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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re:)	Case No. 09-29162-D-11
)	
SK FOODS, L.P.,)	Docket Control No. MSS-2
)	
Debtor.)	
)	
)	
In re:)	Case No. 09-29161-D-11
)	
RHM INDUSTRIAL/SPECIALTY FOODS,)	Docket Control No. MSS-2
INC.,)	
)	
)	DATE: September 29, 2009
Debtor.)	TIME: 10:00 a.m.
)	DEPT: D

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.

MEMORANDUM DECISION

I. Introduction

SS Farms, LLC; SSC Farming, LLC; SSC Farming 1, LLC; SSC Farming 2, LLC (collectively the "Farm Entities"); and Scott Salyer ("Salyer") have brought a Motion to Remove Trustee and Disqualify Counsel for Trustee; For Protective Order Striking Complaint and Excluding Evidence Taken in Violation of Moving Parties' Constitutional and Common Law Rights and In Violation of Ethical Standards, Docket Control No. MSS-2 (the "Motion" or "Motion to Remove Trustee").

The Motion is opposed by the chapter 11 trustee in this case, Bradley D. Sharp (the "trustee"), the United States Trustee, and the Official Committee of Unsecured Creditors in

1 this case. In addition, the trustee has brought an Amended
2 Counter-Motion for an Order Authorizing the Trustee's Continued
3 Possession of and Review of Information in His Possession and
4 Which Relates to Non-Debtor Entities (the "Amended Counter-
5 Motion" or "Counter-Motion"). The Counter-Motion is opposed by
6 Salyer and the Farm Entities.

7 For the reasons set forth below, the court will deny the
8 Motion and grant in part the Counter-Motion.

9 II. Background

10 SK Foods, L.P. ("SK Foods"), and RHM Industrial/Specialty
11 Foods, Inc. ("RHM" and, together with SK Foods, the "debtors")
12 are processors of tomato products. According to Salyer and the
13 Farm Entities, Salyer and his related entities, directly or
14 indirectly, own SK Foods, and the Farm Entities are owned,
15 directly or indirectly, by Salyer and/or his children.

16 On May 5, 2009, certain creditors filed involuntary chapter
17 11 petitions against the debtors as Case Nos. 09-28955 and 09-
18 28956.¹ Two days later, the debtors filed voluntary chapter 11
19 petitions. On June 18, 2009, the court substantively
20 consolidated the SK Foods involuntary and voluntary cases and the
21 RHM involuntary and voluntary cases.

22 The same day the debtors filed their voluntary petitions,
23 they also filed a motion in each case for the appointment of a
24 chapter 11 trustee. The motions were granted, and the United
25 States Trustee's appointment of Mr. Sharp as chapter 11 trustee

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27 1. Unless otherwise indicated, all Code, chapter, section
28 and Rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
1330, and to the Federal Rules of Bankruptcy Procedure, Rules
1001-9036.

1 in each case was approved by order dated May 18, 2009. By orders
2 dated July 15, 2009, the court authorized the trustee to employ
3 the firm of Schnader Harrison Segal & Lewis, LLP, as his counsel
4 in each case.

5 Shortly after his appointment, the trustee took possession
6 of the debtors' books and records and those of related entities,
7 including Salyer and the Farm Entities, that kept their books and
8 records on SK Foods' premises and in its computers. The trustee
9 then filed a motion and an adversary complaint in the SK Foods
10 case that ultimately triggered the filing by Salyer and the Farm
11 Entities of the Motion to Remove Trustee. First, on June 9,
12 2009, the trustee filed a motion for an order determining that
13 certain wastewater discharge agreements between one or the other
14 of the debtors, on the one hand, and one or another of the Farm
15 Entities, on the other hand, were executory as of the
16 commencement of the cases, and therefore, subject to assumption
17 or rejection by the trustee (the "Wastewater Motion").² On June
18 12, 2009, the trustee filed an adversary complaint seeking to
19 substantively consolidate a large number of entities allegedly
20 owned and controlled by Salyer, including the Farm Entities, and
21 the assets of those entities into the debtors' bankruptcy estates
22 ("the Adversary Complaint").³

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25 2. Chapter 11 Trustee's Motion for Order Determining that
26 Wastewater Discharge Agreements with Related Parties Constitute
"Executory Contracts" for Purposes of 11 U.S.C. §365, filed June
9, 2009.

27 3. Adversary Complaint for (1) Substantive Consolidation
28 (2) Declaratory Relief (3) Recovery of Fraudulent Transfers,
filed June 12, 2009, and assigned Adv. No. 09-2342.

