

2. In a thinly-veiled maneuver to argue the merits of their affirmative defenses in a situation where Plaintiff has not been given leave to respond, Defendants have now filed a supplemental objection to Magistrate Denlow's Alternative Ruling under the guise that they viewed this Court's January 30, 2009 Order as an invitation to file a supplemental objection that is based on evidence and testimony that Defendants' received after Magistrate Denlow issued his ruling.

3. Plaintiff disagrees with Defendants' interpretation of this Court's January 30, 2009 Order. Defendants' objection to Magistrate Denlow's Alternative Ruling addresses: (1) Defendants' disagreement with Magistrate Denlow's interpretation of the law regarding the "at issue" waiver doctrine, and (2) Magistrate Denlow's finding that Plaintiff had not yet done anything that constitutes an at issue waiver.¹ For the purpose of deciding whether Magistrate Denlow's Alternative Ruling is clearly erroneous or contrary to law, which is the standard for a Rule 72(a) objection, any evidence or testimony that Defendants' obtained after Magistrate Denlow issued his Alternative Ruling is irrelevant.

4. If Defendants believe that Plaintiff committed an "at issue" waiver after Magistrate Denlow issued his order, then the proper course of action is to: (a) wait to find out whether this Court agrees with Magistrate Denlow's interpretation of the law regarding application of at issue waiver, and then (b) file a motion to compel the production of the privileged material that Defendants' believe were put at issue. The parties could then brief and argue whether Plaintiff has committed an "at issue" waiver pursuant to the test that this Court finds is applicable.

¹ Magistrate Denlow's Alternative Ruling is based on extensive briefing and argument by the parties. Plaintiff stands firmly by the arguments he presented in his briefs and during oral argument. If this Court has any doubts about the correctness of Magistrate Denlow's Alternative Ruling, Plaintiff respectfully encourages this Court to review the briefs that Plaintiff filed with Magistrate Denlow and the transcript of the oral argument.

5. Much of Defendants' supplemental objection argues the merits of their affirmative defenses and tells this Court how Defendants expect Plaintiff to respond to those defenses. Because this is not the proper time or procedure for doing so, Plaintiff is not going to argue the merits of the affirmative defenses. Plaintiff's refusal to be baited into that fight at this time should not be looked upon as a concession that Plaintiff agrees with Defendants' arguments or interpretations of the evidence and testimony they proffer. To be sure, he does not. However, as this Court previously contemplated, the dispute over the merits of Defendants' affirmative defenses will take place in the form of summary judgment motions after discovery is completed. Suffice it to say that Plaintiff has absolutely no intention of relying on advice of counsel to respond to any of Defendants' arguments in support of their affirmative defenses. Plaintiff has repeated this representation several times and continues to stand by it.

6. The only point that Plaintiff is going to make regarding Defendants' claimed need for all of Plaintiff's privileged pre-filing investigation material is this: if, as Defendants contend, an easy and dispositive pre-filing investigation would have uncovered indisputable evidence that the instant case is meritless, then Defendants should simply obtain that evidence and file a summary judgment motion on the basis of that evidence. Defendants should not keep forcing Plaintiff to spend time and money fighting privilege disputes so that Defendants can attempt to prove that Plaintiff could have and/or should have obtained that mystery evidence before filing this case. Respectfully, Plaintiff reminds Defendants that the purpose of this bi-furcated proceeding is to make sure that an allegedly meritless claim is not allowed to proceed to trial. Certainly, if Defendants know of and have dispositive evidence, that purpose is most effectively met by Defendants presenting their dispositive evidence at this time.

7. This Court knows what it intended when it issued its January 30, 2009 Order. If this Court did not intend to invite Defendants to file a supplemental objection, Plaintiffs respectfully request that this Court enter an order striking Defendants' supplemental objection.

Wherefore, Plaintiff respectfully requests that this Court enter an order striking Defendants' supplemental objection to Magistrate Denlow's Alternative Ruling.

Dated: February 17, 2009

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

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