

**IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

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

Plaintiff, )

v. )

MAYER BROWN ROWE & MAW LLP and )  
RONALD B. GIVEN, )

Defendants. )

No. 06 C 5486

Judge Virginia M. Kendall

Magistrate Judge Morton Denlow

**JOINT INITIAL STATUS REPORT**

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Mitchell L. Marinello  
Steven Ciszewski  
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*Attorneys for Defendants*

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*Attorneys for Plaintiff*

The parties file this Joint Initial Status Report in accordance with the order of Magistrate Judge Morton Denlow dated December 18, 2007.

1. **Brief Summary of Claims.** The Complaint asserts two counts of legal malpractice. Count I alleges that Defendants negligently represented CMGT, Inc. (“CMGT”) with respect to a dispute that arose between CMGT and Spehar Capital, LLC (“Spehar”), which was CMGT’s financial advisor, and that, as a result of Defendants’ alleged negligence, the dispute expanded into litigation that made it impossible for CMGT to remain in business. Count II alleges that Defendants were obligated to defend CMGT in the lawsuit Spehar filed in California but did not do so with the result that a default judgment (the “Default Judgment”) was entered against CMGT.

2. **Brief Statement Of Relief Sought.** Count I seeks unspecified damages for the lost value of CMGT’s business. Count II seeks to recover the \$17 million Default Judgment entered in favor of Spehar and against CMGT.

3. **Matter Referred To The Magistrate Judge.** In their motion to dismiss Plaintiff’s Complaint, Defendants argued that this case should be dismissed as a “fraud on the court” because, among other things, Spehar sued CMGT and obtained a Default Judgment (which Defendants characterize as “bogus”), used the Default Judgment to put CMGT into involuntary bankruptcy, entered into an agreement with the Trustee, who did not move to vacate the Default Judgment, to pay the costs of this suit in return for a large percentage of any recoveries, and, according to Defendants, to win the case, the Trustee must prove that Spehar’s original lawsuit against CMGT was without merit. After nearly all of their motion to dismiss was denied, Defendants moved for reconsideration.

On October 30, 2007, Judge Kendall denied Defendants’ motion to reconsider, but ordered the parties to engage in limited discovery with respect to, in Judge Kendall’s words, the “unclean

hands” issue. A copy of the October 30, 2007 transcript is attached as Exhibit 1, and a copy of Judge Kendall’s order dated October 30, 2007 is attached as Exhibit 2. (A more complete explanation of Defendants’ “fraud on the court” and “unclean hands” defense and Plaintiff’s responses thereto can be found in the briefs on Defendants’ motion to dismiss and Defendants’ motion for reconsideration.)

The Court gave the parties until March 3, 2008 to complete such discovery and permission to file motions for summary judgment at that time if they so choose. After that, remaining portions of the case, if any, would go forward. Copies of Judge Kendall’s referral order dated December 13, 2007 and her amended referral order dated December 17, 2007 are attached hereto as Exhibits 3 and 4.

On November 5, 2007, Defendants served document requests and interrogatories on Plaintiff. Plaintiff has not yet responded to those discovery requests. On November 20, 2007, Defendants issued a subpoena requesting documents on Spehar and its owner, Gary Spehar. Plaintiff moved for a protective order, arguing that some of his communications with Spehar may be protected by the work product doctrine and requesting the opportunity to review Spehar’s documents and assert such a privilege before the documents are produced to Defendants. At a hearing on December 13, 2007, Judge Kendall granted Plaintiff’s request and stated that she would refer the privilege issues to this Court for resolution. A copy of the transcript dated December 13, 2007 is attached hereto as Exhibit 5.

Judge Kendall ordered the parties to complete discovery relating to the “unclean hands” issues on or before March 3, 2008, and she ordered Plaintiff to provide a final privilege log no later than March 10, 2008. However, the parties need the document and privilege issues resolved before they

take the depositions, not afterwards. For example, it would waste resources for the parties to take the deposition of Spehar in California and then to have to repeat that deposition because documents were held back on privilege grounds that should not have been.

Counsel agreed that Plaintiff would review the Spehar documents and produce a privilege log as soon as possible so that any disagreements about privilege issues can be brought to this Court's attention before the depositions begin. Plaintiff's counsel received documents from Spehar's counsel on January 7, 2008 and hopes to have the privilege log for the Spehar documents produced in early January.

There are a number of discovery disputes that the parties are trying to work out and will bring to the Court's attention if necessary.

4. **The Status Of Briefing And Related Matters.** There are currently no motions pending. However, Spehar filed objections to Defendants' document subpoena and a court hearing on the subpoena may be necessary.

