



product doctrine to documents that Plaintiff withheld from production. The primary focus of the briefs was the parties' conflicting interpretations of case law discussing the "at issue" waiver doctrine. Plaintiff's position was that an "at issue" waiver occurs only if (a) the party asserting the privilege affirmatively relies upon evidence in support of a claim or defense, and (b) such evidence puts privileged material at issue. Defendants' position was that an "at issue" waiver occurs whenever a party asserts a claim, defense, argument or denial that could be supported or rebutted by privileged communications, regardless of whether that party actually relies upon such evidence.

After reviewing the parties' briefs and hearing oral argument, Magistrate Denlow agreed with Plaintiff's position and held that Plaintiff did not put the withheld documents "at issue." (Opinion at pp. 14-18.) However, Magistrate Denlow also held that statements this Court made and orders this Court entered on October 30, 2007 and December 13, 2007 led him to believe that this Court intended to put all of Plaintiff's pre-lawsuit attorney-client privileged communications and work product "at issue," such that the privilege/protection otherwise applicable to those documents has been waived. (Opinion at pp. 13-14.) Stated another way, Magistrate Denlow concluded that those privileges had been waived even though Plaintiff had not waived them.

Plaintiff respectfully disagrees with Magistrate Denlow's interpretation of this Court's statements and orders. In the second section of this Objection, Plaintiff summarizes the facts that led to the referral to Magistrate Denlow. That summary demonstrates that this Court never entered an order, made a finding or expressed an intent that resulted in Plaintiff losing his attorney-client privilege or work product protection with respect to any documents. Thus, Magistrate Denlow's finding that an "at issue" waiver has occurred such that Plaintiff must

produce all of his pre-lawsuit privileged communications and opinion work product is clearly erroneous and must be set aside. In addition, regardless of whether Magistrate Denlow correctly interpreted this Court's intent, his finding that this Court's orders caused an "at issue" waiver should be set aside because it is contrary to the law. Only Plaintiff had the ability to waive his privileges, and he did not do so. Accordingly, this Court should enforce Magistrate Denlow's alternative finding that all of the withheld documents are protected from disclosure by either the attorney-client privilege or the work product doctrine.

## **II. BACKGROUND FACTS**

In two separate and independent counts, Plaintiff alleges that Defendants committed legal malpractice in connection with their representation of CMGT, Inc. ("CMGT"). Pl. Compl. at pp. 17-22. Pursuant to Rule 12(b)(6), Defendants moved to dismiss Plaintiff's claims on the basis that Plaintiff purportedly did not and cannot allege that Defendants breached a duty to CMGT or that their breach proximately caused CMGT to suffer an injury. Defs. Mot. to Dismiss at pp. 8-20. After extensive briefing, this Court denied the bulk of Defendants' motion to dismiss in a detailed and reasoned Memorandum Opinion and Order. *See* Mem. Op. and Order dated 6/28/07. This Court based much of its opinion on the exhibits attached to Plaintiff's complaint. *Id.*

Separate from their Rule 12(b)(6) argument, Defendants also argued that this case should be dismissed as a sanction because it is a purported fraud on the court. Defs. Mot. to Dismiss at pg. 7. In support of this argument, Defendants cited just one case, *REP MCR Realty, LLC v. Lynch*, 363 F. Supp. 2d 984 (7<sup>th</sup> Cir. 2005), which states that courts have the authority to dismiss a case with prejudice when a litigant commits a fraud on the court. *Id.* According to Defendants, the case at bar is a fraud on the court because Spehar Capital, LLC ("Spehar"), the

judgment creditor whose judgment is the basis for one of Plaintiff's legal malpractice counts, purportedly (a) does not have a legitimate judgment, (b) improperly used its "bogus" judgment to put CMGT into bankruptcy, and (c) convinced Plaintiff to go along with the fraud and file a meritless lawsuit against Defendants. *Id.* In its opinion denying Defendants' sanction request, this Court noted that under existing precedent, the sanction of dismissal with prejudice is appropriate only where a party has acted in bad faith or fraudulently, such as where a party commits perjury or fabricates a document. Mem. Op. and Order, 6/28/07 at pp. 6-7. This Court denied Defendants' sanction request because Defendants presented no evidence of fraud by Plaintiff, and the only evidence Defendants presented regarding Spehar was its facially valid default judgment. *Id.*

