

**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 FOR PROTECTIVE ORDER**

Plaintiff, David Grochocinski, in his capacity as the Chapter 7 trustee for the bankruptcy estate of CMGT, Inc. (“Plaintiff”), moves for a protective order pursuant to Rule 26 of the Federal Rules of Civil Procedure. In support of this motion, Plaintiff states as follows:

**I. BACKGROUND**

**A. Plaintiff (and his attorneys) Investigate Claims on Behalf of the Estate**

1. Plaintiff was appointed trustee of the estate of CMGT after the events that gave rise to this case took place. Thus, Plaintiff does not have first-hand knowledge of the occurrence facts alleged in his complaint.

2. Therefore, before Plaintiff filed the complaint in this matter, he (and his attorneys) conducted an investigation and evaluation of potential claims against Defendants and others. Plaintiff’s pre-lawsuit investigation included conducting legal research, interviewing occurrence witnesses and issuing subpoenas for documents (the subpoenas were issued in the bankruptcy proceeding). For example, Plaintiff (and/or his attorneys) interviewed Gerry Spehar (“Spehar”) and Wayne Baliga (“Baliga”) (an investor in CMGT). Plaintiff’s attorneys also sought to

interview Louis Franco (“Franco”) and James Wong (“Wong”) prior to filing the complaint. Although both Franco and Wong signed tolling agreements, they were unwilling to speak to Plaintiff’s attorneys.

3. The claims filed by Plaintiff, which were initially part of his investigation, relate directly to Spehar and events in which Spehar was involved. Thus, Spehar has first-hand knowledge of most of the occurrence facts alleged in Plaintiff’s complaint. In fact, as is evident from Plaintiff’s complaint, the persons who have the most knowledge concerning Plaintiff’s complaint are Spehar, Franco (CMGT’s president and chief executive officer) and defendant Ronald Given (“Given”).

4. Because Spehar is a key fact witness, Plaintiff’s attorneys asked Spehar questions concerning various factual and legal issues as part of their pre-lawsuit investigation. On more than one occasion, Spehar responded to Plaintiff’s attorneys’ questions in writing. These memorandums were prepared for Plaintiff and/or Plaintiff’s attorneys for the sole purpose of answering Plaintiff’s attorneys’ questions regarding potential claims, which Plaintiff could and should pursue. Spehar’s written responses to Plaintiff’s attorney’s inquiries reveal Plaintiffs’ attorneys’ legal strategies and mental impressions. Moreover, in many instances, Spehar directly quotes Plaintiff’s attorneys’ questions or comments in his memorandums.

5. In addition to preparing memorandums for Plaintiff and/or Plaintiff’s attorneys that reveal Plaintiff’s and/or Plaintiffs’ attorneys mental impressions and legal strategies, Spehar may have come into possession of documents prepared by Plaintiff or Plaintiff’s attorneys that reveal Plaintiff’s or Plaintiff’s attorneys’ legal strategies or mental impressions concerning this case.

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

**B. This Court Orders Limited Discovery on Defendants' "Unclean Hands" Defense.**

7. On October 30, 2007, this Court ordered the parties to engage in limited discovery regarding Defendants' so-called "unclean hands" defense.

8. On November 20, 2007, Defendants issued a third-party subpoena to Spehar. (Defendants did not serve Plaintiff with a copy of their third-party subpoena until November 30, 2007. The response date for the document production aspect of the subpoena is December 5, 2007, but Plaintiff understands that Defendants agreed to extend the response date by two weeks.)

9. Defendants' third-party subpoena includes document requests for:

- a. All documents that Spehar gave to the Trustee (which is defined as including the Trustee's attorneys) prior to the filing of the Complaint;
- b. All documents relating to any investigation or analysis done by, or on behalf of, the Trustee before the Complaint was filed regarding the facts, circumstances, claims or damages alleged in the Complaint;
- c. Any statement given by Spehar regarding CMGT, Spehar, Defendants, or any of the facts, circumstances, claims or damages alleged in the Complaint, and all documents relating thereto; and,
- d. All documents relating to any interview or communications with anyone regarding CMGT, Spehar, Defendants or any of the facts, circumstances, claims or damages alleged in the Complaint.

(A copy of Defendants' subpoena is attached hereto as Exhibit A.)

10. Given the communications that took place between Plaintiff (including Plaintiff's attorneys) and Spehar, it is likely that Spehar has possession of documents that are responsive to

these requests, but that are subject to Plaintiffs' (and Plaintiffs' attorneys') work product privilege.

11. Accordingly, as explained below, Plaintiff respectfully requests that a protective order be entered that grants Plaintiff the right and opportunity to: (a) review all documents to be produced by Spehar before they are produced, (b) create a privilege log for those documents that Plaintiff believes are protected by the work product privilege, and (c) file a motion for protective order with respect to the documents listed in the privilege log before those documents are produced, so that this Court can resolve any disputes about whether the privilege applies to those documents.

