IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES *ex rel.* FLOYD LANDIS,	)	No. 10-cv-00976 (CRC)
Plaintiff,	)	(Oral Argument Requested)
v.	)	**REDACTED**
TAILWIND SPORTS CORPORATION, *et al.*,	)	
Defendants.	)	

RELATOR'S MOTION TO COMPEL NON-PARTY WILLIAMS & CONNOLLY, LLP TO COMPLY WITH SUBPOENA

Relator Floyd Landis ("Relator") hereby moves this Court for an order compelling non-party Williams & Connolly, LLP ("W&C") to comply with a subpoena *duces tecum* issued by Relator, and specifically for an order holding that the attorney-client privilege does not apply to W&C's communications with defendant Lance Armstrong or defendants Capital Sports and Entertainment Holdings, Inc., William Stapleton and Bart Knaggs ("the CSE Defendants") and that W&C should produce responsive documents not subject to a claim of attorney-client privilege directly to Relator.

Pursuant to Local Civil Rule 7(m), counsel for Relator conferred with counsel for defendant Armstrong and counsel for non-party W&C to determine if they would consent to or oppose any part of this motion. Armstrong and W&C oppose the motion. The United States does not oppose the motion.

In support of this Motion, Relator respectfully submits the Memorandum of Points and Authorities attached hereto and the accompanying Declaration of Paul D. Scott and proposed order.

Dated: June 9, 2015

Respectfully submitted,

/s/
Paul D. Scott
pdscott@lopds.com
California State Bar No. 145975
Admitted *Pro Hac Vice*

/s/
Lani Anne Remick
laremick@lopds.com
California State Bar No. 189889
U.S.D.C. No. PA0045
Jon L. Praed
U.S.D.C. No. 450764
D.C. Bar No. 51665
LAW OFFICES OF PAUL D. SCOTT, P.C.
Pier 9, Suite 100
San Francisco, California 94111
Tel: (415) 981-1212
Fax: (415) 981-1215

Attorneys for Relator Floyd Landis

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES *ex rel.* FLOYD LANDIS,	)	No. 10-cv-00976 (CRC)
Plaintiff,	)	(Oral Argument Requested)
v.	)	**UNDER SEAL**
TAILWIND SPORTS CORPORATION, *et al.*,	)	**CONTAINS MATERIAL SUBJECT TO SEPTEMBER 15, 2014 PROTECTIVE ORDER**
Defendants.	)	**(ECF No. 221)**

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RELATOR'S MOTION TO COMPEL NON-PARTY WILLIAMS & CONNOLLY, LLP TO COMPLY WITH SUBPOENA

On May 8, 2015, relator Floyd Landis ("Relator") served defendant Armstrong's former counsel Mark S. Levinstein ("Levinstein") and Williams & Connolly, LLP ("W&C") with a subpoena *duces tecum*, requesting twelve categories of documents. *See* Declaration of Paul D. Scott ("Scott Decl."), Exh. 1. [redacted]

> Request No.1: ALL YOUR COMMUNICATIONS with Lance Armstrong, William Stapleton, Barton Knaggs or CSE between August 1, 2005 and August 23,2010 RELATING TO the August 2005 article in *L 'Equipe* regarding an allegedly positive test for EPO in Lance Armstrong's blood sample from the 1999 Tour de France.
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> Request No.3: ALL YOUR COMMUNICATIONS between August 1, 2005 and August 23, 2010 with Lance Armstrong, William Stapleton, Barton Knaggs or CSE RELATING TO the VRIJMAN REPORT.
>
> Reguest No.7: ALL YOUR COMMUNICATIONS between April2004 and August 23, 2010 with Lance Armstrong RELATING TO Lance Armstrong's missed doping test in April 2004.
>
> Reguest No.8: ALL YOUR COMMUNICATIONS with William Stapleton, Bart Knaggs or CSE RELATING TO Lance Armstrong's missed doping test in April 2004.
>
> Request No.9: ALL YOUR COMMUNICATIONS between January 1, 1998 and January 18, 2013 with William Stapleton, Barton Knaggs or CSE RELATING TO DOPING by Lance Armstrong.
>
> Request No.12: ALL YOUR COMMUNICATIONS, between May 1, 2010 and the present, with Armstrong, Stapleton, or Knaggs RELATING TO any attempts to lobby or influence elected officials, political appointees or their staff in connection with the USADA INVESTIGATION or the U.S. INVESTIGATION, including, but not limited to, the criminal portion of the investigation.

