

**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 MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Plaintiff, David Grochocinski, in his capacity as the Chapter 7 trustee for the bankruptcy estate of CMGT, Inc. (“Plaintiff”), moves for an order compelling defendants Mayer Brown Rowe & Maw LLP and Ronald B. Given (“Defendants”) to produce documents. In support of this motion, Plaintiff states as follows:

BACKGROUND

1. During discovery, Plaintiff served Defendants with a document request seeking all documents that Defendants contend support their so-called “unclean hands” defense.
2. In response to Plaintiff’s discovery requests, Defendants produced privilege logs identifying affidavits they obtained from Louis Franco, James Wong, Kimberly Quarles and Wayne Baliga. Defendants correctly asserted that the documents were protected from disclosure by the work product doctrine, and those documents would have remained privileged if Defendants had not put them “at issue.”
3. On May 29, 2009, however, Defendants filed their motion for summary judgment and attached Franco’s, Wong’s, Quarles’ and Baliga’s affidavits to their motion. Defendants

thereby waived the work product privilege with respect to those affidavits because they put them “at issue.”

4. Accordingly, Plaintiff sent Defendants a letter requesting production of all documents relating to the preparation of the affidavits, including any drafts. (*See* Carroll letter to Marinello dated June 11, 2009, attached hereto as Exhibit 1.)

5. Defendants responded the next day, stating that they would not produce the requested documents because (a) they believe the documents do not fall within the scope of Plaintiff’s document request, and (b) the requested documents are not discoverable. (*See* Marinello letter to Carroll dated June 12, 2009, attached hereto as Exhibit 2.)

6. On June 15, 2009, Plaintiff sent Defendants a letter arguing that the documents relating to the preparation of the affidavits attached to Defendants’ motion for summary judgment are within the scope of his document request and that any privileges otherwise applicable to those documents were waived when Defendants submitted and relied upon the affidavits. (*See* Carroll letter to Novack, Marinello and Ciszewski dated June 15, 2009, attached hereto as Exhibit 3.)

7. Defendants responded on June 19, 2009. They argue that they are not required to produce the requested documents because: (a) the request is untimely because the requested documents are not responsive to Plaintiff’s discovery request, and (b) Defendants have not waived the work product protection applicable to the documents. (*See* Novack letter to Carroll dated June 19, 2009, attached hereto as Ex.4.)

8. After receiving Defendants’ June 19 letter, Plaintiff’s counsel called Defendants’ counsel to discuss this discovery issue. Despite their good faith attempts, the parties were not

able to reach an agreement on whether Defendants are required to produce the requested documents.

ARGUMENT

9. Defendants admit that they believe the affidavits identified on their privilege logs support their unclean hands defense. (Exhibit 1.) Defendants also admit that the affidavits attached to their summary judgment brief are the same affidavits that are identified on their privilege logs. *Id.*

10. Because Defendants have asserted that the final affidavits support their unclean hands defense, the documents used in preparation of the affidavits, such as drafts and communications with the affiants, are also within the scope of Plaintiff's document request and should be produced.

11. Plaintiff's request is limited and simple. He is only requesting the production of documents that relate to the preparation of the affidavits that were previously withheld on the basis of a privilege and that are now attached to Defendants' motion for summary judgment (and thus no longer privileged). This request is not burdensome or onerous. Moreover, although Plaintiff is requesting a 14 day extension for the filing of his summary judgment Response, that request is based on more reasons than just this discovery request. (*See* Pl. Unopposed Mot. for Ext. of Time to File Resp. to Defs. Mot for Summary Judgment.) Thus, compelling Defendants to produce the requested documents will not unreasonably delay this proceeding. Accordingly, Defendants should be compelled to produce the requested documents.

12. In addition to their timing argument, Defendants argue that the draft affidavits are work product and that Defendants have not waived the work product protection afforded those documents. As this Court is aware, one of the parties' primary discovery disputes in this matter

has been how the “at issue” waiver doctrine is applied. In its Order adopting Magistrate Denlow’s alternative ruling on that issue, this Court cited several cases for the rule that at issue waiver occurs when the privilege holder uses privileged documents to defend itself or attack its opponent. (*See* Order dated 2/20/09 at pg. 2.) As this Court stated, “[a]pplying this rule effectively prevents parties from selectively disclosing privileged documents that are to their benefit while concealing detrimental documents.” (*Id.*)

13. Here, Defendants are seeking to use specific, privileged communications as both a sword and a shield. In that regard, Defendants are voluntarily waiving the work product protection that they previously asserted as to the affidavits attached to their motion for summary judgment in order to use those affidavits to support their defense (the sword), but then they are also asserting the work product doctrine as to documents relating to the preparation of the affidavits, such as drafts, to prevent Plaintiff from discovering facts about the affidavits, such as what information was provided to the affiants before they signed the affidavits, what thoughts the affiants had regarding the affidavits and what changes were made to the affidavits (the shield). This is exactly the type of conduct that the “at issue” waiver rule is intended to prevent.

WHEREFORE, for all of the foregoing reasons, Plaintiff respectfully requests that this Court enter an Order compelling Defendants to produce all documents relating to the preparation of the affidavits attached to their motion for summary judgment, including but not limited to drafts of those affidavits and correspondence with the affiants.

Dated: June 19, 2009

Respectfully submitted,
DAVID GROCHOCINSKI, not individually, but
solely as the trustee in bankruptcy, for THE
ESTATE OF CMGT, INC.,

By: _____ /s/ Edward T. Joyce
Plaintiff's attorneys

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