Thereafter, Defendants moved for reconsideration of this Court's denial of their motion to dismiss. In relevant part, Defendants argued that their sanction request should have been granted because, regardless of whether a fraud has been committed, Spehar will receive an undeserved windfall if Plaintiff wins his malpractice claims. *See* Defs. Mot. for Reconsideration at pp. 1-2 and Defs. Reply in Support of Mot. for Reconsideration at pp. 2-6. On October 30, 2007, after receiving full briefing and oral argument on Defendants' motion for reconsideration, this Court held a hearing during which it denied Defendants' motion. *See* Tr. dated 10/30/07, pp. 2-3 attached hereto as Exhibit 1; *See also*, Minute Order dated 10/30/07, attached hereto as Exhibit 2. Although this Court denied Defendants' motion, it ordered the parties to engage in limited discovery regarding Defendants' affirmative defense, which this Court referred to as the "unclean hands" issue. Tr. 10/30/07 (Ex. 1) at pp. 2-3; *see also*, Minute Order dated 10/30/07 (Ex. 2). The parties and the Court then discussed the general parameters of that discovery, but the Court did not state or otherwise indicate that its order was intended to waive Plaintiff's

attorney-client privilege or work product protection with respect to any documents. Tr. 10/30/07 (Ex. 1) at pp. 4-7.<sup>1</sup>

After Defendants issued discovery requests to Plaintiff and Spehar, Plaintiff filed a motion for protective order so that he could (a) review Spehar's documents before they were produced to Defendants, (b) remove any privileged documents, and (c) create a privilege log so that this Court could rule on contested privilege issues. See Pl. Mot. for Prot. Order dated 12/07/07. Defendants responded to Plaintiff's motion by arguing that there was no reason to implement Plaintiff's proposed procedure because Plaintiff had waived his attorney-client privilege and work product protection with respect to all documents relating to his pre-lawsuit investigation by putting those documents "at issue." See Defs. Resp. to Pl. Mot. for Prot. Order at pp. 5-8. According to Defendants, Plaintiff committed this "at issue" waiver as a result of arguments and statements he made in his responses to Defendants' motion to dismiss and motion for reconsideration and in his motion for protective order. *Id.*

The day after Defendants filed their response, Plaintiff filed a reply in which he made two arguments. Plaintiff first argued that, regardless of whether he put any documents "at issue," most of his pre-lawsuit investigative material is irrelevant because his understanding of this Court's October 30, 2007 order is that the "unclean hands" defense is limited to Plaintiff's decision not to move to vacate Spehar's judgment. Pl. Reply in Support of Mot. for Prot. Order at pp. 1-2. Plaintiff also argued that even if the scope of discovery is broader than what he understood it to be, he had not committed an "at issue" waiver because (1) such a waiver occurs only where a party affirmatively relies on evidence that puts privileged material "at issue," and (2) he had not relied upon any evidence that puts privileged documents "at issue." *Id.* at pp. 6-7.

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<sup>1</sup> As stated throughout this Objection, the Court did not have the ability to waive Plaintiff's privileges.