See Scott Decl., Exh 1, Subpoena; [redacted]

None of the foregoing categories of communications, however, are protected by the attorney-client privilege because the crime-fraud exception applies. In addition,

communications with the CSE Defendants are not privileged because they were not clients of W&C, nor do they qualify as Armstrong's "intermediary" under applicable law. Finally, some of the communications were not made for the purpose of seeking legal advice but were made for lobbying or other non-privileged purposes.

Notably, Relator seeks these documents from non-party W&C in part because they are unavailable from the CSE Defendants, due to CSE's destruction of many potentially relevant documents in January 2005. Scott Decl., Exh. 3, CSE Interrogatory Responses ("CSE replaced the server for its email in January 2005 and did not retain the files from the old server. CSE does not have emails before January 2005 unless they were printed in hard copy."). Additional documents may have been destroyed when CSE replaced its server again in September 2010. *Id.* Because of the known destruction of many of the CSE Defendants' potentially relevant documents, and possible destruction of others, Relator is attempting to obtain those materials from other parties to the communications.

I. STANDARD OF REVIEW

The attorney-client privilege applies only if:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

In re Sealed Case, 737 F.2d 94, 98-99 (D.C. Cir. 1984) (quoting *United States v. United Shoe Machinery Corp.*, 89 F.Supp. 357, 358-59 (D. Mass. 1950)) (emphasis added).

"[T]he party claiming the privilege bears the burden of proving that the communications are protected." *In re Lindsey*, 148 F.3d 1100, 1106 (D.C. Cir. 1998). "Each and every element of the privilege must be proved by 'competent evidence,' and

the proponent's burden "cannot be 'discharged by mere conclusory or *ipse dixit* assertions.'" *Cobell v. Norton*, 377 F. Supp.2d 4, 8 (D.D.C. 2005) (Lamberth, J.) (citations omitted). "The Supreme Court has held that because the privilege obstructs the search for truth, courts should construe it narrowly." *United States v. Singhal*, 800 F. Supp.2d 1, 6 (D.D.C. 2011) (Lamberth, J.) (citing *Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976)).

II. ARGUMENT

A. The crime-fraud exception applies to Armstrong's communications with W&C.

It has long been established that "attorney-client communications are not privileged if they 'are made in furtherance of a crime, fraud, or other misconduct.'" *In re Grand Jury*, 475 F.3d 1299, 1305 (D.C. Cir. 2007) (quoting *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985)). "To overcome a claim of privilege, the [challenging party] must 'make a prima facie showing of a violation sufficiently serious to defeat the privilege'; such a 'violation is shown if it is established that the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme'; and the [challenging party's] burden of proof is satisfied 'if it offers evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud .'" *Id.* (quoting *In re Sealed Case*, 754 F.2d at 399). *See also United States v. Singhal*, 842 F. Supp.2d at 6 (D.D.C. 2011) ("It is well established that the attorney-client privilege is waived when the client uses the relationship in the commission of a crime or fraud.") (citing *Clark v. United States*, 289 U.S. 1 (1933)).

1. Crime, fraud or other misconduct

Defendant Armstrong doped and cheated in cycling races from 1995 through 2005, so many times that he cannot even remember which races. Scott Decl., Exh. 4, Armstrong *Acceptance* Interrogatory Responses at ¶ 1; *see also* Anabolic Steroid Control Act, Pub. L. No. 101-647, title XIX, §§ 1901-05. Nonetheless, throughout his entire career until January 2013, he vehemently denied his doping and punitively attacked

anyone who dared to suggest otherwise. *Id.* at ¶ 13. [redacted][1] He attacked their family members.[2] [redacted][3] [redacted][4] and he attacked anti-doping officials.[5] Armstrong basically attacked anyone who got in his way. [redacted][6] Meanwhile, throughout the entire period, Armstrong reaped the benefit of his lies at the expense of sponsors who he knew would "all go away" if they learned the truth about his doping (and who did "go away" when the truth finally came out).[7]

