EXHIBIT A

Grochocinski v. Mayer Brown Rowe & Maw LLP et al Doc. 120 Att. 1

Dockets.Justia.com

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Virginia M. Kendall	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	06 C 5486	**DATE**	10/28/2008
CASE TITLE	GROCHOCINSKI vs. MAYER BROWN ROWE & MAW et al		

DOCKET ENTRY TEXT

Defendants are given to November 12, 2008 to file objections to the alternative ruling. In addition, Defendants' Unopposed Motion to Reset the Discovery Deadline is granted so that discovery may be completed pending the resolution of these privilege issues. Discovery is ordered closed January 31, 2009.

■[For further details see text below.]

Notices mailed by Judicial staff.

STATEMENT

Plaintiff David Grochocinski ("Grochocinski"), in his capacity as Chapter 7 Trustee for the bankruptcy estate of CMGT, Inc., brought suit against Defendants Mayer Brown Rowe & Maw LLP, Ronald B. Given and Charles v. Trautner (collectively "Defendants"), alleging legal malpractice. Defendants brought a Motion to Dismiss, arguing in part that Grochocinski's case should be dismissed because it amounted to a fraud on the Court, or, as this Court has framed it, because he filed the suit with "unclean hands." This Court denied the Motion to Dismiss and the Motion to Reconsider that followed; however, it found Defendants' "unclean hands" argument very persuasive. As such, this Court bifurcated the case and ordered the parties to conduct discovery solely on the issue of "unclean hands" so that this Court, with all the relevant facts in front of it, could decide whether the case should be dismissed on that basis. Grochocinski then brought a Motion for a Protective Order, and following discussion of some of the relevant privilege issues, this Court ordered Grochocinski to prepare a privilege log listing any document to which he wanted to assert privilege and submit it to Magistrate Judge Denlow for his review. In addition, this Court referred all issues regarding the discovery of privilege matters to Judge Denlow.

Grochocinski argued in Judge Denlow's Court that documents related to his pre-lawsuit investigation and mental impressions of his case were privileged and thus not discoverable. Defendants argued that such documents were not privileged because the pre-lawsuit investigation had been put at issue and because Grochocinski waived the attorney-client and work product privileges. Judge Denlow issued a Memorandum Opinion and Order on June 9, 2008 granting in part and denying in part Grochocinski's Motion for a Protective Order. Specifically, he granted the protective order regarding communications that took place after the filing of the lawsuit but denied the protective order regarding communications that preceded the filing of the lawsuit. In so ruling, Judge Denlow held that this Court's orders placed the communications preceding the filing of the instant lawsuit "at issue" and thus waived any privilege that would otherwise apply. Specifically, Judge Denlow stated that the pre-filing communications were "exactly the type of information Judge Kendall intended the

STATEMENT

parties to discover, in order to resolve the issue of whether Plaintiff filed this lawsuit in good faith." Judge Denlow also issued an alternative ruling addressing "at issue" waiver by a party, attorney-client privilege, and work product doctrine and granting the Motion for a Protective Order in full. Such alternative ruling comes into play only if this Court sets aside the original Order. Grochocinski objected to Judge Denlow's order, arguing that this Court did not and in fact could not order the production of privileged documents.

Here, Judge Denlow misinterpreted this Court's referral. This Court did not intend to inherently put all privileged communications regarding Grochocinski's motivation for filing the instant lawsuit at issue by opening discovery on the "unclean hands" issue. The Court merely opened discovery regarding Grochocinski's motivation for filing this lawsuit, and he must now make his own decisions as to what potentially privileged communications to reveal in order to support his case. As such, this Court intended, by its referral, for Judge Denlow to address the privilege issues that would and did arise as a result of this Court opening discovery on the "unclean hands" issue. Therefore, this Court rejects Judge Denlow's primary ruling.

This Court intends to adopt Judge Denlow's alternative ruling. Defendants are given two weeks from the date of this order to file objections to the alternative ruling. In addition, Defendants' Unopposed Motion to Reset the Discovery Deadline is granted so that discovery may be completed pending the resolution of these privilege issues. Discovery is ordered closed January 31, 2009.