1 On August 7, 2009, Salyer and the Farm Entities filed the
2 Motion to Remove Trustee. They allege that Salyer's and the Farm
3 Entities' files and records are confidential vis-à-vis the
4 trustee and in many instances protected by the attorney-client
5 privilege or the work product doctrine. They allege further that
6 the trustee's and his counsel's actions with respect to the files
7 and records of Salyer and the Farm Entities violated and continue
8 to violate their privacy rights under the California Constitution
9 and the Fourth Amendment to the United States Constitution and,
10 as to the trustee's counsel, the California Rules of Professional
11 Conduct, and constitute conversion. Accordingly, Salyer and the
12 Farm Entities ask the court to remove the trustee, disqualify his
13 counsel, dismiss the Adversary Complaint, exclude from evidence
14 documents the trustee allegedly unlawfully obtained, and require
15 the trustee and his counsel to account for every record they
16 accessed.

17 On September 1, 2009, the trustee filed the Amended Counter-
18 Motion, in which he alleges that Salyer and the Farm Entities'
19 actions are inconsistent with the maintenance of a privacy
20 interest or privilege in their records vis-à-vis the debtors and
21 the trustee. The trustee therefore requests an order confirming
22 his authority to possess and control the records in question.

23 The court has reviewed the parties' respective memoranda of
24 points and authorities, oppositions, supporting declarations,
25 exhibits, and replies, with regard to both the Motion and the
26 Counter-Motion. The court heard oral argument on September 29,
27 2009.

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1 Preliminarily, the court has considered Salyer and the Farm
2 Entities' separate statements of material disputed facts, filed
3 in connection with both the Motion and the Counter-Motion, and
4 their objections to the admission of certain evidence. The court
5 has not found it necessary for purposes of this decision to
6 determine any of the allegedly disputed facts or to rely on any
7 of the challenged evidence. Thus, an evidentiary hearing is not
8 necessary. For purposes of this decision, and on the basis that
9 the court has not found it necessary to rely on the challenged
10 evidence, the court sustains the objections to evidence.

11 III. Analysis

12 This court has jurisdiction over the Motion pursuant to 28
13 U.S.C. §§ 1334 and 157(b)(1). The Motion is a core proceeding
14 under 28 U.S.C. § 157(b)(2)(A).

15 A. Standards for Removing a Trustee

16 "The court, after notice and a hearing, may remove a trustee
17 . . . for cause." § 324(a). The Bankruptcy Code does not define
18 "cause," but it is "well-established that 'cause' may include
19 trustee incompetence, violation of the trustee's fiduciary
20 duties, misconduct or failure to perform the trustee's duties, or
21 lack of disinterestedness or holding an interest adverse to the
22 estate." In re AFI Holding, Inc., 355 B.R. 139, 148 (9th Cir.
23 BAP 2006), aff'd and adopted, 530 F.3d 832 (9th Cir. 2008). A
24 party seeking removal must set forth and prove specific facts
25 supporting cause. Id.

26 A trustee is the legal representative and fiduciary of the
27 bankruptcy estate. Id. at 147. His or her primary role is to
28 marshal and sell assets so that their value may be distributed to

1 creditors. Id. at 148. To that end, a trustee has an
2 affirmative duty to investigate the debtor's financial affairs.
3 11 U.S.C. §§ 704(4), 1106(a)(3). The trustee at all times must
4 act without regard to his own interests or those of any
5 particular creditor, AFI Holding, 355 B.R. at 147, 148, and must
6 act with "that measure of care and diligence that an ordinary
7 prudent person would exercise under similar circumstances." In
8 re Rigden, 795 F.2d 727, 730 (9th Cir. 1986).

9 The Farm Entities do not allege that the trustee violated
10 his fiduciary duties.⁴ Their claim for removal is instead
11 predicated on his alleged misconduct with respect to their
12 personal and business records, which they allege violated their
13 state constitutional right of privacy (Article I, section 1 of
14 the California Constitution), their rights under the Fourth
15 Amendment to the United States Constitution, and their rights
16 under the attorney-client privilege and the attorney work product
17 doctrine.