5. **Trial Before Magistrate Judge.** The parties do not consent to proceed to trial before the Magistrate.

6. **Status of Settlement Discussions.** There have not been any settlement discussions to date.

MAYER BROWN LLP and  
RONALD B. GIVEN,

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

By: /s/ Mitchell L. Marinello  
One Of Their Attorneys

By: /s/ Robert Carroll  
One Of His Attorneys

# **Exhibit 1**

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

DAVID GROCHOCINSKI, Case No. 1:06-cv-5486  
Plaintiff, Chicago, Illinois  
v. October 30, 2007  
Status Hearing  
MAYER BROWN ROWE & MAW, LLP,  
et al.,  
Defendants.

-----  
TRANSCRIPT OF STATUS HEARING  
BEFORE THE HONORABLE VIRGINIA M. KENDALL  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Edward T. Joyce & Associates  
By: Edward T. Joyce, and  
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(312) 641-2600

For the Defendants: Novack & Macey  
By: Stephen Novack, and  
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Court Reporter: April M. Metzler, RPR, CRR  
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Chicago, IL 60604  
(312) 408-5154

Proceedings recorded by mechanical stenography;  
transcript produced by notereading.

1 (Commenced at 9:13 a.m.)

2 THE CLERK: 06C5486, Grochocinski versus  
00:00:03 3 Mayer, Brown, status hearing.

00:00:09 4 MR. NOVACK: Good morning, your Honor.  
00:00:10 5 Steve Novack for defendants, N-o-v-a-c-k.

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

00:00:14 7 MR. NOVACK: Good morning.

00:00:14 8 MR. JOYCE: And Ed Joyce, J-o-y-c-e, for the  
00:00:17 9 plaintiff.

00:00:18 10 THE COURT: Good morning.

00:00:18 11 MR. CARROLL: Rob Carroll, C-a-r-r-o-l-l.

00:00:22 12 THE COURT: Good morning.

00:00:22 13 All right, gentlemen. I have reviewed this  
00:00:24 14 high and low and inside and out, and here's what I'm  
00:00:28 15 going to do:

00:00:29 16 I am denying the motion to reconsider,  
00:00:32 17 because I still believe that there are many fact  
00:00:35 18 disputes that need to be resolved and that it is not a  
00:00:39 19 situation where I can dismiss on a motion to dismiss.  
00:00:43 20 But let me tell you where I'm coming from as far as how  
00:00:47 21 we're going to move forward.

00:00:48 22 I find defendant's position extremely  
00:00:50 23 persuasive, and I think the issue of unclean hands, for  
00:00:55 24 lack of a better term -- he's used the term repeatedly  
00:00:59 25 fraud on the court, I think there might be a few other

00:01:03 1 variations of what that issue is -- but there is a  
00:01:06 2 question lurking about why this was handled in the way  
00:01:10 3 it was and issues as to the trustee's position in coming  
00:01:15 4 forward and being paid by this entity, issues regarding  
00:01:20 5 why the trustee didn't go in and move to vacate the  
00:01:23 6 dismissal, and I think what we need to do is we need to  
00:01:27 7 do discovery solely on that, what I would call, unclean  
00:01:32 8 hands issue first, so that I can have facts in front of  
00:01:37 9 me and decide whether the case should be dismissed based  
00:01:40 10 upon that issue.

00:01:41 11           It's a fact dispute that I'm having the  
00:01:44 12 problem with. I think there are disputed issues of fact  
00:01:47 13 that I can't get rid of this on a dismissal, but I find  
00:01:54 14 your argument extremely persuasive. It is a very unique  
00:01:54 15 situation. It's a very odd case.

00:02:03 16           MR. JOYCE: Judge, why is this something  
00:02:03 17 that the District Court resolves as opposed to the  
00:02:03 18 bankruptcy court? Because in the bankruptcy court it's  
00:02:03 19 not the least bit unique. It's a regular -- it happens  
00:02:06 20 all the time.

00:02:06 21           THE COURT: I don't think it happens all the  
00:02:07 22 time that you have an entity that has a defaulted  
00:02:11 23 judgment that has gone in -- you're coming in on a  
00:02:15 24 malpractice count. How often have you seen a  
00:02:18 25 malpractice claim with the only asset in the estate



00:02:20 1 being the value of the defaulted judgment?

00:02:24 2 MR. JOYCE: I'm focusing on -- the creditors  
00:02:26 3 very often fund --

00:02:28 4 THE COURT: Oh, fair enough. That's one  
00:02:29 5 issue; that's one issue.

00:02:30 6 MR. JOYCE: Correct.

00:02:31 7 THE COURT: In many. Fair enough. That's  
00:02:32 8 one issue in many.