So ordered.

EXHIBIT B

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 MAGISTRATE JUDGE DENLOW'S <u>JUNE 9, 2008 MEMORANDUM OPINION AND ORDER</u>

Stephen Novack
Mitchell L. Marinello
Steven J. Ciszewski
Novack and Macey LLP
100 N. Riverside Plaza
Chicago, IL 60606
(312) 419-6900
#231985

Defendants Mayer Brown LLP and Ronald B. Given submit the following Response to Plaintiff's Objection to Magistrate Judge Denlow's June 9, 2008 Memorandum Order and Opinion (the "Magistrate Order"). For the reasons set forth below, Plaintiff's Objection should be denied and the Magistrate Order's primary ruling -- that Plaintiff must produce all documents on his privilege logs pre-dating the filing of the Complaint -- should be affirmed.

I. PROCEDURAL HISTORY

On August 23, 2006, Plaintiff filed his Complaint in the Circuit Court of Cook County, Illinois. It asserts two counts of legal malpractice, alleging that Defendants negligently advised CMGT, Inc. ("CMGT"): (a) not to settle a claim asserted against it by Spehar Capital, LLC ("SC") before that claim ripened into litigation; and (b) not to appear in, and defend against, the litigation that SC ultimately filed in California (the "California Action").

On October 10, 2006, Defendants removed this case to this Court. Thereafter, Defendants filed their motion to dismiss the Complaint (the "Dismissal Motion") on the basis of, among other things, the defenses that the Court and parties have at various times referred to as the "absurd result," "unclean hands" or "fraud on the court" defenses (the "Defenses"). On June 28, 2007, the Court denied the bulk of the Dismissal Motion, including its arguments relating to the Defenses.

On July 13, 2007, Defendants filed their motion to reconsider the denial of the Dismissal Motion's arguments relating to the Defenses (the "Reconsideration Motion"). On October 30, 2007, the Court orally denied the Reconsideration Motion, finding that the Defenses raised factual questions that could not be decided on a motion to dismiss. However, observing that this is a "very odd case" and "very unique situation," the Court expressly stated three times that Defendants' arguments based on the Defenses were "extremely persuasive" or "very persuasive." (10/30/07 Transcript, attached hereto as Exhibit A, at pp. 2-3, 6.) The Court then bifurcated the case to allow

for discovery and a summary judgment process regarding the Defenses before any discovery on Plaintiff's malpractice claims. (Id., pp. 2-3, 7-8.) The Court's approach is best summarized by the following excerpt from its oral ruling on the Reconsideration Motion:

> I am denying the motion to reconsider, because I still believe that there are many fact disputes that need to be resolved and that it is not a situation where I can dismiss on a motion to dismiss. But let me tell you where I'm coming from as far as how we're going to move forward.
>
> I find defendant's position extremely persuasive, and I think the issue of unclean hands, for lack of a better term -- he's used the term repeatedly fraud on the court, I think there might be a few other variations of what that issue is -- but there is a question lurking about why this was handled in the way it was and issues as to the trustee's position in coming forward and being paid by this entity, issues regarding why the trustee didn't go in and move to vacate the [default judgment], and I think what we need to do is we need to do discovery solely on that, what I would call, unclean hands issue first, so that I can have facts in front of me and decide whether the case should be dismissed based upon that issue.
>
> It's a fact dispute that I'm having the problem with. I think there are disputed issues of fact that I can't get rid of this on a dismissal, but I find your argument extremely persuasive. It is a very unique situation. It's a very odd case. (Id., pp. 2-3.)