18 B. Standards for Evaluating Privacy, Privilege, Conversion Claims

19 The elements of a claim for violation of the California
20 constitutional right of privacy are "(1) a legally protected
21 privacy interest; (2) a reasonable expectation of privacy in the
22 circumstances; and (3) conduct by defendant constituting a
23 serious invasion of privacy." Hill v. National Collegiate
24 Athletic Assn., 7 Cal. 4th 1, 39-40 (1994). The first element is
25 a question of law; the latter two, mixed questions of law and
26 fact. Id. at 40. "If the undisputed material facts show no

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28 4. For ease of reference, this and subsequent references to
the Farm Entities will, unless otherwise noted, include Salyer.

1 reasonable expectation of privacy or an insubstantial impact on
2 privacy interests, the question of invasion [of the right of
3 privacy] may be adjudicated as a matter of law." Id.

4 Similarly, "the Fourth Amendment does not proscribe all
5 searches and seizures, but only those that are unreasonable."
6 Skinner v. Railway Executives' Ass'n., 489 U.S. 602, 619 (1989).
7 "What is reasonable, of course, 'depends on all of the
8 circumstances surrounding the search or seizure and the nature of
9 the search or seizure itself.'" Id., quoting United States v.
10 Montoya de Hernandez, 473 U.S. 531, 537 (1985).

11 The party charging a violation of the Fourth Amendment "must
12 show that he had a reasonable expectation of privacy in the place
13 searched." United States v. Heckenkamp, 482 F.3d 1142, 1146
14 (2007), citing Rakas v. Illinois, 439 U.S. 128, 143 (1978). "An
15 individual has a reasonable expectation of privacy if he can
16 'demonstrate a subjective expectation that his activities would
17 be private, and he [can] show that his expectation was one that
18 society is prepared to recognize as reasonable.'" Heckenkamp, 482
19 F.3d at 1146, citing United States v. Bautista, 362 F.3d 584, 589
20 (9th Cir. 2004).

21 Among the factors the court may consider are

22 the [individual's] possessory interest in the property
23 searched or seized, see United States v. Broadhurst,
24 805 F.2d 849, 852 n.2 (9th Cir. 1986), the measures
25 taken by the defendant to insure privacy, see id.,
26 whether the materials are in a container labeled as
27 being private, see id., and the presence or absence of
28 a right to exclude others from access, see Bautista,
362 F.3d at 589.

Heckenkamp, 482 F.3d at 1146.

/ / /

1 The right of privacy, under both the California Constitution
2 and the Fourth Amendment, may be waived by consent. Hill, 7 Cal.
3 4th at 26 (California Constitution); Schneckloth v. Bustamonte,
4 412 U.S. 218, 222 (1973) (Fourth Amendment).

5 The attorney-client privilege may be waived by voluntary
6 disclosure, United States v. Plache, 913 F.2d 1375, 1379 (9th
7 Cir. 1990), citing Clady v. County of Los Angeles, 770 F.2d 1421,
8 1433 (9th Cir. 1985). The party asserting the privilege must
9 prove he or she has not waived it. Weil v. Investment/
10 Indicators, Research & Mgmt., Inc., 647 F.2d 18, 25 (9th Cir.
11 1981). Id. "Because it impedes full and free discovery of the
12 truth, the attorney-client privilege is strictly construed."
13 Id. at 24.

14 Waiver of the privilege may be express or implied. In re
15 Oracle Securities Litigation, 2005 U.S. Dist. LEXIS 46931, *21
16 (N.D. Cal. 2005). "An express waiver occurs when a party
17 discloses privileged information to a third party who is not
18 bound by the privilege, or otherwise shows disregard for the
19 privilege by making the information public." Id.⁵

20 An 'express' waiver need not be effectuated by words or
21 accompanied by the litigant's subjective intent.
22 [Citation] Rather, the privilege may be waived by the
client's . . . actions, even if the disclosure that
gave rise to the waiver was inadvertent.

23 Bittaker, 331 F.3d at 720, n.4. Like the attorney-client
24 privilege, the protection of the attorney work product rule may

26 5. By contrast, "[a]n implied waiver arises where a party
27 asserts a claim that places at issue privileged matter" (id. at
28 719), such as where a client puts his or her attorney's
performance at issue during the course of litigation. See
Bittaker v. Woodford, 331 F.3d 715, 719-20 (9th Cir. 2003).

1 be waived. Oracle at *18, citing United States v. Salsedo, 607
2 F.2d 318, 320 (9th Cir. 1979).