The day after Plaintiff filed his reply, the parties appeared before this Court on Plaintiff's motion for a protective order. Within the first few minutes of the hearing, this Court noted that it had not seen Plaintiff's reply. Tr. dated 12/13/07 at pg. 4, attached hereto as Exhibit 3. Before reading Plaintiff's reply, this Court stated "I don't understand why the at issue response isn't something that -- you've put this into play filing this lawsuit. We need to address whether or not this is going to be a situation of unclean hands or not." *Id.* at pg. 5. Plaintiff immediately responded to the Court's comment by explaining the same two points he made in his reply. *Id.* at pp. 5-9. After Plaintiff made his first argument regarding his understanding of the limited scope of the unclean hands issue, this Court stated,

Unclean hands could cover your behavior throughout the whole period of time. It's really getting to the issue as to what was the motivation for the filing of the lawsuit, all of the steps leading up to the failure to move to dismiss this suit could potentially show intent or a pattern of behavior or some theory by the defendants as to why this would be unclean hands.

Tr. dated 12/13/07 (Ex. 3) at pg. 6.

After this Court explained that the unclean hands issue may encompass more than just Plaintiff's decision not to move to vacate Spehar's default judgment, Plaintiff argued his second point -- i.e., that "at issue" waiver does not occur unless the party asserting the privilege affirmatively relies upon evidence that puts privileged communications "at issue," and that Plaintiff had not relied upon any such evidence. *Id.* at pp. 7-9.

This Court then took a recess so that it could read Plaintiff's reply. After reading Plaintiff's reply, this Court decided to refer the "at issue" dispute (and all privilege disputes) to Magistrate Judge Denlow,

[A]ll of these communications are going to start to percolate up as potential privilege disputes. And as such I'm extending this issue of discovery to March 3rd. I am ordering that a privilege log be prepared for any document that you assert privilege on and that that privilege log be prepared and submitted to Judge Denlow, who's going to review it,...by March 10<sup>th</sup>...I'm referring any issues

regarding the discovery of privilege matters to Judge Denlow...So move forward with your requests, and if you believe that its something that's privileged and shouldn't be turned over, you're going to need to address it with Judge Denlow.

Tr. dated 12/13/07 (Ex. 3) at pp. 13-14. Clearly, this Court did not rule on the "at issue" waiver dispute.

After the hearing concluded, this Court entered a minute order reflecting the fact that a hearing was held on Plaintiff's motion for protective order, extending discovery to March 3, 2008, referring the case to Magistrate Denlow for "issues relating to discovery on this motion," and ordering the parties to produce privilege logs to Magistrate Denlow by March 10, 2008. *See* Minute Order dated 12/13/07, attached hereto as Exhibit 4. This Court also entered a separate order referring the case to Magistrate Denlow "for the purpose of holding proceedings relating to discovery supervision." *See* Referral Order dated 12/13/07, attached hereto as Exhibit 5.

On December 14, 2007, Defendants sent this Court a letter stating,

At the court appearance yesterday, Your Honor stated that this matter was being referred to Magistrate Denlow for resolution of any disputes regarding the application of privilege during discovery on the unclean hands defense. (*See* 12/13/07 Transcript at pp. 13-14 copy attached.) However, the Orders issued after our appearances say that the referral to Magistrate Denlow is for discovery supervision, without the "privilege" limitation. If the Court intended the referral to be limited to the issue of privilege, we respectfully request that the Court so state in an amended referral order so that there is no future confusion regarding the matters properly before Magistrate Judge Denlow.

*See* Defs. letter dated 12/14/07, attached hereto as Exhibit 6. (Emphasis in original.)

Clearly, Defendants recognized that this Court had not ruled on the "at issue" waiver dispute.

On December 17, 2007, this Court entered a minute order stating "[t]o clarify minute entry #[76] from the hearing regarding Plaintiff's motion for a protective order, the expedited referral to Magistrate Denlow for all discovery [77] includes a referral to Magistrate Denlow for

determination of Plaintiff's motion for a protective order." See Minute Order dated 12/17/07, attached hereto as Exhibit 7.

