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2 UNITED STATES DISTRICT COURT  
3 NORTHERN DISTRICT OF ILLINOIS  
4 EASTERN DIVISION

5 DAVID GROCHOCINSKI, Case No. 1:06-cv-5486  
6 Plaintiff, Chicago, Illinois  
7 v. December 13, 2007  
Motion Hearing  
8 MAYER BROWN ROWE & MAW, LLP,  
et al.,  
9 Defendants.  
10 -----

11 TRANSCRIPT OF MOTION HEARING  
12 BEFORE THE HONORABLE VIRGINIA M. KENDALL  
13 UNITED STATES DISTRICT JUDGE

14 APPEARANCES:

15 For the Plaintiff: Edward T. Joyce & Associates  
16 By: Arthur W. Aufmann, and  
17 Robert D. Carroll  
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18 For the Defendants: Novack & Macey  
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25 Proceedings recorded by mechanical stenography;  
transcript produced by notereading.

1 (Commenced at 10:06 a.m.)

2 THE CLERK: 06-5486, Grochocinski versus  
00:00:04 3 Mayer, Brown.

00:00:08 4 MR. NOVACK: Good morning, your Honor.  
00:00:09 5 Steve Novack, N-o-v-a-c-k, on behalf of defendants.

00:00:13 6 THE COURT: Good morning.

00:00:13 7 MR. CISZEWSKI: Good morning, your Honor.  
00:00:14 8 Steven Ciszewski, C-i-s-z-e-w-s-k-i, also for the  
00:00:19 9 defendants.

00:00:19 10 THE COURT: Good morning.

00:00:19 11 MR. AUFMANN: Good morning, your Honor.  
00:00:20 12 Arthur Aufmann and Robert Carroll on behalf of the  
00:00:22 13 plaintiff.

00:00:23 14 THE COURT: Good morning.

00:00:24 15 Do you object to the plaintiff's motion for  
00:00:26 16 protective order?

00:00:29 17 MR. NOVACK: We do, your Honor. And the  
00:00:32 18 reason why we did -- why we made our objection, we have  
00:00:35 19 a short fuse on this discovery period. You only gave us  
00:00:39 20 until the end of January --

00:00:40 21 THE COURT: That's right.

00:00:41 22 MR. NOVACK: -- to complete discovery. And  
00:00:44 23 both the trustee and Mr. Spehar's counsel asked us for  
00:00:48 24 extensions of time to respond to our discovery and to  
00:00:51 25 extend the deposition dates --

00:00:52 1 THE COURT:- Oh, I thought I'm looking at a  
00:00:54 2 motion for protective order. Isn't that what I'm  
00:00:57 3 looking for? Isn't that what I have up for today?

00:01:00 4 MR. AUFMANN: Correct.

00:01:01 5 THE COURT: All right. It's not a motion to  
00:01:03 6 extend time.

00:01:05 7 MR. NOVACK: It is not, but it will have  
00:01:06 8 that effect, and that's what I'm saying.

00:01:08 9 THE COURT: Oh, okay. Go ahead.

00:01:09 10 MR. NOVACK: When both those parties asked  
00:01:11 11 us for extensions -- and we accommodated them,  
00:01:14 12 absolutely accommodated them -- nobody suggested to us  
00:01:17 13 that there was going to be another motion, which nobody  
00:01:20 14 ever told us about, asking for an interim period whereby  
00:01:25 15 Mr. Spehar would produce his documents first to the  
00:01:28 16 trustee, the trustee would take a period to do  
00:01:31 17 something, and then there would be an intervening motion  
00:01:36 18 for -- possibly an intervening motion for work-product  
00:01:40 19 privilege claims. So faced with all of that and our  
00:01:45 20 impending January 28 cutoff, we objected.

00:01:48 21 And as we were looking at the situation, it  
00:01:51 22 occurred to us that without getting into all of the  
00:01:54 23 issues of waiver and all the issues of whether this is  
00:01:58 24 work product or not, all of which we're reserving, one  
00:02:01 25 overarching observation came to us, which is they have

00:02:06 1 put into issue --

00:02:07 2 THE COURT: Right.

00:02:07 3 MR. NOVACK: -- at issue a waiver doctrine  
00:02:11 4 we think trumps any possible work-product privilege  
00:02:16 5 assertion. And we thought why don't we just shortcut  
00:02:19 6 it, and so we responded the way we responded.

00:02:22 7 THE COURT: Okay. Counsel?