3 Finally, the court looks to state law to determine whether a
4 conversion has occurred. Petralia v. Jercich (In re Jercich),
5 238 F.3d 1202, 1206 n.16 (9th Cir. 2001), citing In re Bailey,
6 197 F.3d 997, 1000 (9th Cir. 1999). The elements of a conversion
7 in California are (1) the plaintiff's ownership or right to
8 possession of property; (2) the defendant's conversion by a
9 wrongful act or disposition of property rights; and (3) damages.
10 Farmers Ins. Exchange v. Zerlin, 53 Cal. App. 4th 445, 451 (1997).

11 However, "a plaintiff in a conversion action must also prove
12 that it did not consent to the defendant's exercise of dominion."
13 Bank of New York v. Fremont General Corp., 523 F.3d 902, 914 (9th
14 Cir. 2008), citing Farrington v. A. Teichert & Son, Inc., 59 Cal.
15 App. 2d 468, 474 (1943) ["there can be no conversion where an
16 owner either expressly or impliedly assents to or ratifies the
17 taking, use or disposition of his property."].

18 C. Discussion

19 The Farm Entities rely primarily on In re Truck-A-Way, 300
20 B.R. 31 (E.D. Cal. 2003), in which an attorney for a chapter 7
21 trustee obtained an ex parte order purportedly authorizing him to
22 enter and search certain residences located outside the district
23 and to seize items that were property of the estate. The
24 attorney used intimidation by way of the presence of armed deputy
25 U.S. Marshals to gain entrance to a private residence over the
26 objection of its occupants, a mother with her two small children.
27 The resulting search encompassed a bedroom and included dressers
28 and other personal belongings. The attorney seized the titles to

1 two vehicles and a key for a storage locker, from which he seized
2 boxes of documents. The court, noting that the attorney's
3 actions were "unlike anything to come before this court," 300
4 B.R. at 35, disqualified counsel. Id. at 40.

5 The Truck-A-Way case is inapposite here. Indeed, its facts
6 are so glaringly different from those in the case at hand that
7 the Farm Entities' need to rely on it undercuts their argument.

8 No one is alleged to have forcibly entered a private
9 residence or any other premises to which the trustee did not
10 lawfully have access. Instead, pursuant to his duty to
11 investigate the debtors' affairs, see § 1106(a)(3), the trustee
12 took control over the debtors' business records at SK Foods'
13 business premises and on SK Foods' computers.⁶

14
15 6. The Farm Entities' heavy reliance on United States v.
16 Comprehensive Drug Testing, Inc., 2009 U.S. App. LEXIS 19119 (9th
17 Cir. 2009), is similarly flawed. That case concerned the
18 government's execution of a warrant for electronic records of
19 steroid drug testing on professional baseball players, and its
20 seizure of records of persons, baseball players and others, other
21 than those named in the warrant. That case lacked the element of
22 ownership and control, present in this case, between those named
in the warrant and the third parties whose records were also
searched. Further, the case did not implicate bankruptcy
considerations in any way, or a trustee's duties under the Code,
and the search and seizure took place at premises at which the
government agents otherwise had no right to access. Finally, the
question of waiver, as discussed below, was not in play in
Comprehensive Drug Testing.

23 The bankruptcy cases cited by the Farm Entities, In re White
24 House Decorating Co., 607 F.2d 907 (10th Cir. 1979); In re
Skinner, 336 B.R. 316 (Bankr. N.D. Ohio 2005); United States v.
25 Patrick, 916 F. Supp. 567 (N.D. W.Va. 1996); and In re Asia
Global Crossing, Ltd. 322 B.R. 247 (Bankr. S.D.N.Y. 2005), either
26 do not stand for the propositions for which they are cited (White
House Decorating) or are inapposite (Skinner - whether a trustee
27 may search a non-debtor's residence; Patrick - whether a trustee
may consent to government's search in criminal case of non-debtor
premises; Asia Global Crossing - whether waiver occurred by

(continued...)

1 1. Storage of and Access to Paper and Electronic Records

2 As it happened, most of the Farm Entities' paper records,
3 including financial, legal, and business records, were located at
4 SK Foods' places of business or in storage units under SK Foods'
5 control. Declaration of Shondale Seymour in Support of
6 Opposition to the Motion to Remove Trustee, filed August 19, 2009
7 ("Seymour Decl."), ¶¶4, 8, 9.