In addition, the Court repeatedly stated that broad discovery regarding the Defenses would be allowed. For example, at the October 30, 2007 hearing on the Reconsideration Motion, the Court asked Defendants what discovery they anticipated regarding the Defenses. (Id., p. 4.) The following colloquy then occurred:

> **Defendants' Counsel**: I would imagine, your Honor, that there would be discovery taken of [Plaintiff], probably in the form of a deposition of [Plaintiff]; probably [a] deposition of Mr. Spehar, who's the principal of [SC]; and probably some depositions of the key shareholders, slash, officers of the debtor.
>
> **The Court**: What would the shareholders show you?
>
> **Defendants' Counsel**: Well, I think, among other things, the shareholders are going to show that they were not contacted by [Plaintiff] to even ask them about the allegations that we think are completely unsupported. They're on information and

> belief. But the people that had the information about this complaint, I think, will testify that they were never contacted by [Plaintiff], that they don't believe in this complaint, and had they been asked by [Plaintiff] they would have so told him.
>
> **The Court**: Okay. (Id., pp. 4-5.)

Following bifurcation, Defendants served Plaintiff and SC with written discovery regarding the Defenses. Plaintiff objected to this discovery, and filed a Motion for a Protective Order (the "Protective Motion"), based upon the work-product doctrine. On December 13, 2007, when Plaintiff presented the Protective Motion, he made two arguments. First, Plaintiff argued that Defendants' discovery was irrelevant because Plaintiff believed that discovery regarding the Defenses was limited to Plaintiff's decision not to take action to vacate the default judgment that SC obtained in its California Action (the "Default Judgment"). The Court rejected this argument and confirmed that much broader discovery regarding the Defenses would be allowed. Specifically, the Court stated:

> Unclean hands could cover [Plaintiff's] 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, whether the -- I mean, all of the steps leading up to the failure to move to dismiss the suit could potentially show intent or a pattern of behavior or some theory by defendants as to why this would be unclean hands. (12/13/07 Transcript, attached hereto as Exhibit B, at p. 6.)

Second, Plaintiff argued that many of the requested documents were privileged and that no at issue waiver had occurred. As to this argument, the Court expressed its doubts:

> But 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., p. 5.)

In connection with his at issue argument, Plaintiff also belittled the merit of the Defenses, but was quickly told to stop. Specifically, Plaintiff argued that Defendants "take the position now that because they made a baseless allegation against [Plaintiff] and he denied it that suddenly all of

his attorney work product [has been waived]." (Id., p. 9.) This Court admonished Plaintiff "to get off the baseless accusation [argument], otherwise I wouldn't have ordered the discovery." (Id.)

After taking a short recess, the Court ordered Plaintiff to produce a privilege log identifying the documents he claimed were privileged and referred the case to Magistrate Judge Denlow for ruling on any objections arising therefrom. Ultimately, Plaintiff submitted his privilege logs with the withheld documents to Magistrate Judge Denlow. Thereafter, Magistrate Judge Denlow resolved the Parties' dispute regarding Plaintiff's privilege log designations as follows:

(a) Plaintiff and SC were required to produce all documents listed on the privilege logs that pre-date Plaintiff's filing of the Complaint because those documents were put "at issue" by this Court's analysis of the Reconsideration Motion, Protective Motion and discovery that would be allowed relating to the Defenses; and

(b) Plaintiff and SC were not required to produce any documents listed on the privilege logs that post-date Plaintiff's filing of the Complaint because those documents were not put "at issue."

(This two-part ruling in the Magistrate Order is referred to herein as the "Primary Ruling").

Plaintiff objects to part (a) of the Primary Ruling and contends that he should not be required to produce any of the documents listed on his privilege logs. (The Magistrate Order also contains an "Alternative Ruling" that would apply only if this Court sustains Plaintiff's objection to, and reverses, the Primary Ruling. Defendants timely objected to the Alternative Ruling. However, given its nature as a contingent ruling that does not apply unless and until this Court reverses the Primary Ruling, Defendants also timely filed an agreed motion for extension of time to file their brief in support of their objection to the Alternative Ruling, if necessary, until after the Court rules on Plaintiff's objection to the Primary Ruling. That agreed motion for extension of time was taken under advisement by Order dated June 26, 2008.)

II. ARGUMENT

A Fed. R. Civ. P. 72(a) objection to a magistrate judge's order is governed by a clearly erroneous standard of review. Am. Hardware Mfrs. Ass'n v. Reed Elsevier, Inc., No. 03 C 9421, 2007 WL 1610455, at * 1 (N.D. Ill. Feb. 13, 2007). This means that Plaintiff's Objection must be rejected unless this Court is left with a "definite and firm conviction" that a mistake has been made. Id. In this case, Plaintiff cannot meet this burden for the reasons discussed below.

