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' RESPONSE TO PLAINTIFF'S MOTION TO COMPEL

Defendants Mayer Brown LLP and Ronald B. Given, by their attorneys, Novack and Macey LLP, hereby respond to Plaintiff's Motion to Compel (the "Motion to Compel"). For the reasons set forth below, the Motion to Compel should be denied.

BACKGROUND

A. The Procedure for the "Unclean Hands Defenses"

On October 30, 2007 -- after expressly finding that Defendants' defenses based on fraud on the court, unclean hands and absurd result (collectively, the "Unclean Hands Defenses") were "extremely persuasive" -- the Court bifurcated this case. In particular, the Court decided that the case should first proceed on the Unclean Hands Defenses, and ordered discovery with respect thereto. Thereafter, the parties engaged in discovery on the Unclean Hands Defenses during an 18-month period -- from October 30, 2007 to May 1, 2009. The Court also set a briefing schedule pursuant to which Defendants' motion for summary judgment was due on or before

June 1, 2009; Plaintiff's response is presently due on June 29, 2009 and Defendants' reply is presently due on July 20, 2009.

B. Plaintiff's Document Request

On January 7, 2008, Plaintiff served Defendants with a document request that contained a single request for documents that read as follows:

> All documents that you contend support your "unjust result," "unclean hands," and/or "fraud on the court" defense(s). For purposes of this request, the definition of your "unjust result," "unclean hands,"and "fraud on the court" defense(s) shall be that which you describe in your response to Plaintiff's Interrogatory Number 1. (Emphasis added.)

This request was expressly limited to documents that "[Defendants] contend support" their Unclean Hands Defenses.

C. The Subject Affidavits

On February 27, 2008, Defendants timely served their response to Plaintiff's document request. By that time, Defendants had obtained signed affidavits from Louis Franco, Wayne Baliga and Kimberly Quarles. Defendants contend that these affidavits support their Unclean Hands Defenses, so they disclosed the existence thereof. As the Motion to Compel admits (at ¶2), because the affidavits had not yet been filed, Defendants properly listed them on their privilege log ("Privilege Log") as work product.

In or around March, 2009, Defendants obtained the signed affidavit of James Wong, which Defendants also contend supports their Unclean Hands Defenses. Accordingly, on March 10, 2009, Defendants amended their Privilege Log to disclose the existence of the Wong affidavit which, like the other affidavits, was properly not produced because it was then Defendants' work product. (Motion to Compel, ¶2.)

Even though the existence of three of these affidavits was disclosed to Plaintiff more than 14 months before the close of discovery (and the fourth was disclosed about two months before discovery closed), at no time did Plaintiff seek any written discovery from the four affiants directly, nor did Plaintiff ever seek or take any of their depositions.

D. Discovery Closes And Defendants File Their Motion For Summary Judgment

On May 1, 2009, the time for discovery on the Unclean Hands Defenses expired. Plaintiff did not ask for an extension of the discovery period. On May 29, 2009, Defendants timely filed their Motion for Partial Summary Judgment on Their Unclean Hands Defenses (the "SJ Motion"), supported by, among other things, the aforementioned affidavits of Franco, Baliga, Quarles and Wong (the "Affidavits").

E. The Motion to Compel

Now, after the close of discovery and after receiving the SJ Motion, Plaintiff has filed his Motion to Compel seeking to obtain drafts of the Affidavits as well as any communications counsel had with the affiants.

ARGUMENT

The Motion to Compel completely overlooks the fact that Plaintiff never requested the documents that Plaintiff now seeks, and that it is too late to request such documents because discovery is closed. The Motion also fails to get around the fact that the documents it seeks are privileged work product. Although the Motion to Compel does not make it clear, it appears to rely on three incorrect arguments: (1) that the draft affidavits allegedly lost their work-product privilege once Defendants filed the final versions thereof; (2) that the draft affidavits allegedly lost their work-product privilege to any extent they were submitted to the affiants; and/or (3) that under the "at issue" doctrine, Defendants somehow waived the work-product privilege applicable

to the drafts once Defendants submitted the final versions. No case law is cited to support any of these arguments, and none of them has any merit. Accordingly, as will now be shown, the Motion to Compel should be denied.