8 Similarly, the debtors' and the Farm Entities' electronic
9 records were stored on computer systems at SK Foods' premises --
10 before June 2008, on an AAS Enterprise system or in Lotus or
11 Excel workbooks owned and maintained by the debtors, Seymour
12 Decl. ¶15, and after June 2008, on Microsoft Dynamics Axapta
13 ("DAX") software. Id. at ¶16. Both the e-mail system and the
14 DAX systems servers were used collectively by SK Foods and the
15 Farm Entities. Declaration of John Matthew Gallegly in Support
16 of Opposition to the Amended Counter-Motion ("Gallegly Decl.")
17 ¶¶6, 7. Although access to records stored on these servers was
18 restricted, id. at ¶¶9,10, Dan Kline, SK Foods' Vice President of
19 Information Technology, and his staff had access to all these
20 records. Kline Declaration in Support of Opposition to Motion to
21 Remove Trustee, filed August 19, 2009, ¶8.⁷

22 In short, virtually all electronic documents relating to the
23 debtors and the other Salyer entities, including the Farm
24 Entities, were stored on computer systems maintained by SK Foods,

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26 6.(...continued)
virtue of corporate e-mail policy).

27 7. "My staff and I had access to everything on the network,
28 24/7, 365 days a year to keep the network up and managed, and my
responsibilities required me the access to review, organize and
analyze files of the Salyer-Related Entities and Affiliates on a
regular basis." Id.

1 and the e-mail communications of all the companies were stored on
2 a server maintained by SK Foods. Seymour Decl. §§17, 18.⁸

3 Shondale Seymour was the Chief Financial Officer of the
4 debtors, and between June 2008 and April 10, 2009, was also the
5 CFO of the Farm Entities. As such, she was "involved in
6 financial management, financial planning, and record keeping."
7 Seymour Decl. ¶1. With limited exception, all administrative and
8 operations support for the Farm Entities, including human
9 resources, administration, IT functions, and accounting, was
10 provided by SK Foods, through its resources and staff. Id. ¶8.

11 Indeed, the Farm Entities concede that they "stored and
12 regularly accessed their financial, business, estate planning and
13 other personal documents at SK Foods, LP[,] and that SK Foods'
14 personnel "performed accounting and record keeping services for
15 the Farm Entities," albeit with an allocation of expenses.
16 Points and Authorities in Support of Motion to Remove Trustee,
17 filed August 7, 2009 ("P. & A."), at 4.

18 The Farm Entities nevertheless insist that SK Foods'
19 employees knew the parties intended "to maintain a separateness
20 and privacy interest in the operating and stored records and
21 data; [and] that the information was confidential[.]" Id. at 5.
22 To support this conclusion, the Farm Entities rely on the
23 testimony of John Matthew Gallegly, Information Technology
24 Consultant to Salyer American Fresh Foods and an employee of SK
25 Foods (and Scott Salyer's son-in-law), that internal security

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27 8. For purposes of this decision, the court finds it
28 irrelevant which entities paid for, owned, or leased which
systems.

1 procedures limited access to the records stored on the DAX
2 systems to particular users. Gallegly Decl. ¶¶8-12.

3 However, more important is this testimony of Ms. Seymour,
4 not countered by the Farm Entities, which clearly shows that even
5 though there may have been certain limited restrictions, the
6 information was accessible by a number of people:

7 At all times during my tenure with the Debtors and any
8 and all of the Salyer-Related Entities and Affiliates,
9 SK Foods' possession of, access to and review of the
10 business records of these other entities was
11 specifically approved by Scott Salyer or his designee
12 on behalf of the Salyer-Related Entities and
13 Affiliates. Scott Salyer and Mark McCormick . . .
14 authorized and instructed me and/or my staff to perform
15 specific functions on behalf of these other entities on
16 a regular basis. These functions included, for
17 example, the transfer of funds from one entity to
18 another. These tasks (in addition to the general
19 responsibilities of handling all accounting) required
20 my staff and me to access, review and often make
21 entries into the business records of these other
22 entities. We did this in the daily course of our
23 responsibilities and at the direction of the most
24 senior management, and have been, at all times,
25 authorized to do so. . . . At no time during my tenure
26 for the Debtors or for the Salyer-Related Entities or
27 Affiliates was I ever advised that I was not to access
28 or review business records of the other Salyer-Related
Entities or Affiliates. To the contrary, I was given
responsibilities that required me to access, review and
analyze those records on a regular basis.

20 Seymour Decl. ¶¶12, 14.

21 The court concludes that with the knowledge and acquiescence
22 of the management of the Farm Entities, and indeed with the
23 permission and at the direction of Scott Salyer, the personal,
24 legal, business, and financial records, both paper and
25 electronic, of Salyer and the Farm Entities were stored at the
26 premises of SK Foods, in storage units maintained by SK Foods, or
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1 on computers at the premises of and maintained by SK Foods.⁹ The
2 court also concludes that with that same knowledge, acquiescence,
3 permission, and direction, these records were routinely accessed
4 and reviewed by employees of SK Foods.