After the matter was referred to Magistrate Denlow, the parties filed a joint initial status report with him. In their joint status report, the parties explained that Plaintiff had filed a motion for a protective order with this Court in which Plaintiff requested that he be given the opportunity to review Spehar's documents and assert applicable privileges before the documents are produced to Defendants. See Joint Initial Status Report at pg. 2, attached hereto as Exhibit 8. The parties further explained that this Court had granted Plaintiff's request, and that it referred all privilege disputes to Magistrate Denlow for him to resolve. *Id.*

After producing detailed privilege logs, Plaintiff filed his Memorandum in Support of Privilege Log Assertions. Thereafter, Defendants filed a response and asserted the same "at issue" waiver argument they had previously made to this Court. See Defs. Resp. to Pl. Mem. in Support of His Priv. Log Assertions at pp. 12-20. Plaintiff then filed his reply, which made clear that the primary issue was whether Plaintiff had committed a waiver as a result of arguments and statements he made in certain pleadings even though he had not relied upon any evidence that put privileged material "at issue." See Pl. Reply in Support of His Mem. in Support of His Priv. Log Assertions at pp. 1-10.<sup>2</sup>

On May 14, 2008, Magistrate Denlow heard oral argument regarding the privilege disputes. During that hearing, Defendants argued, for the first time, that all of the withheld documents are subject to discovery even if Plaintiff did not put them "at issue," because this Court "opened the door to testing what [Plaintiff] did with investigation prior to filing this

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<sup>2</sup> In addition to its "at issue" waiver argument, Defendants argued that Plaintiff waived the attorney-client privilege with respect to communications that were shared with Spehar. Defs. Resp. to Pl. Mem. in Support of His Priv. Log Assertions at pp. 21-23. Defendants also argued that Plaintiff's opinion work product is discoverable because Defendants purportedly have a substantial need for those documents. *Id.* at 23-26



complaint.” Tr. dated 5/14/08 at pg. 17, attached hereto as Exhibit 9. In response to this new argument, Magistrate Denlow asked why, under that rationale, had this Court referred the matter to him. *Id.* at pp. 17-18. Defendants answered that question by stating, incorrectly, that their “at issue” waiver argument had not been presented to this Court, but if it had been, this Court might have agreed with them. *Id.* at pg. 18. After Plaintiff corrected Defendants’ misstatement, they admitted that they had “taken a stab” at the “at issue” waiver argument with this Court, but that this Court had not ruled on the dispute. *Id.* at pp 19-20 and 25-26.

On June 9, 2008, Magistrate Denlow issued a 31-page Memorandum Opinion and Order, granting in part and denying in part Plaintiff’s motion for a protective order. Magistrate Denlow agreed with Plaintiff’s arguments that: (a) all of the withheld documents on Plaintiff’s privilege log are privileged attorney-client communications or opinion work product, (b) existing case law regarding the “at issue” waiver doctrine states that a waiver occurs only if the party asserting the privilege affirmatively relies upon evidence that puts privileged documents “at issue,” (c) Plaintiff has not put any privileged documents “at issue,” and (d) Defendants failed to demonstrate that they have a substantial need for Plaintiff’s opinion work product, or that they cannot obtain substantially equivalent information elsewhere without undue hardship. *See* Mem. Op. and Order, dated 6/09/08 at pp. 14-29, attached hereto as Exhibit 10. With respect to (d), Magistrate Denlow expressly held that Defendants may be able to obtain evidence on their unclean hands defense from non-privileged sources, such as depositions and the non-privileged documents produced by Plaintiff. *Id.* at pg. 29.

Despite agreeing with Plaintiff on nearly every issue presented by the parties, Magistrate Denlow ultimately concluded that Plaintiff must nevertheless produce all of his pre-lawsuit privileged communications and work product because this Court put those documents “at issue”

such that the privileges/protections otherwise applicable to those documents had been waived. *Id.* at pp. 13-14. Magistrate Denlow expressly acknowledged that his conclusion was not based on a “traditional” “at issue” waiver analysis, and he did not cite any authority to support his finding. *Id.* Instead, Magistrate Denlow stated that “where a district court judge directs discovery to proceed regarding a party’s behavior and motivation, it is not for this Court to second guess the decision, but instead to help facilitate discovery on that issue.” *Id.* at pg. 14. As explained below, this part of Magistrate Denlow’s order -- which had the effect of creating a non-existent privilege waiver -- should be set aside because it is clearly erroneous and contrary to law.