1. Plaintiff Never Requested The Documents That He Has Moved to Compel

The Motion to Compel seeks two types of documents: (a) drafts of the Affidavits; and (b) counsel's communications with the four individuals who signed the Affidavits. Plaintiff did not request either category prior to the close of discovery, and it is now too late for him to do so.

As shown above, Plaintiff served only a single document request. That document request was limited to "All Documents [Defendants] contend support [their Unclean Hands Defenses.]" Yet, Defendants never have contended that any draft affidavits support their SJ Motion, nor could they credibly do so. Draft affidavits are not evidence; they are nothing more than an attorney's effort to put on paper the statements to which he or she believes the witness may be able to testify. Such drafts have no evidentiary force and, if submitted in support of a motion for summary judgment, would be stricken. Plaintiff's document request cannot reasonably be interpreted to include a request for draft affidavits.

Plaintiff's request for documents that support the Unclean Hands Defenses also cannot reasonably be interpreted to ask for communications with the affiants. Like the drafts, Defendants have never contended that such communications support their Unclean Hands Defenses, nor could they credibly do so.

* * *

Even if the draft affidavits and any other communications with the affiants could somehow be deemed to come within the scope of Plaintiff's document request (they cannot),

those documents are privileged work product and, thus, not subject to production. As will now be shown, each of Plaintiff's three arguments to the contrary fails.

2. Draft Affidavits Do Not Lose Their Work-Product Protection Simply Because Final Versions Thereof Are Filed

Draft papers that an attorney is preparing for use in a lawsuit are protected as work product. E.g. Bartlett v. State Farm Mut. Auto. Ins. Co., 206 F.R.D. 623, 629 & n.2 (S.D. Ind. 2002) (draft response to interrogatories protected by work-product doctrine). Plaintiff seems to argue that such drafts suddenly lose their work-product status when the final versions are filed with the court. Plaintiff cites no case law to support this strange and illogical contention, and there is none. If Plaintiff were correct, every draft of pleadings and briefs would become fair game for discovery by a party's adversary -- including all arguments and strategies the attorney developed and considered but did not use in the papers that were filed -- even if the attorney intended to use those strategies or arguments later. We all know that is not the law.

The rule is no different for drafts of affidavits. They, too, are protected work product. E.g. United States v. Univ. Hosp., No. 1:05-cv-445, 2007 WL 1665748, at *1 & n.1 (S.D. Ohio June 6, 2007); Ideal Elec. Co. v. Flowserve Corp., 230 F.R.D. 603, 608 (D. Nev. 2005); McPeek v. Ashcroft, 202 F.R.D. 332, 339 (D.D.C. 2001). Most relevant here, drafts of affidavits do not lose their protected status upon the filing of the final, signed version thereof. Randleman v. Fidelity Nat. Title Ins. Co., 251 F.R.D. 281, 285-86 (N.D. Ohio 2008); Univ. Hosp., 2007 WL 1665748, at *1; Ideal Elec., 230 F.R.D. at 609-10.

For example, in Ideal Electric, the plaintiff sought drafts of a signed affidavit attached to the defendant's response to the plaintiff's summary judgment motion. The court refused to compel production of the drafts, holding, among other things, that drafts of the affidavit constituted opinion work product, and thus were not discoverable. The court explained that

"[d]rafts often contain attorney's and client's mental impressions, strategies, and either solicit or provide legal advice." Ideal Elec., 230 F.R.D. at 609. Indeed, as Randleman observed:

> [The defendant] argues that the draft affidavits (because penned by attorneys) and counsel correspondence about the draft affidavits are opinion work product. I agree with the proposition that disclosure of the drafts could reveal the attorneys' thought processes about the case. Whatever an attorney writes at the outset will reflect his approach to whatever issues that affidavit is to speak to. Such disclosure could be particularly revealing, and thus deleterious, where the affiant rejects various aspects of drafts, as plaintiffs claim may have happened here. 251 F.R.D. at 287 (emphasis added).