5 2. The Justice Department Raid and the Retention of Counsel

6 The court need not determine whether, as of April 2008, the
7 Farm Entities had a reasonable expectation of privacy concerning
8 their records stored at SK Foods' premises and on computers on
9 those premises. At that time, representatives of "the Anti-Trust
10 Division of the [U.S.] Department of Justice and other federal
11 agents," with search warrants, raided the premises of SK Foods
12 and seized "an enormous volume of records and copied many other
13 documents and computers" P. & A. at 5 n.3.

14 [M]any of the employees were thereafter represented by
15 counsel; counsel for SK Foods LP had been active at the
16 corporate headquarters and at the facilities; [and]
employees of the company had publically plead guilty to
federal offenses as had employees of customers,

17 Id.¹⁰ The raid must have necessarily put on everyone's radar
18 screen the risk of storing Salyer and the Farm Entities'
19 documents and information on SK Foods' premises and computers and
20 the consequences of leaving possession in the hands of SK Foods.¹¹

21 _____
22 9. The court finds it unnecessary for purposes of this
23 decision to determine whether the records of Salyer and the Farm
24 Entities were maintained in locations within the SK Foods
premises or on its computers that were separate and apart from
the records of the debtors.

25 10. The logical inference is that Salyer personally
26 employed counsel, as he was, directly or indirectly, the owner of
27 the various companies, and as such, one of the primary targets,
if not the primary target, of the investigation.

28 11. The court does not mean to suggest that SK Foods is or
(continued...)

1 The court cannot conjure a bigger red flag.

2 The raid was followed by a federal grand jury investigation
3 and criminal informations in which certain parties were charged
4 with mail fraud, wire fraud, bribery, and false and misleading
5 labeling of products. The defendants have included certain
6 current and former employees of SK Foods. There have also been a
7 number of class action and other lawsuits filed against SK Foods
8 and others. See Declaration of Lisa Crist in Support of Chapter
9 11 Petitions and First Day Pleadings, filed May 8, 2009, at 10-
10 11. The court makes no findings as to the level of involvement
11 of the Farm Entities in those proceedings; however, any
12 suggestion that Salyer, in his capacity as an individual and on
13 behalf of the Farm Entities, or others in charge of the Farm
14 Entities were not fully aware of what was going on would not be
15 credible. Indeed, there is no such contention.

16 To put it generously, the Farm Entities skirt the issue as
17 to why, with knowledge of the risk attendant to leaving the
18 records at SK's premises, they did not simply remove them before
19 the chapter 11s were filed. Instead, they devote their attention
20 to their post-petition demands that the trustee cease his review
21 of their records and return the records to them, and the
22 trustee's refusal to do so. However, by the time the trustee was

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24 11.(...continued)
25 is not a "third party" vis-à-vis the Farm Entities. The court
26 has no need at this time to determine whether either or both
27 debtors are third parties, or are one and the same as one or more
28 of the Farm Entities for purposes of substantive consolidation or
for any other reason. The Farm Entities contend that the
trustee's position as regards the documents and records is based
on such an identity. The court bases the present decision on
other grounds.

1 appointed, the Farm Entities no longer could have had any
2 reasonable expectation of privacy as regards their records stored
3 at SK Foods and on its computers, and to whatever extent they
4 previously had such an expectation, they clearly waived it when,
5 over the course of a full year, they failed to take any steps
6 whatsoever to remove their documents from the possession and
7 control of SK Foods and failed to instruct employees of SK Foods,
8 including Shondale Seymour and Lisa Crist, to cease their review
9 of such records. Seymour Decl. at ¶¶ 12, 14; Declaration of Lisa
10 Crist in Support of Response to the Motion to Remove Trustee,
11 filed August 19, 2009, at ¶¶ 13, 14.

12 Viewed in this light, the Farm Entities' contention that
13 they had no time to remove their records from the debtors'
14 possession because the bankruptcies were "abruptly initiated
15 involuntarily" by their lenders defies credibility.¹² The Justice
16 Department raids preceded the filing of the involuntary petitions
17 by over a year. The debtors retained the national law firm of
18 Winston & Strawn LLP in February 2009, three months prior to the
19 filings, to assist with preparation of the filings and sale of
20 the debtors' assets, and to assist in responding to the federal
21 criminal investigation. Seymour Decl. at ¶29. By the time of
22 the filings, Winston had "accumulated extensive knowledge of the
23 [d]ebtors' business and engaged in negotiations with parties in
24 interest" to such an extent that it had accrued fees and costs
25 totaling \$1,436,500. Declaration of Richard A. Lapping in
26 Support of Application for Authority to Employ Winston & Strawn

27
28 12. Reply in Support of Motion to Remove Trustee, filed
September 22, 2009 (the "Reply"), at 5 n.3.