Here, the Primary Ruling is correct because this Court's discussion regarding the Reconsideration Motion and Protective Motion (set forth above) clearly indicates the broad scope of discovery allowed relating to the Defenses. Specifically, the Court clearly indicated that permitted discovery includes, among other things, Plaintiff's motive, intent and basis for: (a) deciding not to take any action to vacate the Default Judgment; (b) deciding instead to partner with SC to file this malpractice case; and (c) filing this case. Obviously, the documents listed on the privilege logs bear directly on each of these issues. Indeed, the Magistrate Order confirms as much:

> Most of the documents included on Plaintiff's privilege log contain pre-filing communications between Plaintiff, his counsel, and/or Spehar. These communications contain information relating to Plaintiff's basis for filing this lawsuit. They contain the opinions of Plaintiff, his counsel, and Spehar regarding the strengths and weaknesses of the case and their decisions regarding whether to file the lawsuit. This appears to be exactly the type of information Judge Kendall intended the parties to discover, in order to resolve the issue of whether Plaintiff filed this lawsuit in good faith. (Magistrate Order, p. 13; emphasis added.)

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.

The only question remaining is whether Plaintiff can withhold these documents because of a privilege. The Primary Ruling finds that this Court's rulings and statement of the scope of

discovery needed to resolve the Defenses require Plaintiff to produce all documents pre-dating the filing of the Complaint -- even if those documents might otherwise be privileged. Plaintiff argues that the Primary Ruling is wrong because Plaintiff believes this Court cannot cause Plaintiff's privilege to be lost. Rather, according to Plaintiff, his privilege can be lost only if he puts into evidence specific privileged communications in an attempt to defeat the Defenses. As will now be shown, both of Plaintiff's arguments are wrong. Accordingly, the Primary Ruling should be affirmed and Plaintiff should be ordered to immediately produce the documents listed on his privilege logs that pre-date the filing of the Complaint.

A. This Court May Order Production Of Privileged Documents[1]

First, Plaintiff argues that there are no circumstances under which this Court can cause Plaintiff's privilege to be lost. However, Plaintiff cites no authority in support of this argument. In fact, the law is to the contrary and, under the appropriate circumstances, this Court can find that the need for the truth outweighs Plaintiff's privilege. Specifically, the Seventh Circuit Court of Appeals has held that the attorney-client privilege and work-product doctrine "are not absolute." Loctite Corp. v. Fel-Pro, Inc., 667 F.2d 577, 582 (7th Cir. 1981). The Loctite Court continued as follows:

> Where the benefit to the resolution of the suit outweighs the potential injury to the party from whom discovery is sought, . . ., disclosure is required.

Id.; see also, SEC v. Gulf & W. Indus., Inc., 518 F. Supp. 675, 686 (D.C. 1981) ("court should weigh the conflicting needs and conditions presented to determine whether, under the prevailing circumstances, the privilege should be allowed to stand").

---

[1] As Defendants have never seen the documents affected by the Primary Ruling, they have no basis to definitively argue whether those documents are or are not privileged. For purposes of this Objection only, Defendants assume that all of the documents on Plaintiff's privilege logs are, in fact, privileged.

Loctite involved a suit for chemical patent infringement. To sustain that claim, the plaintiff had to allege that the chemical make-up of the infringing chemical was the exact same as the patented chemical. The Loctite plaintiff did not so allege in its complaint and the defendant sought discovery regarding any pre-filing testing done by the plaintiff to establish the required element that the defendant's chemical was the same as the plaintiff's chemical. Despite being ordered to do so, the plaintiff refused to produce these pre-filing test results. On appeal, the plaintiff argued that his pre-filing test results were protected by the attorney-client privilege and/or work-product doctrine. The Seventh Circuit rejected that argument. Among other things, the Seventh Circuit held that the test results were essential to determine whether the plaintiff had a legitimate claim. As such, even if they might otherwise be privileged, those protections were outweighed by the need to disclose the test results to fairly resolve the plaintiff's case.