00:02:34 9 But as has been laid out at the motion to  
00:02:37 10 reconsider hearing in the motion to dismiss, I think  
00:02:40 11 that we need to get to the fact disputes that can aid me  
00:02:44 12 in resolving whether it is common, whether it is  
00:02:47 13 something that was a normal business strategy. It  
00:02:52 14 doesn't sound like it, based upon the unique set of  
00:02:56 15 facts here.

00:02:56 16 So I'd like to ask you what you think the  
00:02:58 17 discovery would be that would get to the bottom of that  
00:03:01 18 issue that we can resolve it first before we go into the  
00:03:04 19 malpractice issue? What do you believe would be  
00:03:07 20 necessary?

00:03:08 21 MR. NOVACK: I would imagine, your Honor,  
00:03:09 22 that there would be discovery taken of the trustee,  
00:03:13 23 probably in the form of a deposition of the trustee;  
00:03:16 24 probably deposition of Mr. Spehar, who's the principal  
00:03:21 25 of the entity that got the default judgment; and

00:03:25 1 probably some depositions of the key shareholder, slash,  
00:03:31 2 officers of the debtor.

00:03:33 3 THE COURT: And --

00:03:34 4 MR. NOVACK: And those things would be  
00:03:36 5 needed to show --

00:03:37 6 THE COURT: What would the shareholders show  
00:03:40 7 you?

00:03:41 8 MR. NOVACK: Well, I think, among other  
00:03:42 9 things, the shareholders are going to show that they  
00:03:45 10 were not contacted by the trustee to even ask them about  
00:03:49 11 the allegations that we think are completely  
00:03:53 12 unsupported. They're on information and belief. But  
00:03:56 13 the people that had the information about this  
00:03:59 14 complaint, I think, will testify that they were never  
00:04:02 15 contacted by the trustee, that they don't believe in  
00:04:05 16 this complaint, and had they been asked by the trustee  
00:04:08 17 they would have so told him.

00:04:09 18 THE COURT: Okay. And what do you think  
00:04:10 19 would resolve any fact dispute which would justify the  
00:04:13 20 proper procedure of moving forward in the case?

00:04:15 21 MR. JOYCE: Well, I haven't seen your  
00:04:17 22 opinion, and I'm concerned that --

00:04:18 23 THE COURT: Well, my opinion -- I don't have  
00:04:20 24 a new opinion on the motion to reconsider. You just  
00:04:22 25 heard my opinion.

00:04:23 1 MR. JOYCE: Okay; okay.

00:04:24 2 THE COURT: My opinion and order was the one  
00:04:25 3 that was issued over a month ago.

00:04:27 4 MR. JOYCE: Okay. Here's my concern: My  
00:04:29 5 concern is that when you give Mr. Novack a limited bite,  
00:04:36 6 he's going to get the whole apple. So I'm going to  
00:04:41 7 submit for deposition twice --

00:04:41 8 THE COURT: Well, you may be going on merits  
00:04:43 9 of discovery. Who said it's going to be a limited bite?

00:04:46 10 What's important here is that if it is an  
00:04:49 11 unclean hands situation -- and I'm using that term, I'm  
00:04:52 12 not so sure that is the -- I think that's a more  
00:04:55 13 appropriate term rather than the fraud on the court that  
00:04:58 14 you've used, but that's just my analysis of it.

00:05:01 15 If that's the case, then we're not going to  
00:05:03 16 go for full discovery. So it's my coordination of the  
00:05:09 17 case, because I find the motion to reconsider very  
00:05:13 18 persuasive. But, as I've said, I think there's fact  
00:05:17 19 disputes in this case that I can't get to the bottom of.  
00:05:19 20 And maybe your fact disputes will show that it needs to  
00:05:23 21 go forward for full discovery. And it may be that you  
00:05:25 22 will need to have your clients be deposed on other  
00:05:28 23 issues other than that later on. But it's my  
00:05:31 24 coordination of this issue and this discovery first that  
00:05:34 25 I think is the appropriate way to go.

00:05:35 1 MR. JOYCE: So he's then going to be limited  
00:05:37 2 to asking questions that would go to the area of unclean  
00:05:40 3 hands?

00:05:40 4 THE COURT: That's correct; that's  
00:05:41 5 absolutely correct.

00:05:42 6 MR. JOYCE: That's fine.

00:05:43 7 THE COURT: That's right.

00:05:43 8 And I -- how long do you think that would  
00:05:45 9 be? 60 days?

00:05:46 10 MR. NOVACK: Judge, I was going to suggest  
00:05:48 11 90 only because 60 gets us bumped up against the end of  
00:05:51 12 the year and the holidays.