### **III. STANDARD OF REVIEW**

Rule 72(a) of the Federal Rules of Civil Procedure states that when a magistrate judge issues a written decision on a nondispositive pretrial matter, the district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law. F.R.C.P. 72(a). Objections are timely if they are filed within 10 days after service of the magistrate’s order. *Id.* As explained below, Magistrate Denlow’s finding that an “at issue” waiver occurred when this Court ordered the parties to engage in limited discovery on the unclean hands defense is clearly erroneous and contrary to law. Therefore, that part of Magistrate Denlow’s June 9th Memorandum Opinion and Order should be set aside.

#### IV. ARGUMENT

##### A. Magistrate Denlow's Conclusion that This Court's Orders Created an "At Issue" Waiver is Clearly Erroneous

Plaintiff respectfully disagrees with Magistrate Denlow's conclusion that the statements this Court made and the orders that it entered on October 30, 2007 and December 13, 2007 indicate that this Court intended to put all of Plaintiff's pre-lawsuit attorney-client privileged communications and opinion work product "at issue" such that the privileges/protections applicable to those documents have been waived. Plaintiff begins his analysis with the October 30, 2007 hearing. During that hearing, the parties and the Court discussed the parameters of the discovery that was going to take place, but this Court never stated or otherwise indicated that Plaintiff would be required to produce any privileged material. *See* Tr. dated 10/30/07 (Ex. 1). Indeed, neither this Court nor the parties even discussed privilege issues until Plaintiff filed his motion for a protective order. Thus, as of October 30, 2007, this Court had not made any findings, explicitly or implicitly, that resulted in a waiver of Plaintiff's attorney-client privilege or work product protection.

When the parties appeared on December 13, 2007 with respect to Plaintiff's motion for a protective order, this Court's initial reaction to Defendants' "at issue" waiver argument -- before the Court heard oral argument or read Plaintiff's reply -- was that Defendants' argument was correct. *See* Tr. dated 12/13/07 (Ex. 3) at pg. 5. However, this Court then listened to oral argument regarding "at issue" waiver and read Plaintiff's reply containing Plaintiff's legal analysis of "at issue" waiver. *Id.* at pp. 2-13. At that point, this Court referred the privilege dispute to Magistrate Denlow for him to decide. *Id.* at pp. 13-14; *see also* Minute Order dated 12/13/07, Referral Order dated 12/13/07 and Minute Order dated 12/17/07. The fact that this Court referred the matter to Magistrate Denlow for him to resolve the privilege dispute

demonstrates that this Court did not intend to waive Plaintiff's attorney-client privilege or work product protection with respect to any documents.

While not dispositive, it is telling that Defendants agree that the purpose of the referral to Magistrate Denlow was for him to resolve the parties' privilege disputes. In that regard, Defendants expressly stated in their December 14, 2007 letter to this Court that it was their understanding that the purpose of the referral was for Magistrate Denlow to resolve privilege disputes. *See* Defs. letter dated 12/14/07. Furthermore, Defendants acknowledged in the joint status report submitted to Magistrate Denlow that the purpose of the referral was for him to resolve the parties' privilege disputes. *See* Joint Initial Status Report at pg. 2. Further still, Defendants admitted during the hearing before Magistrate Denlow that this Court never ruled on their "at issue" waiver argument. Tr. dated 5/14/08 (Ex. 9) at pp. 25-26.