The same is true here. The materials that make up Plaintiff's and his attorneys' pre-filing investigation are absolutely essential to determine if Plaintiff had a legitimate basis to assert this malpractice claim or whether Plaintiff and SC acted in bad faith. As set forth above, this Court has already noted that this is a "very odd case" and "very unique situation." And, this Court has expressly stated that the Defenses are "extremely persuasive" and admonished Plaintiff to stop referring to the them as baseless allegations. This Court also would not have bifurcated the case to allow the Defenses to be resolved first if it was not already clear that the Defenses have a substantial basis in fact and law. In short, there is a serious, threshold question of whether this is a legitimate case being asserted in good faith. As such, it is essential that the Court get to bottom of that issue -- even if it means that potentially privileged documents will be disclosed.

After all, if the Defenses are correct, disclosure of the documents on Plaintiff's privilege logs will help prevent this Court from spending even more time considering a case that should have never been filed in the first place and will help ensure that neither Plaintiff nor SC is rewarded for their improper attempt to secure an unjust windfall through this case.

It is also important to note that the Magistrate Order limits Plaintiff's production to documents created before the Complaint was filed. As such, it is narrowly tailored to allow the Court and Parties to discover the motives and bases for the filing of this case, while protecting later-created documents that might reveal Plaintiff's and his counsel's day-to-day strategy in litigating this case. For example, the Magistrate Order protects communications that might reveal Plaintiff's strategy in responding to the Defenses or in responding to Defendants' arguments that Plaintiff's malpractice claim fails as a matter of law. Nevertheless, Plaintiff still argues that his pre-filing analysis of the strengths and weaknesses of this case will be revealed if these documents are produced. But, no matter what happens, the strengths and weaknesses of Plaintiff's case (if it is allowed to go forward) are going to be revealed as this case is litigated -- through pleadings, other filings and discovery. So, the Magistrate Order is properly tailored to allow the Defenses to be resolved on the merits, while protecting as many privileged communications as possible.

Plaintiff also argues that the Defenses can be resolved through depositions of Plaintiff and SC. This is simply not so. Among other things, the questions raised by the Defenses are not all objective facts that can be verified or contradicted by other evidence or testimony from other witnesses. Instead, they include Plaintiff's and SC's subjective state of mind, knowledge, motive and intent in pursuing this case. Under the circumstances, to find that depositions of Plaintiff and

SC would provide all the information the Court and Defendants need on those subjects, one would have to assume that, if appropriate, Plaintiff and SC would confess their guilt and ill motives.

And, even assuming that Plaintiff and SC will be truthful no matter the consequences, their depositions still will not provide all the relevant information unless these witnesses have a perfect recollection of what they said to whom or what they were told by whom during an investigation over two years ago. Such recall is made more unlikely here because the Defenses are not based on the facts as we know them today but, instead, raise the issue of what Plaintiff knew several years ago as he conducted his pre-filing investigation. So, for the Court and Defendants to get full discovery through depositions, one would have to further assume that the witnesses will be able to, without error, remember precisely what facts they knew when -- and not confuse the facts as they knew them during the pre-filing investigation with the facts as they know them now.

B. <u>Plaintiff's "At Issue" Arguments Also Fail</u>

Plaintiff's second argument is that the Primary Holding is contrary to law because his privilege is lost only if he "relies upon evidence that puts privileged materials 'at issue.'" In essence, Plaintiff is arguing that there is no at issue waiver unless he introduces into evidence a specific privileged communication in support of his good faith/pre-filing investigation argument -- presumably either at trial or on summary judgment. As a threshold matter, the Court need not even reach this argument because, as set forth above, the circumstances of this case mandate the disclosure of all materials relating to Plaintiff's pre-filing investigation even if they might otherwise

be privileged. In all events, even if Plaintiff's second argument is considered, it still fails for the three reasons discussed below.[2]