00:02:24 8 MR. AUFMANN: Judge, in terms of the at  
00:02:27 9 issue waiver argument that the defendants have raised,  
00:02:32 10 they've filed their response two days ago. We filed a  
00:02:35 11 reply as quickly as we could in order to address that  
00:02:38 12 issue --

00:02:38 13 THE COURT: Is there a reply?

00:02:40 14 MR. AUFMANN: It was filed yesterday.

00:02:41 15 THE COURT: Oh, I don't have that.

00:02:42 16 MR. CARROLL: It should have -- I apologize  
00:02:44 17 if you didn't get it. I did instruct somebody to  
00:02:47 18 deliver it to your chambers.

00:02:48 19 THE COURT: Oh, okay. I don't have that.  
00:02:50 20 Well, why don't you go pull it off.

00:03:02 21 Okay. Go ahead.

00:03:02 22 MR. AUFMANN: In any event, I don't think  
00:03:04 23 the at issue waiver doctrine applies whatsoever here.

00:03:09 24 More to the point, the procedure that we're  
00:03:12 25 suggesting, I believe, is entirely reasonable. No one

00:03:15 1 has challenged the fairness or the reasonableness of the  
00:03:18 2 procedure we're suggesting. The only issue counsel is  
00:03:21 3 really raising is that if this procedure's put into  
00:03:25 4 place, it could make it difficult to comply with the  
00:03:28 5 Court's discovery cutoff of January 28th. He might be  
00:03:33 6 right about that. I don't know what your Honor's  
00:03:35 7 feeling is about potentially extending that date. We  
00:03:38 8 would certainly have -- since we're the ones who are  
00:03:41 9 proposing this procedure -- even though we think it's  
00:03:44 10 entirely fair since we are the ones who are proposing  
00:03:47 11 this procedure -- we would have no objection to  
00:03:49 12 extending that date, that January 28th date, so that  
00:03:52 13 this procedure could be engaged in and --

00:03:55 14 THE COURT: Well --

00:03:56 15 MR. AUFMANN: To me, that's the issue that's  
00:03:58 16 in front of your Honor.

00:03:59 17 THE COURT: I'm not sure. They're getting  
00:04:01 18 me the reply.

00:04:01 19 But I don't understand why the at issue  
00:04:04 20 response isn't something that -- you've put this into  
00:04:08 21 play filing this lawsuit. We need to address whether or  
00:04:12 22 not this is going to be a situation of unclean hands or  
00:04:16 23 not.

00:04:17 24 MR. AUFMANN: It's really -- it's really two  
00:04:20 25 points, your Honor.

00:04:22 1 THE COURT: Okay.

00:04:23 2 MR. AUFMANN: We have a definite  
00:04:24 3 understanding of what your Honor was talking about when  
00:04:28 4 you allowed discovery to go forward on the unclean hands  
00:04:31 5 issue. We think it was a narrow issue directed to the  
00:04:38 6 trustee's decision not to file a motion in California to  
00:04:42 7 try and vacate the default judgment. Okay?

00:04:45 8 THE COURT: Well, it may not be. Unclean  
00:04:47 9 hands could cover your behavior throughout the whole  
00:04:50 10 period of time. It's really getting to the issue as to  
00:04:53 11 what was the motivation for the filing of the lawsuit,  
00:04:56 12 whether the -- I mean, all of the steps leading up to  
00:04:59 13 the failure to move to dismiss this suit could  
00:05:03 14 potentially show intent or a pattern of behavior or some  
00:05:09 15 theory by the defendants as to why this would be unclean  
00:05:12 16 hands.

00:05:12 17 MR. AUFMANN: Right. And one of the things  
00:05:13 18 we've tried to address in our reply is that this whole  
00:05:16 19 premise that started this unclean hands argument about,  
00:05:21 20 Oh, the trustee could have just gone into California and  
00:05:23 21 gotten this default vacated, that whole premise is  
00:05:27 22 wrong.

00:05:28 23 THE COURT: Well, fine. Fair enough.  
00:05:30 24 That's why we're doing this. But it doesn't look like  
00:05:32 25 it may be wrong, otherwise I wouldn't have permitted

00:05:35 1 this particular path of discovery to go first, so that  
00:05:39 2 we could address why this is set forth in the odd way  
00:05:44 3 that it's set forth.

00:05:45 4 MR. AUFMANN: Understood.

