

**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,)	No. 06 C 5486
)	
v.)	Judge Virginia M. Kendall
)	
MAYER BROWN ROWE & MAW LLP)	
and RONALD B. GIVEN,)	
)	
Defendants.)	

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

Defendants Mayer Brown Rowe & Maw LLP and Ronald B. Given (together, the "Defendants"), by their attorneys, as and for their Response to Plaintiff's Objection to Defendants' Previously Unopposed Motion for Extension of Time, state as follows:

Background

1. On June 9, 2008, Magistrate Judge Denlow entered his Memorandum Opinion and Order (the "Magistrate Order"). The Magistrate Order's primary ruling requires Plaintiff to produce all of the documents listed on his privilege logs that pre-date the filing of his Complaint (the "Primary Ruling"). Plaintiff filed a timely objection to the Primary Ruling ("Plaintiff's Objection").
2. By Order dated June 24, 2008, this Court set a briefing schedule on Plaintiff's Objection pursuant to which Defendants' response thereto ("Defendants' Response") was due on July 11, 2008. The Court's June 24 Order stated: "No reply is necessary." (A copy of the Court's June 24 Order is attached hereto as Exhibit A.)

3. By Order dated June 26, 2008, the Court extended the due date for Defendants' Response to July 18, 2008. Again, this Order did not allow a reply and simply stated that the Court would thereafter rule on Plaintiff's Objection by mail. (A copy of the Court's June 26 Order is attached hereto as Exhibit B.)

4. The Magistrate Order also contains an alternative ruling (the "Alternative Ruling") that would apply only if this Court sustains Plaintiff's Objection and reverses the Primary Ruling. Defendants filed a timely objection to the Alternative Ruling ("Defendants' Contingent Objection"). However, given the contingent nature of the Alternative Ruling, Defendants also filed an unopposed motion for extension of time to file their memorandum of law in support of their Contingent Objection, if necessary, until after the Court ruled on Plaintiff's Objection ("Defendants' Unopposed Extension Motion").

5. In a separate Order dated June 26, 2008, this Court took Defendants' Unopposed Extension Motion under advisement and stated that it would be ruled upon in connection with Plaintiff's Objection.

6. On July 18, 2008, Defendants timely filed Defendants' Response to Plaintiff's Objection. Citing Defendants' Response, Plaintiff now seeks to belatedly object to Defendants' Unopposed Extension Motion and asks the Court to preclude Defendants from ever filing a memorandum of law in support of Defendants' Contingent Objection.

7. As set forth below, Plaintiff's belated objection to Defendants' Unopposed Extension Motion is: (a) without merit; (b) is a disguised -- but unpermitted -- "Reply"; and (c) should be overruled for at least four reasons.

Defendants' Response Addressed Both Of The Arguments In Plaintiff's Objection

8. Plaintiff argues that Defendants' Response "does not address the two arguments in Plaintiff's Objection." This is simply not true. Defendants' Response addresses and defeats both of those purported arguments.

9. Plaintiff describes his Objection's first argument as being that "Magistrate Denlow misinterpreted this Court's intentions." (Obj., ¶4.) Defendants' Response (at pp. 1-5) directly addresses (and defeats) this argument by establishing that this Court did intend for Plaintiff's pre-filing documents to be part of discovery. Indeed, those pages of Defendants' Response summarize the procedural history that shows what this Court intended with respect to discovery. And, the very first page of the "Argument" section in Defendants' Response shows that the Magistrate Order is entirely consistent with this Court's intent. In fact, the conclusion of that portion of Defendants' Response is: "Accordingly, it is clear beyond debate that the documents that Plaintiff has been ordered to produce are the very documents that this Court intended to be part of discovery regarding the Defenses." (Defendants' Resp., p. 5.)

10. Plaintiff describes his Objection's second argument as being that "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." (Obj., ¶4.) Yet, Defendants' Response (at pp. 6-15) directly addresses (and defeats) this argument. Those pages establish that this Court can effectively place otherwise privileged documents "at issue" if it determines that the need for the truth (and avoidance of a potential fraud on the Court or unjust result) outweighs privilege considerations. Those pages of Defendants' Response also defeat Plaintiff's argument that an "at issue" waiver can occur only when a party introduces into evidence privileged communications.

