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	)	Magistrate Judge Morton Denlow
Defendants.	)	

DEFENDANTS' SUPPLEMENTAL OBJECTION TO THE "ALTERNATIVE RULING" IN MAGISTRATE JUDGE DENLOW'S JUNE 9, 2008 MEMORANDUM OPINION AND ORDER

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I. NEW DEVELOPMENTS

By Order dated October 28, 2008 (the "October 28 Order," attached hereto as Exhibit A), this Court stated that it intends to adopt the "Alternative Ruling" in Magistrate Judge Denlow's June 9, 2008 Memorandum Order and Opinion (the "Magistrate Order"). Specifically, the Court stated that it did not intend to automatically waive any applicable privileges, but that:

> [The Trustee] must now make his own decisions as to what potentially privileged communications to reveal in order to support his case.

In addition, the October 28 Order: (a) granted Defendants until November 12, 2008 to file an Objection to the Alternative Ruling; and (b) granted the Parties until January 31, 2009 to conduct discovery regarding the defenses that have at various times been referred to as the "absurd result," "unclean hands" or "fraud on the court" defenses (the "Defenses").

On November 12, 2008, Defendants filed their initial Objection to the Alternative Ruling (the "Initial Objection").[1] The Court has not yet ruled on that Objection. Thereafter, the Parties conducted discovery regarding the Defenses -- including the deposition of the Trustee on January 19, 2009. The Trustee's deposition testimony makes clear that he personally did almost no pre-filing investigation, but that he relied almost entirely on his attorneys to do so. Obviously, Magistrate Denlow did not have this testimony in front of him when he entered the Magistrate Order and this Court did not have this testimony before it when it entered the October 28 Order.

On January 30, 2009, this Court entered another order that, among other things, granted Defendants two weeks to file an Objection to the Alternative Ruling.[2] Defendants interpret the

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[1] The Initial Objection (without its exhibits) is attached hereto as Exhibit B. It is incorporated herein by reference.

[2] The January 30 Order also extended discovery regarding the Defenses until March 31, 2009.

January 30 Order as requesting a supplemental filing regarding new facts revealed during discovery that are relevant to the issues raised in the October 28 Order. Specifically, now that the Trustee has been deposed, we know more about what the Trustee will rely upon in support of his case.

The remainder of this Supplemental Objection will summarize the Trustee's decisions about what he will rely upon -- as reflected by the Trustee's deposition testimony.[3] It will then argue that the Trustee's decisions (and his deposition testimony) have had the effect of waiving the attorney-client privilege and work product doctrine because the Trustee relied almost exclusively on the pre-filing investigation purportedly conducted by his attorneys. As a result, the Trustee should now be ordered to produce all of the documents that he is withholding on the basis of either privilege.

II. THE TRUSTEE'S DEPOSITION[4]

The Trustee's deposition testimony confirms that he: (A) basically ignored the issue of vacating the Default Judgment; (B) conducted virtually no pre-filing investigation of his own; and (C) relied almost exclusively on his attorneys to conduct the pre-filing investigation. Each point is discussed further in the next three sections.

A. The Trustee Ignored The Possibility Of Vacating The Default Judgment

When the Court first allowed discovery regarding the Defenses, it noted that a key issue was why the Trustee never sought to vacate the Default Judgment against CMGT.[5] Even limited

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[3] Defendants' Initial Objection summarizes the Trustee's decisions as reflected in the papers he filed with this Court.

[4] A copy of the transcript of the deposition of David Grochocinski, dated January 19, 2009, is attached hereto as Exhibit C.

[5] See Transcript of Proceedings dated October 30, 2007, attached hereto as Exhibit D, at p. 3.

discovery has shown that, although the Trustee believed that it was in the interests of the CMGT bankruptcy estate to vacate the Default Judgment, he basically ignored the possibility of doing so.