1. **Privilege Cannot Be Used As A Shield And A Sword**

Plaintiff's argument ignores the overarching and indisputable principle that the attorney-client privilege and work-product doctrine cannot be used as both a shield and a sword. As a result, the attorney-client privilege and/or work-product doctrine are waived when a party voluntarily injects either a factual or legal issue into the case, the truthful resolution of which requires an examination of the confidential communications. Lorenz v. Valley Forge Ins. Co., 815 F.2d 1095, 1098 (7th Cir. 1987); Garcia v. Zenith Elecs. Corp., 58 F.3d 1171, 1175 n.1 (7th Cir. 1995); Pyramid Controls, Inc. v. Siemens Indus. Automations, Inc., 176 F.R.D. 269, 272 (N.D. Ill. 1997).

The rationale for the at issue waiver is as follows:

> [I]t would be entirely unfair for a case to turn on an issue upon which one party has no knowledge and is barred from access to the necessary information while the other party is able to use the information to establish its claim while shielding it from disclosure.

Abbott Labs. v. Alpha Therapeutic Corp., 200 F.R.D. 401, 410-11 (N.D. Ill. 2001).

Here, Plaintiff voluntarily injected his and his attorneys' pre-filing investigation into this case through his response to the Defenses. Specifically, from cradle to grave, Plaintiff has argued that the Defenses fail because he acted in good faith based upon his and his attorneys' pre-filing investigation. Plaintiff first did so in his response to the Dismissal Motion (at pp. 25-26), which

---

[2] Plaintiff's "at issue" arguments raise some issues that may also apply to Defendants' objection to the Magistrate Order's Alternative Ruling. Because these arguments were raised by Plaintiff, they are addressed here. However, Defendants reserve all of their rights with respect to their objection to the Alternative Ruling including, without limitation, their right to file a full legal memorandum in support of that objection, if necessary.

argued that it was Plaintiff's decision to file this case -- signifying that he had a good faith basis to do so and a conviction that he had a valid malpractice claim against Defendants.

In response to the Reconsideration Motion, Plaintiff again argued that he is pursuing this case in good faith based upon his pre-filing investigation. There, Plaintiff argued as follows:

- [I]f Plaintiff decided to file this case because he believes that the claims against [D]efendants are meritorious (which he did), then this case cannot be a fraud. (Plaintiff's Resp. to Reconsideration Motion, p. 6; emphasis added.)

Then, in connection with the Protective Motion, Plaintiff asserted that he was proceeding in good faith based upon his alleged pre-filing investigation -- and that of his attorneys:

- At the conclusion of his (and his attorneys') pre-lawsuit investigation, Plaintiff concluded that meritorious claims exist against at least [Defendants] and Charles Trautner. Thus, Plaintiff filed this case. (Protective Motion, ¶6.)

Even the Magistrate Order (at p. 16) holds that "Plaintiff has affirmatively stated that his pre-filing investigations and that of his attorneys led him to file this suit in good faith." Notably, Plaintiff did not object to this portion of the Magistrate Order. Thus, it is now undisputed that Plaintiff voluntarily and affirmatively injected into this case his own good faith basis for filing the Complaint based upon his and his attorneys' pre-filing investigation.

Having injected this issue into the case in an attempt to defeat the Defenses (i.e., the sword), Plaintiff cannot now stand behind the attorney-client privilege and work-product doctrine to prevent discovery regarding this issue (i.e., the shield). In fact, all documents reflecting Plaintiff's pre-filing investigation and that of his attorneys are necessary for the "truthful resolution" of this issue. That is because the only way Plaintiff can prove his assertion that this case was filed in good faith based on his and his attorneys' investigation is to introduce evidence reflecting the content of those

investigations and how their findings support the Complaint's allegations. But, once Plaintiff opens the door by presenting some evidence regarding the content of the these investigations, the entire investigations are fair game. Any other result would allow Plaintiff to "cherry pick" and select the evidence that best supports his arguments without allowing Defendants access to all of the evidence. This is just like the situation cautioned against in Abbott Labs -- Plaintiff has all of the evidence under his control and can use all of that evidence to craft his "good faith" argument -- while shielding that very same evidence from the Court and Defendants.