00:05:46 5 But one of the things we've done in our  
00:05:48 6 reply -- whereas their arguments to you earlier about  
00:05:51 7 how easy this would have been to vacate this default did  
00:05:54 8 not cite California law, we provided the cite to the  
00:05:57 9 statute and the requirements that must be met. And I  
00:06:02 10 believe we've demonstrated already that those  
00:06:04 11 requirements could not have been met.

00:06:06 12 THE COURT: Meaning what, in discovery, is  
00:06:08 13 that what you're saying, or ...

00:06:09 14 MR. AUFMANN: No, in our reply --

00:06:10 15 THE COURT: In the reply that I don't have  
00:06:12 16 here? Is that it?

00:06:14 17 MR. AUFMANN: Right.

00:06:14 18 THE COURT: Okay. But, of course --

00:06:21 19 MR. AUFMANN: I'm not saying --

00:06:22 20 THE COURT: -- whether that may be the end  
00:06:25 21 result of our first issue really shouldn't be the  
00:06:29 22 response as to today's issue, which is you want a  
00:06:33 23 protective order and whether or not that protective  
00:06:38 24 order can be put into play, whether we adopt the  
00:06:41 25 procedure that would delay discovery.

00:06:44 1 MR. AUFMANN: Right. The argument they made  
00:06:45 2 about at issue is, Judge, we never need to address any  
00:06:49 3 issues of work-product privilege because -- simply  
00:06:52 4 because my client in response to an accusation that  
00:06:56 5 says, You filed this lawsuit in bad faith, said, No, I  
00:06:59 6 didn't file it in bad faith, I filed it in good faith,  
00:07:02 7 that does not put at issue any work-product privilege  
00:07:09 8 documents.

00:07:09 9 In order to put -- in order to invoke the at  
00:07:11 10 issue doctrine, there must be both a claim asserted and  
00:07:16 11 reliance on specific defined identifiable privileged  
00:07:23 12 material. For example, in the case that they're relying  
00:07:26 13 on, you're talking about a situation where the plaintiff  
00:07:28 14 said, I did not blow the statute of limitations because  
00:07:32 15 my lawyer told me that I first had a claim on  
00:07:36 16 such-and-such a date and the discovery rule applies  
00:07:39 17 here, and, therefore, the time for my claim to run  
00:07:43 18 didn't start running until my lawyer told me. He has  
00:07:46 19 not put into issue a specific communication with his  
00:07:49 20 lawyer and, thus, cannot sit back and say, No, you can't  
00:07:52 21 see that communication with my lawyer, it's privileged.  
00:07:55 22 It's the old you can't have your cake and eat it too.

00:07:58 23 The trustee has not done anything like that  
00:08:00 24 here. The trustee has not either in support of a claim  
00:08:04 25 he's asserting or in defense of something that they're



00:08:06 1 asserting said, No, what I did was justified because I'm  
00:08:10 2 relying on a specific piece of work product material.  
00:08:15 3 If he had made a specific reference like that and relied  
00:08:18 4 on a specific piece of work product material, he  
00:08:21 5 couldn't then say, Okay, I'm relying on that, but you  
00:08:24 6 can't see it. That's what the at issue waiver doctrine  
00:08:27 7 is all about, and that hasn't happened here.

00:08:29 8 All that happened here is they accused my  
00:08:32 9 guy of bad faith. We came in on his behalf and said,  
00:08:35 10 That's ridiculous, there's no evidence of bad faith. In  
00:08:38 11 fact, everything that's been done here is in good faith.  
00:08:41 12 And they want to take the position now that because they  
00:08:44 13 made a baseless accusation against him and he denied it  
00:08:47 14 that suddenly all of his attorney work product is --  
00:08:50 15 there's just been a complete blanket waiver? This is  
00:08:53 16 not at all the way the at issue doctrine works --

00:08:56 17 THE COURT: Okay. And, again, you need to  
00:08:57 18 get off the baseless accusation, otherwise I wouldn't  
00:09:00 19 have ordered the discovery.

00:09:01 20 A response?

00:09:02 21 MR. NOVACK: Let me say two things Judge,  
00:09:04 22 and who knows maybe it'll become three things, but two  
00:09:08 23 things at the outset.

00:09:09 24 No. 1, this was said in their reply brief --

00:09:13 25 THE COURT: I am going to take a few minutes

00:09:15 1 and read the reply brief, but, go ahead and argue it --

00:09:18 2 MR. NOVACK: -- one thing to you before you  
00:09:20 3 do.

00:09:21 4 They make a very bold statement in there  
00:09:23 5 that in a work product privilege situation there are two  
00:09:25 6 requisite elements to raise the at issue waiver. One,  
00:09:30 7 that a defense was raised that implicates it.