Defendants' Response Did Not Fully Brief Their Contingent Objection

11. Plaintiff argues that -- instead of responding to the arguments in Plaintiff's Objection -- Defendants' Response makes Defendants arguments in support of their Contingent Objection to the Alternative Ruling.

12. As noted above, however, Defendants' Response does address the arguments raised in Plaintiff's Objection. Moreover, there is no need for Defendants to argue their Contingent Objection to the Alternative Ruling at this time because the Alternative Ruling is irrelevant unless the Court sustains Plaintiff's Objection and overrules the Primary Ruling (which it should not do).

13. In all events, to the extent that Defendants' Response does touch on arguments that might also be relevant to Defendants' Contingent Objection, it does so only because those arguments were first raised in Plaintiff's Objection. For example, Plaintiff's Objection (at pp. 13-14) argues that only a party (i.e., not the Court) can create an "at issue" waiver by introducing into evidence otherwise privileged information -- citing four cases in alleged support thereof. This is an issue that would also be relevant to Defendants' Contingent Objection. But, Defendants had to address it -- and the cases cited relating thereto -- because they were raised by Plaintiff. If Defendants did not address that argument and case law in their Response, Plaintiff would surely claim that Defendants waived their arguments. So, Plaintiff is trying to have it both ways. Simply put, there is nothing improper about Defendants responding to arguments (and cases) that Plaintiff raised in its Objection even if those arguments might also apply to Defendants' Contingent Objection.

Defendants Should Be Allowed To Brief Their Contingent Objection, If Necessary

14. Plaintiff also argues that, if the Court sustains Plaintiff's Objection and reverses the Primary Ruling, then Defendants should not be allowed to file a memorandum of law in support of their Contingent Objection because Defendants' Response already addressed the argument raised in Defendants' Contingent Objection.

15. Not so. As set forth above, although Defendants' Response did touch on some arguments that are relevant to Defendants' Contingent Objection, it did so only because, and to the extent that, those arguments were raised by Plaintiff's Objection.

16. In short, Defendants have not had a opportunity to be heard on all of their arguments supporting their Contingent Objection and it would be extremely prejudicial to limit Defendants' arguments to those that Plaintiff raised in his Objection -- particularly when Plaintiff agreed to the procedure of having Defendants' Contingent Objection briefed only if necessary after a ruling on Plaintiff's Objection.

Plaintiff's Belated Objection Is An Unpermitted "Reply"

17. Plaintiff's belated objection to Defendants' Unopposed Extension Motion is really nothing more than a thinly veiled attempt to file a reply in support of Plaintiff's Objection even though no such reply was allowed. For example, Plaintiff criticizes Defendants' Response for citing two new cases and then goes on to argue (albeit to no avail) why the holdings in those two cases purportedly do not apply here. It should be considered as such and should be denied: (a) because this Court has already ordered that no reply is to be filed; and (b) for the additional reasons set forth herein.

WHEREFORE, Defendants respectfully request: (a) that the Court deny Plaintiff's belated objection to Defendants' Unopposed Extension Motion and grant Defendants' Unopposed Extension Motion; (b) that the Court overrule Plaintiff's Objection; (c) if the Court reverses the Magistrate Order's Primary Ruling (which it should not do), that Defendants be granted twenty-one (21) days thereafter to file their memorandum of law in support of Defendants' Contingent Objection; and (d) that the Court grant such other and further relief as is appropriate.

Respectfully submitted by,

MAYER BROWN ROWE & MAW LLP and
RONALD B. GIVEN

By: /s/ Steven J. Ciszewski
One Of Their Attorneys

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CERTIFICATE OF SERVICE

Steven J. Ciszewski, an attorney, hereby certifies that he caused a true and correct copy of the foregoing Response to Plaintiff's Objection to Defendants' Previously Unopposed Motion for Extension of Time to be served through the ECF system upon the following:

Edward T. Joyce
Arthur W. Aufmann
Robert D. Carroll
Edward T. Joyce & Assoc., P.C.
11 S. LaSalle St., Suite 1600
Chicago, IL 60603

on this 28th day of July, 2008.

/s/ Steven J. Ciszewski