2. Using counsel to further his scheme.

Armstrong used his counsel Williams & Connolly, LLP, including John Cuddihy and Mark Levinstein, to further his scheme in the following ways, among others:[8]

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[1] Scott Decl.,Exh. 5, Filippo Simeoni USADA Witness Statement at ¶ j; [redacted] Exh. 7, Tyler Hamilton Dep. at 414:24-415:7; 419:11-424:15 .

[2] *Id.*, Exh. 8, Betsy Andreu USADA Affidavit at ¶ 80.

[3] *Id.*, Exh. 9, Emma O'Reilly USADA Affidavit at ¶ 123; [redacted]

[4] [redacted]

[5] *Id.*, Exh. 27, Armstrong USDC Complaint at pp. 35-41 (acknowledging that Armstrong's attack brought an end to Mr. Pound's chances for higher office in the Olympic movement.").

[6] [redacted] Exh. 7, Tyler Hamilton Dep. at 414:24-415:7; 419:11-424:15 ; Exh. 4, Armstrong *Acceptance* Interrogatory Responses at ¶ 13; *.id.*, Exh . 11, Cycling News "Armstrong blasts WADA chief Pound, closes door definitively on comeback."; [redacted] *id.*, Exh. 6, Order dismissing Armstrong USDC Complaint (noting Armstrong's attempt at publicity, self-aggrandizement, or vilification of defendants").

[7] *Id.*, Exh. 13, Armstrong SCA I Dep. at 117:19-118:17; Exh. 14, SCA II Final Arbitration Award at 17; [redacted]

[8] Relator does not contend that W&C knew the truth about Armstrong's doping, but the crime-fraud exception does not include a requirement that counsel be complicit in the

*False statements in the context of fighting "missed test" sanctions***.** Armstrong used W&C to make false statements on his behalf in connection with fighting potential sanctions by USADA arising from doping tests that he evaded or missed in April and November 2004 (and possibly others). [9]

*Fraud on the arbitration panel in Armstrong's case against SCA***.** In 2004, Mr. Levinstein helped litigate an action on behalf of Armstrong against SCA Promotions, Inc. ("SCA") to collect a bonus for winning the 2004 Tour de France, which SCA had initially refused to pay based on allegations of doping (the "SCA I" arbitration). Scott Decl., Exh. 14, SCA II Final Arbitration Award at 3. Mr. Armstrong testified under oath that he had never doped, and his lawyers, including Mr. Levinstein, disputed the allegations. *Id.* at 21 & Exh. 20. This advocacy contributed to a $7.5 million "Consent" arbitration award in favor of Armstrong. *Id.*, Exh. 14, SCA II Final Arbitration Award at 3. After learning the truth, the panel subsequently held that Armstrong and Tailwind (represented by Stapleton) had engaged in fraud and other misconduct in the prior proceeding to "secure millions of dollars of benefits" from the respondents and "to falsely claim that the Panel

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fraud. *See In re Grand Jury*, 475 F.3d 1299, 1305 (D.C. Cir. 2007); *see also United States v. Chen*, 99 F.3d 1495 (9th Cir. 1996) (crime-fraud exception applies even where attorney is innocent of wrongdoing or guilty knowledge).

[9] For example, in May 2004 Mr. Cuddihy submitted sworn affidavits of Stapleton and Armstrong to USADA, asserting that Armstrong had missed a test on April 9, 2004 because poor cell phone reception had prevented him from receiving the tester's call. Scott Decl., Exh. 16, May 28, 2004 letter from Cuddihy to USADA. Mr. Cuddihy further asserted to USADA that the agency's previous testing of Armstrong "confirmed what every test has confirmed - that Mr. Armstrong has not taken any prohibited substances." *Id.* Mr. Cuddihy repeated the assertion that "Mr. Armstrong has not taken any prohibited substances" in December 2004 and January 2005 letters to USADA regarding another "missed test" determination on November 10, 2004, when Armstrong claimed to have left for Mexico earlier that day prior to the tester arriving at his residence. *Id.*, Exhs. 17 & 18. In connection with the same November 10, 2004 missed test, Mr. Levinstein also asserted to USADA that "Mr. Armstrong has not taken any prohibited substances" in a separate January 14, 2105 letter. *Id.*, Exh. 19.

exonerated them, thereby allowing them to profit further from additional endorsements and sponsorships." Scott Decl., Exh. 14, SCA II Final Arbitration Award at 17.