## **II. ARGUMENT**

12. The work product doctrine gives qualified protection to documents prepared in anticipation of litigation. *Christman v. Brauvin Realty Advisors, Inc.*, 185 F.R.D. 251, 255 (N.D. Ill. 1999). It is broader in scope than the attorney-client privilege. *Id.*

13. The rationale for protecting work product from discovery is to prevent either party from learning the other party's or counsel's legal strategies and theories. *Id.* The doctrine exists because it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. *Eagle Compressors, Inc. v. HEC Liquidating Corp.*, 206 F.R.D. 474, 478 (N.D. Ill. 2002).

14. In order to come within the qualified protection from discovery created by rule 26(b)(3) a party claiming protection must satisfy three necessary elements. *Caremark, Inc. v. Affiliated Computer Services, Inc.*, 195 F.R.D. 610, 613 (N.D. Ill. 2000). The material must be: (a) documents and tangible things; (b) prepared in anticipation of litigation or for trial; and, (c) by *or for* a party or by *or for* a party's representative (such as a party's attorney). *Id.* Thus, the document in question need not have been prepared by the party or the party's attorney to receive

work product protection, so long as it was prepared *for* the party or the party's attorney in anticipation of litigation. Indeed, "[w]hether a document is protected [by the work-product privilege] depends on the motivation behind its preparation, rather than on the person who prepares it." *Id.* at 615.

15. As explained above, Plaintiff believes (based on knowledge that he has about communications that took place between himself and his attorneys and Spehar) that Spehar is in possession of documents that may be responsive to Defendants' subpoena, but that are protected by the work product privilege. The fact that some of the documents may have been prepared by Spehar *for* Plaintiff or Plaintiff's attorneys in response to questions asked of Spehar does not remove the privilege. F.R.C.P. 26(b)(3); *see also, Caremark, Inc.*, 195 F.R.D. at 615.

16. Likewise, the fact that Spehar may have possession of work product documents prepared by Plaintiff or Plaintiff's attorneys does not constitute a waiver of the work product privilege. *Williams v. Musser*, No. 94 C 4140, 1995 WL 27394, \*2 (N.D. Ill. Jan. 23, 1995). In *Williams*, the court concluded that an investigation report prepared for defendants' attorney was protected by the work product privilege. *Id.* at \* 1-2. The plaintiff in *Williams* argued that the defendant had waived the work product privilege by giving a copy of the report to a non-party. *Id.* at \* 2. Rejecting plaintiff's argument, the court noted the distinction between the attorney-client privilege and the work product privilege:

While the voluntary disclosure to a third party can constitute waiver of the attorney-client privilege, this will not suffice to waive the work product doctrine. The work product doctrine does not exist to protect a confidential relationship, but rather to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of opponents. Accordingly, a disclosure made in the pursuit of trial preparations, and not inconsistent with maintaining secrecy against opponents, does not constitute a waiver of the work product privilege.

*Id.*; see also, *Bramlette v. Hyundai Motor Co.*, No 91 C 3635, 1993 WL 338980, at \* 3 (N.D.Ill. Sept. 1, 1993) (“While any voluntary disclosure by the holder of the attorney-client privilege is inconsistent with the confidential relationship and thus waives the privilege, it is not inconsistent with work product protection to disclose information in the pursuit of trial preparation, *so long as the information is maintained in secrecy against the opponent.*”) (Emphasis added.)

17. As Defendants have pointed out to this Court, Spehar, as a creditor of the estate of CMGT, has a financial interest in the outcome of this litigation. Thus, Plaintiff’s disclosure of work product material relating to possible claims against Given and MBRM to Spehar was not inconsistent with maintaining secrecy against those defendants. Accordingly, Plaintiff did not waive the work product privilege by giving Spehar documents protected by that privilege.

18. Finally, keeping in mind the relief sought by this motion, Defendants will not suffer any prejudice if this motion is granted. At this time, Plaintiff is simply asking for an opportunity to review Spehar’s documents before they are produced so that Plaintiff can, if necessary, prevent the production of privileged documents and prepare a privilege log for those documents. The issue of whether a particular document is privileged is not before the Court at this time. If the issue of whether a particular document is protected by the work product doctrine does eventually come before this Court, Plaintiff has no objection to the Court conducting an *in camera* inspection of the document(s) in question. Thus, in the interest of protecting Plaintiff’s and Plaintiff’s attorneys legal strategies and mental impressions from disclosure to Defendants and preventing Defendants from gaining an unfair advantage in this litigation, Plaintiff’s motion for protective order should be granted.

**Wherefore**, for all of the foregoing reasons, Plaintiff respectfully requests that the Court enter a protective order granting Plaintiff the right and opportunity to: (a) review all documents

to be produced by Spehar before they are produced, (b) create a privilege log for those documents that Plaintiff believes are protected by the work product privilege, and (c) file a motion for protective order with respect to the documents listed in the privilege log before those documents are produced, so that this Court can resolve any disputes about whether the asserted privilege applies to those documents.

Dated: December 7, 2007

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

BY: /s/ Robert D. Carroll  
Plaintiff's attorneys

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