1 LLP as Special Counsel to Chapter 11 Trustee, filed June 2, 2009,
2 at ¶¶3(a), 5.

3 Finally, on April 10, 2009, almost a month prior to the
4 filings, Salyer and certain of his entities retained the national
5 law firm of Kasowitz, Benson, Torres & Friedman LLP. Seymour
6 Decl. at ¶31. Attorneys at Kasowitz "had a great deal of
7 interaction" with Richard Lapping, of Winston & Strawn, prior to
8 the chapter 11 filings. Supplementary Declaration of Donald J.
9 Putterman in Support of Reply in Support of Motion to Remove
10 Trustee, filed September 22, 2009, at ¶22.

11 On April 16, 2009, Donald J. Putterman, of the Kasowitz
12 firm, sent a letter to the managing director of one of the
13 debtors' lenders referencing the lenders' threat to file
14 involuntary bankruptcy proceedings. Affidavit of Lawrence
15 Mizera, filed under seal on August 20, 2009, Ex. A. The next
16 day, an attorney for that lender responded to Mr. Putterman,
17 stating:

18 As you know, the Lenders are owed in excess of \$190
19 million, certain proceeds of which, on information and
20 belief, have been drained from the Borrowers [the
debtors] to affiliated non-borrowers and for the
personal benefit of related parties.

21 Affidavit of James Spiotto, filed under seal on August 20, 2009,
22 Ex. A.

23 Thus, at least as early as April 17, 2009, Salyer's personal
24 counsel was clearly on notice of the potential of involuntary
25 bankruptcy proceedings and of the suspicion on the part of the
26 debtors' major lenders that improper insider transfers had taken
27 place.

28 / / /

1 It is clear Salyer had sophisticated legal advice, knew of
2 the contemplated chapter 11 filings, and knew the major lenders
3 were suspicious of improper insider dealings. At some point, he
4 authorized the voluntary filings, then requested a chapter 11
5 trustee be appointed, and knew or certainly should have known a
6 chapter 11 trustee is mandated to investigate the debtor's books
7 and records, financial affairs, assets, liabilities, and dealings
8 with others, especially insiders.¹³ In circumstances where the
9 debtors' major lenders had already raised the prospect of
10 inappropriate transfers, Salyer must have known a trustee's
11 attention would be drawn to the records of all the related
12 entities, not just those of the debtors.

13 In truth, the Farm Entities had endless opportunities to
14 segregate and remove their records from the debtors' records
15 before the debtors filed their voluntary petitions, but chose not
16 to. By the Farm Entities' own account, to do so would have been
17 easy since their files were separately labeled. P. & A. at 12.
18 Under all these circumstances, the trustee's taking control of
19 all records located at the debtors' premises and on the debtors'

22
23 13. Not only did Salyer and his counsel contemplate the
24 appointment of a chapter 11 trustee from the very beginning of
25 these cases, they also had in mind the particular individual who
26 was ultimately appointed. In their motion, the debtors were
27 complimentary of Mr. Sharp's background, experience, and
28 effectiveness as a chapter 11 trustee, and expressly requested
that the Office of the United States Trustee consider appointing
him. The Bank of Montreal indicates in its joinder in the motion
to appoint a chapter 11 trustee, filed May 11, 2009, that Mr.
Sharp "[had] already begun to familiarize himself with the
operations of the [d]ebtors" Salyer was clearly part of
a very small group that hand-picked Mr. Sharp for this role.

1 electronic systems was not only foreseeable but to be expected.¹⁴

2 The Farm Entities attempt to put the onus on the trustee,
3 charging him with searching through the documents to segregate
4 and return those allegedly not belonging to the debtors, without
5 himself reviewing their contents, or alternatively, with seeking
6 instruction from the court as to how to perform his statutory
7 duties. Under the circumstances presented here, the court would
8 not put the trustee in such an untenable position.