[redacted] Scott Decl., Exh. 12, Vrijman Report. [redacted] Exh. 24, CIRC Report.[10] [redacted]

Similar arguments attacking doping authorities and claiming the independence of the Vrijman Report were made by W&C on behalf of Armstrong before the U.S. District Court for the District of Texas as late as July 2012. *Id.*, Exh. 27, *Armstrong v. USADA* Complaint at pp. 35-41.

Because Armstrong used W&C as described above to further his fraudulent scheme, all of Armstrong's communications with W&C -- at least up through the time

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[10] The February 2015 report of the Cycling Independent Reform Commission ("CIRC Report") concluded, *inter alia*, that in February 2006 Mr. Levinstein extensively revised a preliminary copy of the Vrijman report to "make it more critical of WADA and criticizing in detail the credibility of [the French lab]" and to add an "entirely new section" which was "highly critical of Dick Pound [of WADA]", *id.* at 184-85, provided "extensive input" into an Executive Summary of the Report drafted by Hein Verbruggen in approximately April 2006, *id.* at 186, as well as "collaborat[ing]" with Vrijman and UCI lawyer Verbiest on the final report. *Id.*

that the USADA Reasoned Decision was released on October 10, 2012 and most of Armstrong's sponsors then abandoned him -- are subject to the crime-fraud exception and may not be withheld on the basis of attorney-client privilege.

3. The Court should review *in camera* those documents Armstrong contends are unrelated to doping.

Relator believes that the above facts more than satisfy Relator's burden to offer evidence which, if believed by the trier of fact, would establish a prima facie case of an ongoing crime, fraud, or other misconduct. *In re Grand Jury*, 475 F.3d at 1305. The evidence also makes clear that Armstrong used his relationship with W&C in the commission of his scheme. *United States v. Singhal*, 842 F. Supp.2d at 6. If Armstrong wishes to contend, however, that some of his communication with W&C was unrelated in any way to doping or the USPS Team, then relator would request that the Court review *in camera* any such documents Armstrong seeks to withhold. *See, e.g., Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 134 (D.D.C. 2005) (where challenging party has shown evidence of misconduct but "it is impossible to know, without reviewing the documents *in camera*, whether the [proponent of the privilege] consulted with attorneys with the intent to further any unlawful or fraudulent acts or whether its general purpose in consulting with attorneys was to commit a fraud," court should review documents *in camera*) (citing *U.S. v. Zolin*, 491 U.S. 554, 570-72 (1989); Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 444 (4th ed. 2001)).

B. W&C's communications with the CSE Defendants are not privileged.

The Court should also reject Armstrong's assertion of attorney-client privilege as to W&C's communications with the CSE Defendants, or communications with Armstrong on which CSE, Stapleton or Knaggs were included or copied. Request Nos. 1, 3, 7, 8, 9 and 12 seek communications with Armstrong and/or the CSE Defendants. Armstrong does not contend that the CSE Defendants were clients of W&C. Rather, he apparently bases his assertion of attorney-client privilege with respect to communications

involving the CSE Defendants on the theory that the CSE Defendants were Armstrong's agents, acting as his intermediaries in communicating with W&C. Scott Decl., ¶ 28

