosure confidential communications between a client and his or her attorney "made for the purpose of facilitating the rendition of professional legal services to the client..." TEX. R. EVID. 503(b). This privilege

allows “unrestrained communication and contact between an attorney and client in all matters in which the attorney's professional advice or services are sought, without fear that these confidential communications will be disclosed by the attorney, voluntarily or involuntarily, in any legal proceeding.” *West v. Solito*, 563 S.W.2d 240, 245 (Tex.1978). The privilege thus “promote[s] effective legal services,” which “in turn promotes the broader societal interest of the effective administration of justice.” *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 160 (Tex.1993).

16. Carl contends that the “joint client” exception applies and thus the requested information is excluded from the attorney-client privilege. The joint client exception provides that there is not an attorney-client privilege: “[a]s to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.” TEX. R. EVID. 503(d)(5). There did not exist a common interest between the Current Trustees and Nelva Brunsting. More importantly, neither party retained or consulted Defendants for such alleged common interest. Therefore, the joint client exception does not apply, and the requested documents fall within the attorney-client privilege.

17. The Texas Trust Code provides that “[a] trustee may employ attorneys ... reasonably necessary in the administration of the trust estate.” TEX. PROP. CODE § 113.018. Carl does not dispute that the Current Trustees employed Defendants to assist in the administration of the Family trust. Indeed, Carl does not seriously dispute that an attorney-client relationship existed between the Current Trustees and Defendants about trust matters. Further, Rule 503 contains no exception to the privilege for fiduciaries and their counsel. Carl nonetheless contends that communications between the Current Trustees and Defendants regarding trust matters

cannot be privileged as to Nelva, a trust beneficiary, even if the elements of Rule 503 are otherwise met.

18. The party resisting discovery bears the burden of proving any applicable privilege. *See Huie v. DeShazo*, 922 S.W.2d 920, 926(Tex. 1996). To make a prima facie showing of the applicability of a privilege, a party must plead the particular privilege, produce evidence to support the privilege through affidavits or testimony, and produce documents if the trial court determines that an *in camera* review is necessary. *See Marathon Oil Co. v. Moye*, 893 S.W.2d 585, 590-91 (Tex. App.—Dallas 1994, orig. proceeding). As evidence of the attorney-client relationship, Defendants are filing under seal the Engagement Letters between the Current Trustees and Defendants.

19. The *communications* between the Current Trustees and Defendants made confidentially and for the purpose of facilitating legal services are protected. *Huie v. DeShazo*, 922 S.W.2d 920, 923-24 (Tex. 1996). The attorney-client privilege serves the same important purpose in the trustee-attorney relationship as it does in other attorney-client relationships. *Id.* at 924. A trustee must be able to consult freely with his or her attorney to obtain the best possible legal guidance. *Id.* Without the privilege, trustees might be inclined to forsake legal advice, thus adversely affecting the trust, as disappointed beneficiaries could later pore over the attorney-client communications in second-guessing the trustee's actions. *Id.* The attorney-client privilege protects the confidential information sought in Interrogatories Numbers 15, 16, 17, and 18 under Rule 503. *Id.* at 925.

20. It is anticipated that Carl was argue that the interrogatories do not inquiry into the actual topic of the conversations, but merely into the existence of such communications and are thus not protected. Nonetheless, the attorney-client privilege attaches to the actual existence of

communication between an attorney and client. *Huie*, 922 S.W.2d at 923; *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding); *In re ExxonMobil Corp.*, 97 S.W.3d 353, 357-58 (Tex. App.—Houston [1st Dist.] 2003, no pet.). Defendants request that the Court sustain its objections to Interrogatories Numbers 15, 16, 17, and 18 and deny Carl's Motion to Compel.

(iv) **REQUESTS FOR PRODUCTION NUMBERS 3, 4, 29 AND 30**

21. Carl seeks a copy of "all" agreements with the Current Trustees. It is hard to imagine how a question seeking "all" agreements over an unspecified period is not overly broad, unduly burdensome, and equates to a fishing expedition. It is undisputed that after Nelva Brunsting resigned the Current Trustees retained the services of Defendants to provide legal services with regards to the Family Trust. Nor is it contested that at some point soon thereafter the Current Trustees retained the services of another attorney. Carl cites no basis for the relevancy of the production of agreements in this case. The terms and conditions of Defendants employment are irrelevant to this matter. More importantly, the purpose for which Defendants were engaged is undisputed, and thus the production of any such agreements is unnecessary. Defendants incorporate the discussion regarding the attorney-client privilege in paragraphs 15 through 20, and file under seal for *in camera review* the Engagement Letters between the Current Trustees and Defendants. Defendants request that the Court sustain its objections to Request for Production 3, 4, 29, and 30 and deny Carl's Motion to Compel.

(v) **REQUESTS FOR PRODUCTION NUMBERS 9, 10, 11, AND 12**

22. Carl seeks copies of the invoices and payment of the professional services provided by Defendants to the Current Trustees. Defendants kept separate time records for the work provide by behalf of the Current Trustees. The Current Trustees were invoiced separately

for all work provided on their behalf. The information contained in the invoices sent to the Current Trustees is plainly protected by the attorney-client privilege. *See In re Gen. Agents Ins. Co. of Am., Inc.*, 224 S.W.3d 806, 816 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (invoices for legal services are similar to correspondence between attorney and client and thus protected by privilege). Billing and time records which reveal litigation strategy or the specific nature of the services provided, such as entries describing particular areas of the law researched by an attorney, fall within the protection of the attorney-client privilege. *In re McIntyre*, 2012 WL 3793159, 3 (Tex. App.—Austin 2012, 2012). Defendants incorporate the discussion regarding the attorney-client privilege in paragraphs 15 through 20, and file under seal for *in camera* review the Engagement Letters between the Current Trustees and Defendants. Because requests numbers 9 and 10 attempt to delve into the substance of communications between the Current Trustees and Defendants, the sought after information is privileged from disclosure². Defendants have previously produced all non-privileged invoices for services provided or expenses incurred on behalf of the Family Trust. Thus Defendants request that the Court sustain its objections to Request for Production 9 and 10 and deny Carl's Motion to Compel.