00:09:32 8 THE COURT: Right.

00:09:33 9 MR. NOVACK: And, two -- and this is what  
00:09:34 10 they add, it's beyond the elements that we've put in our  
00:09:37 11 case law -- that there must be a specific reference to  
00:09:40 12 specific documents by the party claiming the  
00:09:43 13 work-product privilege. They cite only two cases for  
00:09:46 14 that, both by Magistrate Judge Schenkier, the Beneficial  
00:09:50 15 Franchise case and the Quality Croutons case. Both of  
00:09:53 16 those cases dealt with the attorney-client privilege,  
00:09:57 17 not with the work product privilege.

00:09:58 18 We know that those privileges are different.  
00:10:01 19 They're governed by separate standards. Attorney-client  
00:10:05 20 privilege is governed by this law of the state of the  
00:10:08 21 forum. The work product is federal law.

00:10:11 22 Judge Denlow's decision in Eagle which is  
00:10:14 23 cited in -- I can't remember if we cited it or they  
00:10:19 24 cited it, frankly --

00:10:19 25 THE COURT: Okay.

00:10:20 1 MR. NOVACK: -- in the earlier briefs points  
00:10:21 2 out that the standards governing attorney-client  
00:10:24 3 privilege and work-product privilege are different.

00:10:27 4 So the second element, well, it may well  
00:10:29 5 apply to an attorney-client privilege. It has nothing  
00:10:32 6 whatsoever to do with work-product privilege.

00:10:35 7 Secondly, the notion that they didn't raise  
00:10:39 8 their good faith as a defense, Judge, I would say to you  
00:10:43 9 that from cradle to grave they raised it every step of  
00:10:48 10 the way. In response to the motion to dismiss they  
00:10:51 11 said -- and they convinced your Honor, because you  
00:10:53 12 denied our motion to dismiss, that we failed to present  
00:10:57 13 evidence that plaintiff acted fraudulently or in bad  
00:11:00 14 faith. Your Honor agreed and said it's not just  
00:11:02 15 Spehar's conduct we have to look to; we have to look to  
00:11:05 16 the trustee.

00:11:06 17 On reconsideration they said to your Honor  
00:11:08 18 that if they filed the case with a good-faith belief  
00:11:12 19 that the malpractice claims were meritorious, then the  
00:11:14 20 case cannot be a fraud on the Court. They said the  
00:11:18 21 critical element to defendants' fraud theory -- they're  
00:11:23 22 interpreting our theory -- is not whether Spehar has a  
00:11:27 23 financial interest in the case. According to the  
00:11:28 24 plaintiff, it is whether the trustee knowingly filed  
00:11:31 25 meritless or untrue claims. That's what we're trying to

00:11:34 1 get at.

00:11:34 2 And when your Honor made your bifurcation  
00:11:37 3 ruling and granted us the discovery and you asked me  
00:11:40 4 what I was going to do, and I said, Well, we'll take the  
00:11:43 5 trustee's deposition, which we've noticed, we'll take  
00:11:47 6 Spehar's deposition, which we've noticed, and I said we  
00:11:49 7 may need discovery from the former shareholders and  
00:11:52 8 officers. And your Honor said, Well, why do you need  
00:11:54 9 that?

00:11:54 10 I said, Because they are -- We believe they  
00:11:57 11 will testify that they were never -- this is from the  
00:11:59 12 transcript, I'm quoting. I said this: That we believe  
00:12:02 13 that they will testify that they were never contacted by  
00:12:05 14 the trustee before he filed the complaint, that they  
00:12:08 15 don't believe in this complaint, and had they been asked  
00:12:11 16 by the trustee they would have told him so.

00:12:13 17 Your Honor's response was, Okay. And there  
00:12:16 18 was no objection. Mr. Aufmann wasn't here; Mr. Joyce  
00:12:20 19 was. There was no objection to that. It was clear to  
00:12:22 20 everybody when your Honor ruled that one of the avenues  
00:12:25 21 of discovery was what was the good faith --

00:12:28 22 THE COURT: Okay. I am not going down  
00:12:31 23 another motion that wasn't filed. I'm dealing with the  
00:12:34 24 protective order, and I'm going to read all of this, and  
00:12:36 25 I'll be out in a few minutes. Okay?

00:27:24 1 (Recess taken.)