Plaintiff's Objection incorrectly argues that Defendants' position is that a matter is at issue whenever a claim or defense is asserted that "could be supported or rebutted by privileged communications." (Objection, p. 2; emphasis in original.) In reality, Defendants have consistently argued that Plaintiff's privileged communications are at issue in this case because they are the only way that Plaintiff can prove he relied upon an appropriate, good faith investigation conducted by his attorneys. Accordingly, Plaintiff not only could -- but must -- rely on the privileged communications to prove his argument. As a result, those communications are now at issue.

Finally, in many ways, this case is no different than a case where the defendant asserts an advice of counsel defense. There, the mere assertion of the advice of counsel defense results in a waiver because the only way to prove that defense is to introduce the advice -- which is privileged -- into evidence. Blackhawk Molding Co. v. Portola Packaging, Inc., No. 03 C 6060, 2004 WL 2211616, at *1 (N.D. Ill. Oct. 1, 2004) ("a party who relies on an advice-of-counsel defense waives attorney-client privilege with respect to the subject matter of the legal advice relied upon"). Courts have likewise found waiver in the context of other claims that, by definition, implicate privileged materials. See Transp. Ins. Co. v. Post Express Co., No. 91 C 5750, 1996 WL 32877, at *3 (N.D.

Ill. Jan. 25, 1996) (waiver following assertion of claim for bad faith denial of insurance claim); Med. Waste Techs. L.L.C. v. Alexian Bros. Med. Ctr., Inc., No. 97 C 3805, 1998 WL 387705, at *2 (N.D. Ill. June 24, 1998) (waiver following assertion of affirmative defense that necessarily implicated attorneys' files relating to formation of a company). Accordingly, Plaintiff's defense to the Defenses here -- which can be proven only by introducing the content of the pre-filing investigations -- results in a waiver.

2. Practical Considerations

In addition, Plaintiff's proposed rule -- that there is no waiver until Plaintiff actually introduces into evidence a specific protected communication -- would cause a logistical nightmare. Under this rule, Plaintiff could conceivably wait until trial to decide to waive the privilege by introducing a specific protected communication into evidence. What happens then? Surely, Plaintiff would not be allowed to ambush Defendants at trial, leaving Defendants with only the opportunity to cross-examine Plaintiff about the privileged communications during trial. But, what is the remedy? Would the Court adjourn the trial and send the case back to Day One of discovery to allow Defendants to do discovery regarding all of Plaintiff's otherwise privileged communications?

3. Plaintiff's Cases

Finally, Plaintiff cites four cases, none of which mandates that privileged material must be introduced into evidence before there is a waiver. Each of Plaintiff's cases is discussed separately below.

Claffey v. River Oaks Hyundai, 486 F. Supp. 2d 776 (N.D. Ill. 2007): The plaintiff in Claffey alleged a willful violation of the Fair Credit Reporting Act ("FCRA"). In response, the defendant asserted that it did not act willfully because it had "reasonable procedures" in place to

ensure compliance with the FCRA. In discovery, the plaintiff argued that the defendant's "reasonable procedures" argument waived the privilege because one of the "reasonable procedures" was consultation with an attorney. Like Plaintiff here, the defendant in Claffey argued that there was no waiver until it introduced into evidence a specific privileged communication to support its defense.

The Claffey court held that the defendant could not create the impression that it relied on advice from its counsel without waiving the privilege:

> Were [the defendant] allowed to create this impression but still maintain its attorney-client privilege, it would in effect be using the privilege as both a shield and a sword, which is not permitted. [The defendant] cannot have it both ways; it cannot seek refuge in consultation with counsel as evidence of its good faith yet prevent [the plaintiff] from discovering the contents of the communication. If, therefore, [the defendant] actually relies on any documents or other evidence that would tend to suggest that its procedures included consultation with counsel, it will be deemed to have waived its attorney-client privilege.

Id. at 779 (internal citations, alterations and quotation marks omitted).

