

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

DAVID GROCHOCINSKI, not individually,)	
but solely in his capacity as the Chapter 7)	
Trustee for the bankruptcy estate of)	
CMGT, INC.)	
Plaintiff,)	No. 06 C 5486
)	
v.)	Judge Virginia M. Kendall
)	
MAYER BROWN ROWE & MAW LLP,)	
RONALD B. GIVEN, and CHARLES W.)	
TRAUTNER,)	
)	
Defendants.)	

**PLAINTIFF’S OBJECTION TO DEFENDANTS’ PREVIOUSLY
UNOPPOSED MOTION FOR EXTENSION OF TIME**

Plaintiff David Grochocinski, not individually but solely in his capacity as the Chapter 7 Trustee for the bankruptcy estate of CMGT, Inc. (“Plaintiff”), through his attorneys, objects to Defendants’ previously unopposed motion for extension of time to object to the “Alternative” ruling in Magistrate Judge Denlow’s June 9, 2008 Memorandum Opinion and Order. In support of this Objection, Plaintiff states as follows:

1. On June 9, 2008, Magistrate Denlow issued a 30-page Memorandum Opinion and Order (“Order”) denying in part and granting in part Plaintiff’s motion for a protective order.
2. Magistrate Denlow’s Order contains a “Primary” ruling, which orders Plaintiff to produce all documents from his privilege log that pre-date the filing of this case. The Order also contains an “Alternative” ruling, which states that Plaintiff does not have to produce any of the documents identified on his privilege logs.

3. Magistrate Denlow based his Primary ruling on his belief that it was this Court's intention to put the privileged documents "at issue" and thereby create a waiver of the attorney-client privilege and/or opinion work product protection otherwise applicable to those documents.

4. On June 23, 2008, Plaintiff filed an objection to Magistrate Denlow's Primary ruling ("Objection"). In his Objection, Plaintiff argues that: (a) Magistrate Denlow misinterpreted this Court's intentions, and (b) regardless of whether Magistrate Denlow misinterpreted this Court's intentions, this Court cannot cause an "at issue" waiver to occur -- only a party can cause such a waiver.

5. Before Plaintiff filed his Objection, Defendants told him that they wanted to object to Magistrate Denlow's Alternative ruling, but they wanted to wait and see what happens with Plaintiff's objection to the Primary ruling before asserting their objection. Plaintiff told Defendants that he had no opposition to proceeding in that manner. Accordingly, Defendants filed an Unopposed Motion for Extension of Time in which they requested an extension of time to object to Magistrate Denlow's Alternative ruling. This Court has taken Defendants' motion under advisement and has indicated that it will rule on Defendants' motion when it decides Plaintiff's Objection.

6. On July 18, 2008, Defendants filed their response to Plaintiff's Objection ("Response"). Defendants' Response does not address the two arguments in Plaintiff's Objection. Instead, under the guise of responding to Plaintiff's second argument -- see ¶ 4(b) above -- Defendants improperly use their Response to advance their objections to Magistrate Denlow's Alternative ruling. It is on this basis that Plaintiff now objects to Defendants' request for additional time to object to Magistrate Denlow's Alternative ruling.

7. Defendants assert two positions in their Response. Defendants first assert that Plaintiff's Objection should be denied because the privileged documents are "absolutely essential" to their affirmative defenses. Defs. Response at pp. 6-9. In support of this assertion, Defendants cite two cases that have never before been cited in this litigation -- not to this Court nor to Magistrate Denlow.

8. According to Defendants, those two cases, *Loctite Corp. v. Fel-Pro, Inc.*, and *SEC v. Gulf & W. Indus., Inc.*, state that a court can compel disclosure of privileged communications when the need for the information contained in those documents outweighs the privilege. Although framed differently, Defendants made this same "essential need" argument to Magistrate Denlow. Compare Defs. Response at pp. 5-9 with Defs. Resp. to Pl. Mem. in Support of His Priv. Log Assertions at pp. 25-26. Magistrate Denlow, who conducted an *in camera* review of the withheld documents, has already rejected Defendants' "essential need" position. He concluded that Defendants may be able to obtain evidence regarding their unclean hands defense from non-privileged sources, such as depositions and the non-privileged documents produced by Plaintiff. Op. and Order at pg. 29. Thus, Defendants' "essential need" position is really just a "back door" challenge to Magistrate Denlow's finding that they can obtain substantially equivalent information elsewhere without undue hardship -- it is not a response to Plaintiff's Objection to the Primary ruling.

9. To justify their assertion of this "essential need" position, Defendants mischaracterize Plaintiff's Objection. In that regard, Defendants' assert that Plaintiff "argues that there are no circumstances under which this Court can cause Plaintiff's privilege to be lost." Defs. Response at pg 6. But that is not what Plaintiff argued in his Objection. Rather, Plaintiff argued that there is no "legal authority to support his [Magistrate Denlow's] finding that a court can put privileged

documents ‘at issue’ such that a waiver of the privilege occurs.” Pl. Obj. at pg. 13. Thus, Plaintiff’s argument focuses on the circumstances under which an “at issue” waiver can occur -- not whether there are “any circumstances” under which this Court can cause a privilege to be lost.

10. This leads us to Defendants’ next position, which also purports to be a response to Plaintiff’s second argument -- see ¶ 4(b) above -- but is just another disguised attack on Magistrate Denlow’s Alternative ruling. As explained above, Plaintiff’s second argument focuses on whether a court -- as opposed to a party -- can cause an “at issue” waiver to occur. Defendants have not responded to that argument. Instead, Defendants have reasserted the same “at issue” waiver position they presented to Magistrate Denlow. *Compare* Defs. Response at pp. 9-15 *with* Defs. Resp. to Pl. Mem. in Support of His Priv. Log Assertions at pp. 12-20. That position, which focuses on the type of conduct that a party must engage in to have committed an “at issue” waiver, is not responsive to Plaintiff’s argument that only a party (and not a court) can cause an “at issue” waiver. Accordingly, there was no reason for Defendants to reargue their “at issue” waiver position that was presented to and rejected by Magistrate Denlow.¹

11. The point of Plaintiff’s opposition to Defendants’ previously unopposed motion for extension of time is this: If Defendants had no response to Plaintiff’s Objection (as seems to be the case), they should not have filed a response brief. (Or, they should have filed a short brief stating that they have no response to Plaintiff’s Objection and reiterating their request for an extension of time to object to the Magistrate’s Alternative ruling.) It was simply improper and unfair for Defendants to use their response brief, to which Plaintiff does not get to reply, to assert positions and cite new authority regarding Magistrate Denlow’s Alternative ruling.

¹ Defendants have the right to disagree with the Magistrate’s interpretation of the “traditional” at issue waiver analysis, but they cannot do so under the guise of responding to Plaintiff’s Objection.

12. For this reason, even though Plaintiff did not previously object to Defendants' request for an extension of time, he objects to that request now.

WHEREFORE, Plaintiff respectfully requests that this Court deny Defendants' previously Unopposed Motion for Extension of Time or, alternatively, that this Court deem Defendants' Response to be their objection to the Alternative ruling.

Dated: July 24, 2008

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

By: /s/ Robert D. Carroll
Plaintiff's attorneys

Edward T. Joyce
Arthur W. Aufmann
Robert D. Carroll
EDWARD T. JOYCE & ASSOC., P.C. - Atty No. 32513
11 South LaSalle Street, Ste., 1600
Chicago, Illinois 60603