00:27:24 2 THE COURT: Okay. Gentlemen, I have  
00:27:26 3 reviewed all of the papers now, which I'm sorry I didn't  
00:27:29 4 have the reply brief in hand. It was filed -- I don't  
00:27:34 5 know what time that it came in, but I have read it now,  
00:27:37 6 and this is what I'm going to do.

00:27:39 7 It is true that my issue, I think, is  
00:27:42 8 broader than the way the plaintiffs have narrowly  
00:27:45 9 defined it. That being said, all of these  
00:27:48 10 communications are going to start to percolate up as  
00:27:51 11 potential privileged disputes. And as such I'm  
00:27:55 12 extending this issue of discovery to March 3rd. I am  
00:27:59 13 ordering that a privilege log be prepared for any  
00:28:03 14 document that you assert privilege on and that that  
00:28:06 15 privilege log be prepared and submitted to Judge Denlow,  
00:28:11 16 who's going to review it, who is your magistrate judge  
00:28:13 17 on this case, by January -- well, let's see.

00:28:19 18 If I give you discovery to March 3rd, I'll  
00:28:25 19 have to give you 'til shortly thereafter. It should be  
00:28:28 20 something that you're generating as you're doing  
00:28:30 21 discovery. So I'm going to require that you give it to  
00:28:33 22 Judge Denlow by March 10th, so one week after the close  
00:28:37 23 of discovery. I don't think that is too short of a  
00:28:40 24 period of time, because as requests are made they can be  
00:28:43 25 brought to Judge Denlow's attention.

00:28:44 1 I'm referring any issues regarding the  
00:28:48 2 discovery of privilege matters to Judge Denlow. And  
00:28:51 3 then I will see you all again on March 19th, so strike  
00:28:54 4 any other schedule, except this one, and we'll readdress  
00:28:58 5 where we're headed with this issue on the 19th.

00:29:01 6 So move forward with your requests, and if  
00:29:03 7 you believe that it's something that's privileged and  
00:29:05 8 shouldn't be turned over, you're going to need to  
00:29:08 9 address it with Judge Denlow.

00:29:09 10 MR. AUFMANN: Is March 19th a status date?

00:29:11 11 THE COURT: It is for me, not Judge Denlow.  
00:29:13 12 And I'm going to give Judge Denlow a call right now and  
00:29:17 13 explain the situation so he knows what's coming. Okay?

00:29:19 14 MR. NOVACK: Judge, could I ask one thing --

00:29:21 15 THE COURT: Yes.

00:29:21 16 MR. NOVACK: -- to be included in the order?

00:29:23 17 Because it sounds like what's going to  
00:29:25 18 happen is Spehar, instead of producing it to us, it  
00:29:27 19 sounds like it's going to be produced to the trustee.  
00:29:30 20 And I just wonder if the order could require that Spehar  
00:29:34 21 Bates stamp all the documents that it produces to the  
00:29:37 22 trustee, keep a copy, so there's never --

00:29:40 23 THE COURT: I think that's a very helpful  
00:29:42 24 idea, and that's something I've done in the past when I  
00:29:45 25 was litigating and I think that's very helpful.

00:29:47 1 So as you give it to the trustee, it would  
00:29:50 2 be Bates stamped so we know exactly what he is  
00:29:52 3 reviewing, and then that set goes to the judge and the  
00:29:55 4 judge reviews it. You should be fine with that.

00:29:58 5 MR. NOVACK: Well, it's actually --

00:30:00 6 MR. AUFMANN: Thank you.

00:30:00 7 MR. NOVACK: Spehar isn't here today. What  
00:30:03 8 they're asking for is that instead of Spehar responding  
00:30:06 9 to our subpoena -- I believe this is what they asked  
00:30:08 10 for --

00:30:08 11 THE COURT: I know.

00:30:09 12 MR. NOVACK: -- he send it to them.

00:30:11 13 THE COURT: Right.

00:30:11 14 MR. NOVACK: So I'm asking Spehar --

00:30:13 15 THE COURT: Yes, that is fine.

00:30:17 16 MR. CARROLL: We understand. And we'll put  
00:30:17 17 the Bates number of the documents being withheld on the  
00:30:18 18 basis of privilege on the privilege log.

00:30:21 19 THE COURT: Exactly. That's the way it  
00:30:23 20 should be. Okay. Thank you.

00:30:24 21 MR. NOVACK: Thank you, your Honor.

00:30:24 22 THE COURT: Thank you.

23 (Concluded at 10:36 a.m.)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

\_\_\_\_\_  
April M. Metzler, RPR, CRR

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Date



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