- Admitted that, if the Default Judgment was vacated, the estate would not have a $17 million claim against it and that it would be in the interest of the estate to get rid of the Default Judgment so the remaining creditors could share in whatever assets CMGT had. (Ex. C, p. 60.)

- Never tried to obtain or review the transcript of the hearing at which the Default Judgment was entered -- during which the presiding Judge all but invited a motion to vacate the default. (Ex. C, pp. 87-89.)

- Never asked Defendants if they knew anything that might help the Trustee vacate the Default Judgment or if they would assist him in trying to vacate the Default Judgment. (Ex. C, pp. 64, 86-87.)

- Never looked at any case law, hornbooks or treatises with respect to whether the Default Judgment could be vacated. (Ex. C, p. 64.)

- Never talked to a California attorney about how default judgments can be vacated. (Id.)

- On December 16, 2004 -- almost three months after being appointed Trustee (and about a month after the time for vacating the Default Judgment had passed) -- the Trustee sent a letter to Kim Quarles, a CMGT shareholder, stating that "[i]t is likely that the time period to vacate the [Default Judgment] has now expired" -- confirming that he had not previously determined the deadline and was still not going to do so. (See December 16, 2004 letter attached hereto as Exhibit E.)

- Finally, the Trustee claims that one reason he did not try to vacate the Default Judgment is because the CMGT estate had no money to hire an attorney to do so. (See Trustee's August 8, 2008 Affidavit, attached hereto as Exhibit F, at ¶12.) Notably, as discussed further below, CMGT's lack of funds is the very same reason that several CMGT shareholders gave the Trustee for why CMGT did not defend itself in the California Action in the first place.

B. The Trustee Conducted Virtually No Pre-Filing Investigation

When asked about the essential elements of his malpractice claim, the Trustee had virtually no personal knowledge about the case -- and testified that he did not personally investigate many of the bases for his malpractice claim. For example, the Trustee testified that he could not recall contacting any witnesses before filing his Complaint:

- Cannot recall if he talked to any CMGT officers, employees or shareholders about the malpractice claim before it was filed. (Ex. C., pp. 129-130.)
- Never spoke to James Wong, CMGT's CFO and a major CMGT shareholder. (Ex. C, p. 159.)
- Never spoke to Wayne Baliga, a major CMGT shareholder, who provided funds to keep CMGT afloat. (Ex. C, p. 164.)
- Never contacted Charles Trautner -- the CMGT shareholder who put together the Newco deal that was scuttled by the California lawsuit (the "California Action") filed against CMGT by Spehar Capital, LLC ("SC"). (Ex. C, p. 171.)
- Never called Ms. Quarles, who had informed the Trustee by letter (copy attached hereto as Exhibit G) that: (1) CMGT did not defend the California Action because it had no money to do so; and (2) SC was the cause of CMGT's failure. (Ex. C, p. 70-71.)
- Shortly before filing this case, still had "no clue" whether anyone had contacted Louis Franco -- CMGT's former President -- about the malpractice claim. (Ex. C, p. 188.)
- Did not speak to anyone at Mayer Brown, including Defendant Given, prior to filing the malpractice claim. (Ex. C, p. 131.)

A fundamental premise of the malpractice claim is that CMGT did not appear to defend the California Action (or seek to vacate the Default Judgment) because of allegedly negligent advice by Defendants. However, several CMGT officers and shareholders confirmed that CMGT decided not

to appear to defend the California Action because it had no money to do so -- not because of any advice offered by Defendants. The Trustee's testimony establishes that he did no personal investigation about this essential premise of his malpractice claim.

- Does not know if it is true that CMGT did not have the financial resources to defend itself in the California Action. (Ex. C, p. 140.)
- Never took any action to determine if Franco's letter stating that CMGT had no money to defend the California Action was true. (Ex. C, p. 140.)
- Never asked anyone at CMGT even one question about why CMGT did not attempt to vacate the Default Judgment. (Ex. C, p. 80.)
- Does not know if CMGT made a deliberate decision not to appear for the Default Judgment prove-up hearing. (Ex. C, p. 97.)