This analysis helps Defendants. Here, any reference to Plaintiff's reliance on his attorneys' pre-filing investigation would create the impression that Plaintiff's attorneys blessed this case and/or that their investigation supports the Complaint. But, under Claffey, Plaintiff is not allowed to create this impression without waiving the privilege. Accordingly, Plaintiff has already waived the privilege by relying upon his attorneys' pre-filing investigation in an attempt to defeat the Defenses.

Trustmark Ins. Co. v. Gen. & Cologne Life Re of Am., No. 00 C 1926, 2000 WL 1898518 (N.D. Ill. Dec. 20, 2000) and Quality Croutons, Inc. v. George Bakeries, Inc., No. 05 C 4928, 2006 WL 2375460 (N.D. Ill. Aug. 14, 2006): Plaintiff's reliance upon these cases is misplaced because the claims or defenses in these cases did not rely upon, nor did their resolution require the

examination of, any privileged communications or information. In contrast, as set forth above, Plaintiff's response to the Defenses does require examination of otherwise privileged communications. Indeed, they are the only way Plaintiff could ever prove his argument.

Murata Man. Co. v. Bel Fuse, Inc., No. 03 C 2934, 2007 WL 781252 (N.D. Ill. Mar. 8, 2007): This case is simply inapplicable because the Murata court stated twice that a waiver did not occur because the issues raised did not rely upon, or require examination of, any privileged communications. Id. at *7-8. In contrast, Plaintiff here has affirmatively relied upon his and his attorneys' pre-filing investigation and, in so doing, put that investigation at issue. In addition, Plaintiff's arguments can be proven only by relying upon the purportedly privileged content of those investigations. Thus, unlike Murata, Plaintiff's response to the Defenses here does rely upon, and require examination of, the investigations that Plaintiff contends are privileged.

III. CONCLUSION

For the foregoing reasons, Plaintiff's Objection to the Magistrate Order should be denied, the Primary Ruling in the Magistrate Order should be affirmed, and Plaintiff should be ordered to immediately produce the documents on his privilege logs that pre-date the filing of the Complaint.

If the Court should somehow disagree and reverse the Magistrate Order, then Defendants should be granted time to file a brief in support of their objections to the Magistrate Order's Alternative Ruling.

Respectfully submitted,

MAYER BROWN LLP AND RONALD GIVEN

By: /s/ Stephen Novack
One Of Their Attorneys

CERTIFICATE OF SERVICE

Stephen Novack, an attorney, hereby certifies that he caused a true and correct copy of the foregoing Defendants' Response to Plaintiff's Objection to Magistrate Judge Denlow's June 9, 2008 Memorandum Opinion and Order 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 18th day of July, 2008.

/s/ Stephen Novack

EXHIBIT C

1

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

4

5 DAVID GROCHOCINSKI, Case No. 1:06-cv-5486

6 Plaintiff, Chicago, Illinois
October 30, 2007
7 v. Status Hearing

8 MAYER BROWN ROWE & MAW, LLP,
et al.,
9
Defendants.
10 -------------------------------

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

13
APPEARANCES:
14
For the Plaintiff: Edward T. Joyce & Associates
15 By: Edward T. Joyce, and
Robert D. Carroll
16 11 S. LaSalle St., Ste. 1600
Chicago, IL 60603
17 (312) 641-2600

18 For the Defendants: Novack & Macey
By: Stephen Novack, and
19 Steven J. Ciszewski
100 N. Riverside Plaza, Ste. 1500
20 Chicago, IL 60606
(312) 419-6900
21

22
Court Reporter: April M. Metzler, RPR, CRR
23 219 South Dearborn St., Rm. 2318-A
Chicago, IL 60604
24 (312) 408-5154

25 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.
[illegible]: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
[illegible]: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
1:01:47 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
: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
0:04:55 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
: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.
0:05:52 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
: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.)
9 - - -
10
11
12
13
14
15 C E R T I F I C A T E
16
17 I certify that the foregoing is a correct transcript
18 from the record of proceedings in the above-entitled
19 matter.
20
21 ______________________________ ____________
22 April M. Metzler, RPR, CRR Date
23
24
25