"In considering whether a client's communication with his or her lawyer through an agent is privileged under the intermediary doctrine, the 'critical factor' is 'that the communication be made `in confidence for the purpose of obtaining legal advice from the lawyer.' " *In re Lindsey*, 158 F.3d 1263, 1280 (D.C. Cir. 1998). The purpose of the intermediary is "facilitating the representation" by counsel and "ensur[ing] complete understanding of the client," and thus the exception does not apply when the intermediary "changes a message in a way not intended simply to ensure complete understanding" or otherwise goes beyond the role of "mere intermediary." *Id.*[11] In applying the intermediary doctrine, the D.C. Circuit has cautioned that the privilege must be 'strictly confined within the narrowest possible limits consistent with the logic of its principle.'" *Id.*

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[11] In addition, although determining that it did not need to reach the issue in *Lindsey*, the D.C. Circuit recognized that other courts have held that, in order for the privilege not to be waived, the agent's assistance must be "reasonably necessary" for the client to communicate with the attorney. *Id.* at 1279-80. *See, e.g., SEC v. Wyly*, Civ. No. 10-5760, 2011 WL 3366491, at *2 (S.D. N.Y. July 27, 2011); *Leone v. Fisher*, No. 05-521, 2006 WL 2982145 at *5 (D. Conn. Oct. 18, 2006) ("Communications between an individual client's representative and that client's lawyer will be afforded attorney-client privilege protection only if the information communicated is: (1) related to the subject matter of the underlying attorney-client relationship; (2) *necessary to effectuate the representation; and (3) could not have been communicated by the client herself*." (emphasis added); *Hendrick v. Avis Rent a Car Sys. Inc.*, 944 F. Supp. 187 (W.D. N.Y. 1996); Restatement (Third) of the Law Governing Lawyers § 70 cmt. f (2000); *see also Farahmand v. Jamshidi*, Civ. Action No. 04-542 (JDB), 2005 WL 331601, at *2-3 (D.D.C. Feb. 11, 2005) ("reasonable necessity" standard met such that privilege not waived when client's son-in-law was present at meeting with lawyer and helped to translate from Farsi).

Armstrong has made no showing that the participation of an agent was "reasonably necessary" to facilitate his communication with W&C. Indeed, individuals -- as opposed to corporations -- "normally will communicate directly with their attorneys" and " 'a private person generally . . . has no need for a representative to communicate with an attorney.' " *La Suisse, Societe D'Assurances Sur La Vie v. Kraus*, No. 06 Civ. 4404 (CM)(GWG), 2014 WL 6765684 at *5 (S.D.N.Y. Dec. 2, 2014) (quoting *In re Grand Jury Subpoenas Dated Jan. 20, 1998*, 995 F.Supp. 332, 340 (E.D.N.Y.1998)).

Armstrong's current position that the CSE Defendants were his confidential agents for purposes of communicating with W&C is inconsistent with the undisputed fact that, starting in 2003 or earlier, the CSE Defendants were acting as the agents *of defendant Tailwind*, the owner of the USPS Team (and Armstrong's employer), and had duties to Tailwind which included complying with the USPS Sponsorship Agreement and with anti-doping rules. Moreover, the CSE Defendants subsequently became officers of Tailwind. *See generally*, Relator's Response to CSE Motion for Summary Judgment, ECF No. 336 at 3-5.

[redacted]; Exh. 4, Armstrong *Acceptance* Interrogatory Responses at ¶¶ 11-12. Clearly, if the CSE Defendants knew of Armstrong's doping then they were part of the deception and their claims of common interest or attorney-client privilege as to their communications with W&C would fail under the crime-fraud exception just as Armstrong's do. If on the other hand, we were to accept for purposes of this motion that the CSE Defendants didn't know the truth, then the CSE Defendants were mere pawns in Armstrong's efforts to use W&C to further his ongoing fraudulent scheme and they were not truly being used for the purpose of facilitating candid communications between a client and his lawyer. *See In re Lindsey*, 158 F.3d at 1276 (principle behind the attorney-client privilege is to encourage "candor" and "frank communication" by clients in seeking advice from their lawyers); *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1369 (D.C. Cir. 1984) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981)). Moreover, Armstrong would then have fundamentally breached his duties to them as his agents on the core matter on which they represented him. *See* Restatement (Third) of Agency, § 8.15 ("A principal has a duty to deal with the agent fairly and in good faith, including a duty to provide the agent with information about

risks of . . . pecuniary loss that the principal knows, has reason to know, or should know are present in the agent's work but unknown to the agent."). To apply the privilege in such circumstances would plainly run contrary to the D.C. Circuit's admonition that the privilege must be "strictly confined within the narrowest possible limits."