The Trustee also alleges that Defendants negligently advised CMGT not to settle its dispute with SC before litigation. Again, however, the Trustee did not investigate this allegation. Indeed, the Trustee testified that he:

- Does not know if Defendant Given recommended settlement to Franco. (Ex. C, p. 324.)
- Does not know if a settlement with SC was even possible before the closing of the Newco deal. (Ex. C, p. 288.)
- Does not know if CMGT's shareholders were interested in settling with SC. (Ex. C, p. 322.)
- Admits that it is possible that Franco and other CMGT shareholders just wanted to give up the business rather than deal further with SC. (Ex. C, p. 322.)
- Does not know if SC would have settled for anything less than full adherence to every demand that it made. (Ex. C, p. 289.)
- Does not know what assets CMGT had available to give to SC as part of a settlement before the Newco deal closed. (Ex. C, p. 287.)

- Does not know if CMGT had any money to pay SC as part of any settlement. (Ex. C, p. 315.)

Another key premise of the malpractice claim is that Defendants "negligently pushed" CMGT to accept the Newco deal instead of pursuing other potential deals with the Washoe or Sealaska Indian tribes. The Trustee testified that he had no knowledge about this aspect of his case:

- Does not know if Given pressured Franco to agree to the Newco LOI. (Ex. C, p. 257.)
- Does not know the factual basis for his allegation that Given did not advise Franco that an alternative deal could have closed if terms better to CMGT were offered to Sealaska or other potential investors. (Ex. C, p. 257.)
- Never contacted anyone with Sealaska. (Ex. C, p. 173.)
- Does not recall seeing the alleged signed LOI from Sealaska -- which is alleged in Paragraph 33 of the Complaint, and purportedly offered a better deal for CMGT than the Newco deal. (Ex. C, pp. 240-41.)
- Does not know the factual basis for his allegation that CMGT and Sealaska were close to closing a financing deal. (Ex C, p. 243.)
- Never spoke to anybody with the Washoe (whom the Complaint alleges signed an LOI to finance CMGT). (Ex. C, p. 172.)
- Never asked to see a copy of the alleged signed Washoe LOI. (Ex. C, p. 268-69.) An unsigned version of the Washoe LOI is attached to the Complaint as Exhibit 6, but Mr. Spehar testified in his deposition that the Washoe never signed this LOI, that the contrary allegation in the Complaint (at ¶45) is false, and that he told the Trustee so. (See Transcript of the deposition of Robert Gerard Spehar dated January 21, 2009, attached hereto as Exhibit H, at pp. 49, 279-80 & 287-88.)

The Trustee also admitted to knowing nothing about many other allegations in his Complaint:

- Does not know what would have happened if CMGT would have put up a defense in the California Action. (Ex. C, p. 347.)

- Does not know the factual basis for his allegation that SC and CMGT regularly agreed to oral modifications to SC's contract with CMGT (at ¶27 of the Complaint) -- even though SC's entire California Action is based upon an alleged oral modification to that contract. (Ex. C, pp. 237-38.)

- Does not know the factual basis for his allegation (at ¶31) that Defendants had a purported conflict because they represented SC as well as CMGT. (Ex. C, p. 240.)

As this testimony makes clear, the Trustee knows very little about the bases for his malpractice claim. And, what he does know supports Defendants' point that CMGT chose not to defend the California Action because it had no money to do so -- not because of any advice from Defendants. As such, the Trustee cannot establish that he filed this case in good faith on the basis of his own personal investigation. Instead, he will have to rely on the purported investigation of his attorneys. As will now be shown, that is exactly what the Trustee did during his deposition.