In sum, the transcripts and orders from the October 30, 2007 and December 13, 2007 hearings do not support Magistrate Denlow's conclusion that this Court intended to (or actually did) waive Plaintiff's attorney-client privilege and work product protection. In fact, this Court's December 13, 2007 and December 17, 2007 orders show that this Court wanted Magistrate Denlow to resolve the parties' privilege disputes. Because Magistrate Denlow misinterpreted this Court's intentions/orders, his conclusion that privileged material should be produced even though Plaintiff did not waive any privilege is clearly erroneous. Thus, Plaintiff respectfully requests that (a) Magistrate Denlow's order compelling Plaintiff to produce his pre-lawsuit privileged communications and work product be set aside, and (b) Magistrate Denlow's alternative finding that Plaintiff need not produce any of the withheld documents because Plaintiff did not waive any privilege be enforced.

**B. Magistrate Denlow's Finding that this Court's Orders Created an "At Issue" Waiver is Contrary to Law**

Magistrate Denlow made three significant findings in his Memorandum Opinion and Order relating to "at issue" waiver. First, Magistrate Denlow found that under the "traditional" "at issue" waiver analysis, a party waives its attorney-client privilege or work product protection only if that party uses a privileged document to defend itself or to attack its opponents. Mem. Op. and Order dated 6/09/08 (Ex. 10) at pp. 15-16. Second, Magistrate Denlow found that, under that analysis, Plaintiff has not committed an "at issue" waiver. *Id.* at pg. 16. Third, Magistrate Denlow found that the "traditional" "at issue" waiver analysis does not apply here because this Court's orders placed Plaintiff's pre-lawsuit privileged communications and work product at issue. *Id.* at pg. 13. These findings are significant, because while Magistrate Denlow expressly acknowledged that "at issue" waiver focuses on the conduct of the party asserting the privilege and that Plaintiff had not committed an "at issue" waiver, Magistrate Denlow did not cite any legal authority to support his finding that a court can put privileged documents "at issue" such that a waiver of the privilege occurs.

There simply is no legal authority to support that finding, which is contrary to established precedent stating that an "at issue" waiver occurs only if the party asserting the privilege relies upon evidence that puts privileged material "at issue." *See Claffey v. River Oaks Hyundai*, 486 F.Supp.2d 776, 778 (N.D. Ill. 2007), *Trustmark Ins. Co. v. General & Cologne Life Re of America*, No. 00 C 1926, 2000 WL 1898518 at \* 7 (N.D. Ill. Dec. 20, 2000), *Quality Croutons, Inc. v. George Bakeries, Inc.*, No. 05 C 4928, 2006 WL 2375460, at \* 4 (N.D. Ill. Aug. 14, 2006), and *Murata Manufacturing Co., Ltd. v. Bel Fuse, Inc.*, No. 03 C 2934, 2007 WL 781252

at \* 6 (N.D. Ill. March 8, 2007); *see also*, Mem. Op. and Order dated 6/09/08 (Ex. 10) at pp. 12-13 and 16-17.<sup>3</sup>

Because Magistrate Denlow's finding that this Court's orders put Plaintiff's pre-lawsuit privileged communications and opinion work product "at issue" is contrary to law, that finding must be set aside. Accordingly, Plaintiff respectfully requests that this Court enforce Magistrate Denlow's alternative finding, which is that Plaintiff need not produce any of the withheld documents because they are all protected by either the attorney-client privilege or the work product doctrine.

#### V. CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that this Court enter an order (a) setting aside Magistrate Denlow's finding that this Court's orders created an "at issue" waiver such that Plaintiff must produce all of his pre-lawsuit privileged communications and opinion work product, and (b) enforce Magistrate Denlow's alternative finding that Plaintiff need not produce any of the withheld documents because those documents are all protected from disclosure by either the attorney-client privilege or the work product doctrine.

Dated: June 23, 2008

Respectfully submitted,  
DAVID GROCHOCINSKI, not individually, but  
solely in his capacity as the Chapter 7 Trustee for  
for the bankruptcy estate of CMGT, INC.

By: /s/ Robert D. Carroll  
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<sup>3</sup> For a complete discussion of these, and other "at issue" waiver cases, see Plaintiff's Memorandum in Support of His Privilege Log Assertions, Defendants' Response to that memorandum, and Plaintiff's reply in support of his memorandum.