(vi) **REQUESTS FOR PRODUCTION NUMBERS 21, 22, AND 23**

23. Carl seeks original documents signed by certain parties. Defendants have produced copies of all non-privileged documents signed by the requested persons, and have made the originals of such documents available at a mutually agreeable date and time. Documents signed and notarized related to Defendants representation of the Current Trustees are exempt from production under the attorney-client privilege. Defendants incorporate the previous discussion regarding the attorney-client privilege in paragraphs 15 through 20.

² In Carl's Motion to Compel, he stipulates that privilege portions can be redacted. This begs the question, if all privileged information is redacted (which would be almost the entire document) what use are the requested documents to Carl? Documents that are substantially redacted would offer no benefit to Carl.

(vii) REQUESTS FOR PRODUCTION NUMBERS 31 AND 32

24. Carl seeks documents evidencing the termination of the attorney-client relationship between Defendants and the Current Trustees. Carl's Motion to Compel states he is only interested in the date of the establishment and termination of the relationship. He further agrees that all privileged information can be redacted. The sought after information is obtainable from another source that is more convenient and less burdensome. It would seem a better use of everyone's resources for Carl to simply ask such inquiry through an interrogatory or during a deposition. Again, it is not disputed by anyone in this case that Defendants provided professional services to the Current Trustees, nor is it unsettled that the Current Trustees later retained Bernard Mathews, of the law firm Green & Mathews, LLP. Carl contends that the joint representation exception applies and such documents are not protected by privilege. There is nothing to support, nor does Carl offer any evidence, of a joint representation. To be clear, a joint representation did not occur.

(viii) REQUESTS FOR PRODUCTION NUMBERS 35 AND 36

25. There can be nothing confusing about Defendants' response to these requests. "Defendants have no documents responsive to this request." Defendants do not maintain logs for the requested time period – or any time period. Defendants are not claiming any type of privilege with respect to communications or documents sent to Candy. The assertion of the privilege lies solely based on Defendants' attorney-client relationship with the Current Trustees.

B. DEFENDANTS' OBJECTIONS SHOULD BE SUSTAINED

26. Defendants have made complete responses, subject to the applicable objections asserted, to all of Carl's discovery. A trial court has discretion to protect a party from harassing, overly broad requests, or the disclosure of privileged information. TEX. R. CIV. P. 166b(5);

Axelson, Inc. v. McIlhany, 798 S.W.2d 550, 553 (Tex. 1990) (trial court has discretion to narrow the scope of discovery on a case-by-case basis with a protective order). Moreover, all relevant and responsive documents have been produced by Defendants, subject to the applicable objections asserted.

C. ALTERNATIVE MOTION FOR AN IN CAMERA REVIEW

27. A discovery order is improper if it compromises a person's right to possible claims of privilege or mandates the disclosure of privileged information that exceeds the scope of discovery. *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 553 (Tex. 1990); *In re Dolezal*, 970 S.W.2d 650, 651 (Tex. App.—Corpus Christi 1998, orig. proceeding). Generally, privileged matters are not discoverable. *In re Anderson*, 973 S.W.2d 410, 411 (Tex. App.—Eastland 1998, orig. proceeding). Thus, the Court must conduct an in camera inspection of the documents included on Defendants' privilege log to determine their materiality before compelling their production. *In re E.I. DuPont de Nemours and Co.*, 136 S.W.3d 218, 223 (Tex. 2004) (if after an in camera review it is determined the document are privileged, then they are not subject to discovery, and may not be considered by the factfinder); *Arkla, Inc. v. Harris*, 846 S.W.2d 623, 629 (Tex. App.—Houston [14th Dist.] 1993, no writ); *In re Strategic Impact Corp.*, 214 S.W.3d 484, 488 (Tex. App.—Houston [14th Dist.] 2006, no pet.); see *Russell*, 452 S.W.2d at 436. In reviewing the documents this Court must balance the nonparty's rights to privacy against Sullivan's need for the information. *In re CSX Corp.*, 124 S.W.3d 149, 153 (Tex. 2003); *In re Fort Worth Children's Hosp.*, 100 S.W.3d 582, 589 (Tex. App.—Fort Worth 2003, no pet.).

**IV.
PRAYER**

WHEREFORE, PREMISES CONSIDERED, Defendants Candace L. Kunz-Freed and Vacek & Freed, PLLC f/k/a The Vacek Law Firm, PLLC respectfully requests that the Court

sustain their objections to Plaintiff's discovery requests as Defendants have complied with the applicable discovery rules. Therefore, Plaintiff's Motion to Compel should be in all things denied. Defendants request such other and further relief, both general and special, at law or in equity, to which they may show themselves justly entitled.

Respectfully submitted,

THOMPSON, COE, COUSINS & IRONS, L.L.P.

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CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of the foregoing instrument in accordance with the *TEXAS RULES OF CIVIL PROCEDURE* on the 15th day of May 2014 to the following counsel of record:

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