9 Also unavailing is the Farm Entities' argument that portions
10 of the documents in question have nothing to do with the
11 Wastewater Motion or the allegations in the Adversary Complaint.
12 The scope of a trustee's duties and of his legitimate access to
13 books and records is, of course, never limited by the subject
14 matter of motions and adversary complaints already on file.
15 Finally, the court rejects the Farm Entities' contention that the
16 trustee should be precluded from using the documents or their
17 contents against the Farm Entities.

18 In short, represented by counsel, the Farm Entities chose
19 not to act. In effect, the Farm Entities ask the court to shield
20 them from the direct and clearly foreseeable consequences of
21 their own ill thought-out and imprudent choices. This the court

22
23 14. "The absence of a right to exclude others from access
24 to a situs is an important factor militating against a legitimate
25 expectation of privacy." Bautista, 362 F.3d at 589, citing
Rawlings v. Kentucky, 448 U.S. 98, 105 (1980). Thus, where a
hotel guest's stay has run, he or she no longer has a legitimate
expectation of privacy in the hotel room. Bautista at 589.

26 Similarly, in this case, Salyer gave up the right of access
27 to SK Foods' premises, including computers on those premises,
28 when he authorized the debtors to request the appointment of a
chapter 11 trustee. With the right of access, he also gave up
any reasonable expectation of privacy.

1 will not do.

2 IV. Conclusion

3 Whether a party has a reasonable expectation of privacy is a
4 context-specific inquiry. Leonel v. Am. Airlines, 400 F.3d 702,
5 712 (9th Cir. 2005). The question of consent is similarly to be
6 determined based on the totality of the circumstances. Hill,
7 7 Cal. 4th at 102 n.15. Based on the facts of this case, the
8 court finds that the Farm Entities had no reasonable expectation
9 of privacy in records stored at the debtors' place of business,
10 in their storage units, or on their electronic systems; or, in
11 the alternative, that the Farm Entities have waived their
12 reasonable privacy expectation in these records by not removing
13 them before the bankruptcy filings. The court thus concludes
14 that the trustee did not run afoul of the Fourth Amendment.¹⁵

15 For the same reason, the court also finds that the Farm
16 Entities, as against the debtors and the trustee, waived their
17 right of privacy in the records at issue, and that the trustee
18 did not convert the Farm Entities' records. See Kremen v. Cohen,
19 337 F.3d 1024, 1030 (9th Cir. 2003) (putative owner in conversion
20 action must have established a legitimate claim to exclusivity).

21 Finally, based on the Farm Entities' conduct and the
22 analysis set forth above, the court finds that the Farm Entities
23 waived the attorney-client privilege and their rights under the

24
25 15. Because the court finds the Farm Entities had no
26 reasonable expectation of privacy, it need not decide whether the
27 Fourth Amendment binds a bankruptcy trustee. The court notes
28 that the cases are divided on this question. Cf. Truck-A-Way,
300 B.R. at 36-37 (trustee is so bound); In re Barman, 252 B.R.
403, 412-413 (Bankr. E.D. Mich. 2000) (same); In re Kerlo, 311
B.R. 256 (Bankr. C.D. Cal. 2004) (trustee is not so bound).

1 work-product doctrine in the records at issue.¹⁶

2 Because the court is persuaded that the Trustee and his
3 counsel did not act improperly, it will deny the Farm Entities'
4 request to disqualify either. The court will also deny the Farm
5 Entities' requests to dismiss the Adversary Complaint, to exclude
6 evidence obtained as a result of the trustee and his counsel's
7 review of their records, and to require the trustee to account
8 for the records he accessed. The court will grant the Counter-
9 Motion, but only with respect to Salyer and the Farm Entities'
10 records, since only Salyer and the Farm Entities have had the
11 opportunity to oppose the Counter-Motion.

12 The court will issue an appropriate order.

13 Dated: October 9, 2009

/s/

14 ROBERT S. BARDWIL

15 United States Bankruptcy Judge
16
17
18
19
20

21 16. The Farm Entities express concern about the costs
22 presumably imposed by a rule whereby "separate businesses who
23 share administrative functions waive all property rights and
24 privileges" when one such business files for bankruptcy. Reply
at 15. The better rule, according to the Farm Entities, is that
such shared functions (and concomitant information-sharing) cease
once a bankruptcy is filed.

25 The court, though mindful of the Farm Entities' concern,
26 does not agree that requiring parties with notice of a related
27 party's imminent bankruptcy filing to remove their records in
28 order to avoid a finding of waiver will discourage shared
administrative arrangements. In any event, the court's findings
as expressed in this decision are limited to the facts of this
case.