3. Draft Affidavits Do Not Lose Their Work-Product Status Just Because They Are Submitted To The Potential Affiant

Drafts of affidavits do not lose their work-product status when the attorney submits the drafts to potential affiants. For example, in holding that any documents relating to the creation of an affidavit were subject to work-product protection, the University Hospital court explained that it was:

> not aware of any case in which a court has permitted opposing counsel to question a witness about any role that counsel may have had in the evolution of an affidavit, about any communications with counsel relating to an affidavit, or about prior undisclosed drafts of an affidavit.

2007 WL 1665748, at *1. Defendants' research has not revealed any such case either. On the contrary, authority "uniformly and unequivocally" holds that the opposing party may not obtain such documents. Id.; see also Randleman, 251 F.R.D. at 283, 287. This is the case whether or not the affiant is a party or a third-party witness. Id.

Unlike the attorney-client privilege -- which may be waived when shared with third parties -- the work-product privilege is not waived if the third party with whom it is shared is not adverse. Grochocinski v. Mayer Brown Rowe & Maw LLP, 251 F.R.D. 316, 329 (N.D. Ill. 2008) (waiver depends on "whether the information is disclosed to an adversary") (emphasis

added); Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc., 237 F.R.D. 176, 183 (N.D. Ill. 2006) (same); Ideal Elec., 230 F.R.D. at 609. Here, the Affidavits were all obtained from cooperative witnesses who testified to facts undermining Plaintiff's case. Plaintiff cannot seriously dispute this legal point. After all, Plaintiff took exactly the same legal position when he refused to produce his communications with Spehar. Indeed, inasmuch as this Court affirmed Magistrate Judge Denlow's holding that Plaintiff did not waive the work-product privilege by sharing such material with Spehar, a non-adverse witness, Plaintiff is in no position to argue the contrary now.

4. The "At Issue" Doctrine Has No Application Here

The "at issue" exception to privilege applies only where a party relies on privileged material, but seeks to shield that privileged material from discovery. E.g. Trustmark Ins. Co. v. Gen. & Cologne Life Re of Am., No. 00 C 1926, 2000 WL 1898518, at *7 (N.D. Ill. Dec. 20, 2000) ("a party must affirmatively try to use the privileged communication to defend itself or attack its opponent in the lawsuit before the 'at issue' waiver may apply"). That exception has no application here.

The fact is that Defendants do not rely on the documents they seek to keep privileged -- the drafts of the Affidavits. As already explained, those drafts are simply the work of Defendants' counsel. They are not evidence, and Defendants are not using them as a "sword." Thus, the "at issue" doctrine has no relevance here, and Defendants can continue to properly "shield" the drafts as counsel's work product.

Indeed, the Motion to Compel's correct statement of the at issue doctrine sounds the death knell for Plaintiff's argument: "at issue waiver occurs when the privilege holder uses privileged documents to defend itself or attack its opponent." (Motion to Compel, ¶12.) But,

here, Defendants are not using the privileged draft affidavits to defend themselves or to attack Plaintiff. It would be different if Defendants somehow summarized and cited to draft affidavits in support of their position, but refused to produce those documents. That would be using the drafts as both a sword and a shield. But Defendants have not done that.

At bottom, Plaintiff's "at issue" argument is simply an attempt to raid counsel's files in hopes of finding some inconsistency between the draft and final affidavits. Yet, as the McPeek court held:

> Plaintiff wants to see these documents to probe for inconsistencies in the witnesses' testimony between what they said in the draft and what they said in the final version of their affidavits. But, if the desire to impeach a witness with prior inconsistent statements is a sufficient showing of substantial need, the work product privilege would cease to exist; there is not a lawyer born who would not like to see opposing counsel's files in order to search for inconsistencies in opposing witnesses' potential testimony. 202 F.R.D. at 339 (citation omitted).

CONCLUSION

For the foregoing reasons, the Motion to Compel should be denied, and Defendants should be granted such other and further relief as is appropriate.

Respectfully submitted,

MAYER BROWN LLP and RONALD B. GIVEN, Defendants

By: /s/ Stephen Novack
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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 Motion to Compel 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.
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on this 24th day of June, 2009.

/s/ Stephen Novack