C. The Trustee Relied Almost Exclusively On His Attorneys

The Trustee's deposition testimony leaves no doubt that he relied almost entirely on his attorneys to conduct a pre-filing investigation. Specifically, the Trustee testified as follows:

> Q. [D]o you recognize that you have any responsibility whatsoever to make sure that there's the slightest accuracy to anything you put down on paper?
>
> A. Of course. I have counsel that's representing me that's done an investigation and recommended to me to file a -- a cause of action which I in fact have filed. (Ex. C, p. 253.)
>
> * * *
>
> A. Again, Mr. Spehar is not the one that runs the case. The cause of action belonged to the estate. I hired special counsel, and I was not unhappy with the way matters were proceeding. I relied on my special counsel to do what -- such investigation as they deemed appropriate. (Ex. C, p. 189.)
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> * * *

Q. Prior to the date of this e-mail, were you intending there to be [pre-filing] depositions of some of the witnesses to the malpractice claims?

A. I -- I don't know. I was -- my -- my counsel was proceeding with an analysis of this case whether it should be filed or not, and they were doing what they needed to do.

Q. Um-hum.

A. That's why I hired special counsel. (Ex. C, p. 180.)

* * *

Q. Did you take what Mr. Spehar told you just hook, line and sinker and just accept all of it as true?

A. Hook, line and sinker? No, but on the other hand, counsel investigated this situation. I assume that -- that they did whatever they needed to do with respect to this . . .. (Ex. C, p. 283.)

The Trustee also relied on his counsel's investigation when asked about specific allegations in the Complaint. Specifically, the Trustee testified as follows:

Q. Okay. So then your investigation didn't support this allegation [i.e., that there is a signed LOI from the Washoe] one iota, did it?

A. I believe it does.

Q. You believe it does based on what?

A. On the investigation of counsel. (Ex. C, p. 274.)

This last example, in particular, shows why the Trustee's testimony must have the effect of waiving the attorney-client privilege and work product doctrine. How can Defendants cross-examine the Trustee about these allegations if he can simply hide behind the investigation of his counsel in response to every question about them? Indeed, the need for such cross-examination is clear because Mr. Spehar admits that the Washoe LOI was not signed and that the allegation in the Complaint --

i.e., that it was signed -- is false. (Ex. H at p. 49.) Whether the Washoe LOI was signed is critical to the Trustee's allegation that Defendants' negligently "pushed" the Newco deal over other options -- like the Washoe, and shows that there really is no good faith basis for some of the crucial allegations in the Complaint. Accordingly, as discussed further below, the Trustee's deposition testimony confirms that he has waived the attorney-client privilege and work product doctrine.

III. ARGUMENT

An "at issue" waiver of the attorney-client privilege and/or work product doctrine occurs when: (A) the privilege holder voluntarily injects a factual or legal issue into the case; and (B) truthful resolution of that issue requires an examination of privileged communications. Lorenz v. Valley Forge Ins. Co., 815 F.2d 1095, 1098 (7th Cir. 1987). See also, Garcia v. Zenith Electronics Corp., 58 F.3d 1171, 1175 at n. 1 (7th Cir. 1995) (waiver when "client asserts claims or defenses that put his attorney's advice at issue in the litigation"). The rationale for 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). In short, the at issue waiver ensures that a litigant cannot use the privileges as both a shield and a sword.

Here, an "at issue" waiver occurred because: (A) the Trustee voluntarily injected his attorneys' purported pre-filing investigation when he affirmatively argued and then testified that he filed this case in good faith based largely upon his attorneys' purported investigation; and (B) truthful resolution of the question of whether the Trustee's attorneys conducted a complete and appropriate investigation and whether that purported investigation supported the filing of this case

requires an examination of the contents of the purported investigation and the Trustee's communications with his attorneys about the purported investigation.

A. The Trustee Injected The Pre-Filing Investigations As An Issue In This Case

As set forth in Defendants' Initial Objection (at 5), no one really disputes that Plaintiff affirmatively argued that the Defenses should be rejected because he filed this case in good faith based upon his attorneys' pre-filing investigation. Indeed, the Magistrate Order so finds, and Plaintiff did not object to that finding. (See Mag. Ord., p. 16 -- "Plaintiff has affirmatively stated that his pre-filing investigations and that of his attorneys led him to file this suit in good faith") (emphasis added). Moreover, Defendants' Initial Objection (at 5) cites to the many arguments in the Trustee's filings in this case where he affirmatively raises the purported pre-filing investigation of his attorneys as a basis for his decision to file this malpractice claim.