00:05:52 13 THE COURT: Fair enough. 90 days.

00:05:54 14 I am sure you're going to have a dispute as  
00:05:56 15 to what is covered, I bet, and you're going to come back  
00:05:58 16 to me.

00:05:59 17 MR. JOYCE: It's a bad bet for me.

00:06:00 18 THE COURT: Just -- I can see you and I can  
00:06:02 19 see that that's where we're headed. But that's okay. I  
00:06:05 20 will be here and I will resolve whether it is limited or  
00:06:07 21 not. Rather than sending this off to a magistrate  
00:06:10 22 judge, let me resolve it.

00:06:11 23 So 90 days for the limited discovery on  
00:06:13 24 unclean hands. And then from the basis of that  
00:06:17 25 discovery, you, if you fully believe it's appropriate,

00:06:21 1 can move for summary judgment on that issue alone. And  
00:06:24 2 if it is denied, we go forward for the rest of the case.

00:06:27 3 MR. NOVACK: Thank you very much.

00:06:27 4 THE COURT: And that's the way we're going  
00:06:28 5 to handle this.

00:06:29 6 MR. JOYCE: Thank you, Judge.

00:06:30 7 THE COURT: Thank you.

8 (Concluded at 9:20 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

\_\_\_\_\_  
Date

# **Exhibit 2**

UNITED STATES DISTRICT COURT  
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 3.0  
Eastern Division

David Grochocinski

Plaintiff,

v.

Case No.: 1:06-cv-05486

Honorable Virginia M. Kendall

Mayer Brown Rowe & Maw LLP, et al.

Defendant.

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NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Tuesday, October 30, 2007:

MINUTE entry before Judge Virginia M. Kendall :Status hearing held. For the reasons stated on the record in open court, motion for reconsideration [50] is denied. Discovery regarding "unclean hands" ordered closed by 1/28/2008. Any motion for summary judgment shall be filed by 2/28/2008. Responses due by 3/28/2008. Replies due by 4/11/2008. Mailed notice(gmr, )

**ATTENTION:** This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at [www.ilnd.uscourts.gov](http://www.ilnd.uscourts.gov).

# **Exhibit 3**



**UNITED STATES DISTRICT COURT  
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 3.0  
Eastern Division**

David Grochocinski

Plaintiff,

v.

Case No.: 1:06-cv-05486

Honorable Virginia M. Kendall

Mayer Brown Rowe & Maw LLP, et al.

Defendant.

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**NOTIFICATION OF DOCKET ENTRY**

This docket entry was made by the Clerk on Thursday, December 13, 2007:

MINUTE entry before Judge Virginia M. Kendall : Hearing held re motion for a protective order [72]. Deadline to complete discovery is extended to 03/3/08. Case is referred to Magistrate Judge Denlow for issues relating to discovery on this motion. Parties are to produce a privilege log to Judge Denlow no later than 3/10/08. Case set for Further Status hearing before Judge Kendall on 3/19/2008 at 09:00 AM. Mailed notice. (kw, )

**ATTENTION:** This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at [www.ilnd.uscourts.gov](http://www.ilnd.uscourts.gov).

# **Exhibit 4**

UNITED STATES DISTRICT COURT  
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 3.0  
Eastern Division

David Grochocinski

Plaintiff,

v.

Case No.: 1:06-cv-05486

Honorable Virginia M. Kendall

Mayer Brown Rowe & Maw LLP, et al.

Defendant.

---

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Monday, December 17, 2007:

MINUTE entry before Judge Virginia M. Kendall : To clarify minute entry #[76] from the hearing regarding Plaintiff's motion for a protective order, the expedited referral to Magistrate Judge Denlow for all discovery [77] includes a referral to Magistrate Judge Denlow for determination of Plaintiff's Motion for a protective order [72]. Mailed notice. (kw, )

**ATTENTION:** This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at [www.ilnd.uscourts.gov](http://www.ilnd.uscourts.gov).

# **Exhibit 5**

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

DAVID GROCHOCINSKI,

Case No. 1:06-cv-5486

Plaintiff,

Chicago, Illinois

December 13, 2007

v.

Motion Hearing

MAYER BROWN ROWE & MAW, LLP,  
et al.,

Defendants.

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

APPEARANCES:

For the Plaintiff:

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By: Arthur W. Aufmann, and  
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For the Defendants:

Novack & Macey  
By: Stephen Novack, and  
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Court Reporter:

April M. Metzler, RPR, CRR  
219 South Dearborn St., Rm. 2318-A  
Chicago, IL 60604  
(312) 408-5154

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

\_\_\_\_\_  
Date

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