C. Communications that did not involve legal advice are not privileged.

Communications are only privileged if they are made for the purpose of seeking legal advice. *In re Sealed Case*, 737 F.2d at 98-99.

Request Nos. 1 and 3 seek W&C's communications regarding the *L'Equipe* article and the Vrijman Report, which did not represent legal advice to Lance Armstrong. For example, communications regarding press releases for UCI and communications regarding how UCI should direct its investigation do not represent legal advice. Likewise, advocating that UCI attempt to discredit WADA President Dick Pound or exclude the French laboratory is not legal advice. *See In re Lindsey*, 148 F.3d 1100, 1106 (D.C. Cir. 1998) (holding that communications were not privileged where attorney acted as a policy advisor, media expert, business consultant, banker, referee, or friend); *City of Springfield v. Rexnord Corp.*, 196 F.R.D. 7, 9 (D. Mass. 2000) (documents prepared to respond to media inquiries not privileged).

Request No. 8 seeks W&C's communications with CSE, Stapleton or Knaggs regarding Armstrong's missed doping test in April 2004, as to which Stapleton provided a sworn factual declaration which was submitted to USADA. Scott Decl., Exh. 16, May 28, 2004 Cuddihy letter to USADA citing Stapleton declaration. As such, these communications involved Stapleton in his role as a fact witness, and were not for the purpose of seeking legal advice on behalf of Armstrong. *Vondrak v. City of Las Cruces*, 760 F. Supp.2d 1170, 1180 (D.N.M 2009) (communications between lawyer and purported "agent" of client were not privileged where agent was not acting as a "mere intermediary" but rather was a potential fact witness).

Request No. 12 seeks W&C's communications related to lobbying. Communications regarding lobbying are not privileged, even if the lobbyist is also a

licensed attorney. *See, e.g., In re Application of Chevron Corporation*, 749 F. Supp.2d 141 (S.D.N.Y. 2010) (lawyer's efforts in "media and public relations, lobbying and political activism" were not legal advice); *In re Grand Jury Subpoena Dated March 9, 2001*, 179 F. Supp.2d 270, 285 (S.D.N.Y. 2001).

Accordingly, Relator requests that the Court compel W&C to produce all communications responsive to Request No. 1, 3, 8 and 12, or any other communications that did not involve legal advice.

D. Logging of documents.

Even if the Court were to conclude that the attorney-client privilege applied and that the CSE Defendants were encompassed by the privilege, communications between W&C attorneys and the CSE Defendants would have to be logged individually, as the Court's Privilege Order provides for categorical logging between a party and his attorneys as follows: "Communications between any party and their current or former counsel who is not counsel of record in this case (along with such attorney's work product) may be logged categorically." ECF No. 220. Accordingly, the order does not allow for categorical logging of communications between W&C and the CSE Defendants as purported agents for Armstrong. Moreover, individual logging is clearly necessary in order to evaluate the claim of privilege, including issues such as those discussed above.[12]

E. Non-privileged communications should be produced directly to Relator.

[redacted]

[redacted][13] To the extent that the issue is one of burden for W&C, Relator is prepared to provide a list of specific individuals and email addresses related to the third parties (*e.g.*, UCI, WADA, etc.) with whom communications have been requested.

13 [redacted]

Dated: June 9, 2015

Respectfully submitted,

/s/

Paul D. Scott
pdscott@lopds.com
California State Bar No. 145975
Admitted *Pro Hac Vice*

/s/

Lani Anne Remick
laremick@lopds.com
California State Bar No. 189889
U.S.D.C. No. PA0045
Jon L. Praed
U.S.D.C. No. 450764
D.C. Bar No. 51665
LAW OFFICES OF PAUL D. SCOTT, P.C.
Pier 9, Suite 100
San Francisco, California 94111
Tel: (415) 981-1212
Fax: (415) 981-1215

Attorneys for Relator Floyd Landis