This conclusion is made even more clear in light of the Trustee's deposition testimony. It leaves no doubt that the Trustee relied almost exclusively on the purported pre-filing investigation of his attorneys. Indeed, the Trustee testified that the purpose of hiring special counsel was to have him investigate the malpractice claim and make a filing recommendation. And, the Trustee testified that is what happened. As such, the Trustee voluntarily injected into this case the issue of whether he filed this case in good faith based upon his attorneys' pre-filing investigation.

B. Truthful Resolution Requires Examination Of Privileged Materials

As set forth in Defendants' Initial Objection (at 6-7), the Trustee's decision to inject his attorneys' investigation into this case gives rise to a host of questions. Among them are whether a legitimate investigation occurred; what was the result of the investigation; and did the investigation really establish a good faith basis for filing this case. These questions have become more urgent in

light of the documents produced, which show that SC believed the Trustee's counsel had not conducted a "reasonable investigation" as of only a few weeks before the Complaint was filed. (See Series of e-mails dated July 31, 2006, attached hereto as Exhibit I.) All of these questions (and more) now need to be fully investigated and truthfully resolved. And, the only way to do so is to examine the content and result of, and any communications regarding, the investigation.

C. Not Necessary For Trustee To Rely On A Specific Document

Although the Magistrate Order acknowledges that the Trustee voluntarily injected the pre-filing investigations as an issue in this case, the Alternative Ruling holds that no at issue waiver occurs until the Trustee relies on a specific privileged document to support this argument:

> [I]f Plaintiff wishes to use documents or other privileged communications from its pre-filing investigations to show that he filed the lawsuit in good faith, then he will waive the privilege. Plaintiff asserts, however, that he does not intend to use such communication[s] to defend these allegations. Therefore, because Plaintiff has not yet used specific communications to defend the allegations, and because Plaintiff states that he does not intend to do so, the Court finds Plaintiff has not yet put these privileged communications at issue, and has accordingly not waived any communications that are otherwise protected by [the] attorney-client privilege or the work product doctrine. (Mag. Ord., pp. 17-18.)

Respectfully, this result would allow the Trustee to use the privilege as a sword and shield and defeat the rationale for the at issue waiver doctrine set forth in Abbott Labs. Indeed, the Alternative Ruling means that the outcome of the Defenses may turn on an issue about which the Trustee and/or SC control all of the evidence. Yet, the Trustee is now asserting the privilege to prevent access to that evidence and, instead, to restrict the record to the non-privileged information that he chooses to use in support of his arguments. If the Alternative Ruling stands, Defendants will never have access to all of the evidence regarding the Trustee's pre-filing investigation/good faith

argument and will have no opportunity to discover if there is information in the supposedly privileged files that contradicts the argument that the Trustee injected into this case.

Consider the following scenario that may be permitted by the Alternative Ruling. Just as he did during his deposition, the Trustee could take the stand and testify that he filed this case in good faith based upon his attorneys' investigation. If he said nothing more, the Trustee would not have relied upon any specific privileged communications and, therefore, under the Alternative Ruling, no waiver will have occurred. But, if this happens, the Trustee will have created the impression -- even if he does not specifically so testify -- that his attorneys did a legitimate investigation and that, after that investigation, those attorneys blessed this case and had no reservations about it being filed. Yet, without access to the documents and other "privileged" information relating to the investigation, Defendants will be at a significant disadvantage and will lack the full ability to challenge that investigation. And, this Court will not have complete information to determine if the Trustee's story really is true.

In this regard, this case is no different than a claim to impose liability against an employer for the sexual harassment of one of its employees by another employee. In that context, the employer-defendant frequently attempts to avoid liability by arguing that it consulted counsel and conducted a good faith investigation after becoming aware of the situation. In Johnson v. Rauland-Borg Corp., 961 F. Supp. 208 (N.D. Ill. 1997), for example, the employer-defendant asserted that it acted reasonably by employing outside counsel to investigate the matter. Id. at 210. The Johnson court held that the assertion of this defense resulted in an at issue waiver:

> Whether the [employer] acted reasonably will depend on the advice it received from [outside counsel] following her investigation. Since the [employer] placed the

> reasonableness of its conduct following notification of [the plaintiff's] sexual harassment allegations at issue, it must reveal the legal advice it received. Id.

And, this waiver occurs merely by placing the investigation at issue -- even before specific privileged materials are relied upon. This issue was directly confronted in Harding v. Dana Transport, Inc., 914 F.Supp. 1084 (D.N.J. 1996). There, the employer-defendant tried to defeat this type of sexual harassment claim by asserting that it conducted an investigation involving outside legal counsel. The employer-defendant in Harding specifically disclaimed any reliance upon the specifics of that investigation and stated that it was relying only on the fact that the investigation took place. Id. at 1093. Even with this limitation, the Harding court found that the employer-defendant waived the attorney-client privilege and work product doctrine by putting the investigation at issue.

The Harding court reasoned that "[w]ithout having evidence of the actual content of the investigation, neither the plaintiffs nor the fact-finder at trial can discern its adequacy." Id. at 1096. The Harding court held that an employer-defendant relying on an investigation by outside counsel puts at issue, among other things: what information was conveyed between the party and counsel; were all the material facts provided to counsel; did counsel give a well-informed decision; and was counsel's advice followed. Id. at 1095. As noted above, these are the exact questions that are raised by the Trustee's reliance on his attorneys' pre-filing investigation in this case. None of these questions can be answered unless all of the materials from the investigations are produced.

Here, the Trustee chose to voluntarily inject the investigations as an issue in this case. Indeed, the Trustee already used that argument to prevail on Defendants' motion to dismiss, Defendants' motion to reconsider and Plaintiff's Protective Motion. Having already asserted and

obtained relief based upon this issue, Plaintiff has waived the attorney-client privilege and work product doctrine.

Another apt analogy is a case where the defendant asserts an advice of counsel defense. There, the mere assertion of the advice of counsel defense -- even without reliance upon a specific privileged document -- 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, the Trustee's "good faith" response to the Defenses -- which can be proven only by introducing the content of the pre-filing investigations -- results in a waiver.[6]

D. Practical Implications

Finally, the holding that there is no at issue waiver unless and until the Trustee actually relies upon a specific protected communication could give rise to a logistical nightmare. The Trustee could conceivably wait until an evidentiary hearing or trial to decide to waive the privilege by

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[6] In addition, as set forth in Defendants' Initial Objection (at 10-13), none of the case law cited in the Alternative Ruling or relied upon by the Trustee, requires reliance on a specific privileged communication before an "at issue" waiver can occur.

introducing a specific protected communication into evidence. What happens then? Surely, the Trustee would not be allowed to ambush Defendants at trial, leaving Defendants with only the opportunity to cross-examine trial witnesses about the privileged communications. But, what is the remedy? Will the Court adjourn the trial and send the case back to Day One of discovery to allow Defendants to do discovery regarding all of the Trustee's otherwise privileged communications?

IV. CONCLUSION

For the foregoing reasons, the Alternative Ruling should be rejected, and the Trustee should be ordered to immediately produce all documents currently being withheld on the basis of the attorney-client privilege and/or work product doctrine that pre-date the filing of the Complaint.

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' Supplemental Objection to the "Alternative Ruling" in Magistrate Judge Denlow's June 9, 2008 Memorandum Opinion And Order to be served through the ECF system upon the following:

Edward T. Joyce
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on this 13th day of February, 2009.

/s/ Stephen Novack