

Exhibit 1

1
2 UNITED STATES DISTRICT COURT
3 NORTHERN DISTRICT OF ILLINOIS
4 EASTERN DIVISION

5 DAVID GROCHOCINSKI, Case No. 1:06-cv-5486
6 Plaintiff, Chicago, Illinois
7 v. October 30, 2007
Status Hearing
8 MAYER BROWN ROWE & MAW, LLP,
et al.,
9 Defendants.
10 -----

11 TRANSCRIPT OF STATUS HEARING
12 BEFORE THE HONORABLE VIRGINIA M. KENDALL
13 UNITED STATES DISTRICT JUDGE

14 APPEARANCES:

15 For the Plaintiff: Edward T. Joyce & Associates
16 By: Edward T. Joyce, and
17 Robert D. Carroll
11 S. LaSalle St., Ste. 1600
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18 For the Defendants: Novack & Macey
19 By: Stephen Novack, and
20 Steven J. Ciszewski
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21
22 Court Reporter: April M. Metzler, RPR, CRR
23 219 South Dearborn St., Rm. 2318-A
24 Chicago, IL 60604
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25 Proceedings recorded by mechanical stenography;
transcript produced by notereading.

1 (Commenced at 9:13 a.m.)

2 THE CLERK: 06C5486, Grochocinski versus

00:00:03 3 Mayer, Brown, status hearing.

00:00:09 4 MR. NOVACK: Good morning, your Honor.

00:00:10 5 Steve Novack for defendants, N-o-v-a-c-k.

00:00:13 6 THE COURT: Good morning.

00:00:14 7 MR. NOVACK: Good morning.

00:00:14 8 MR. JOYCE: And Ed Joyce, J-o-y-c-e, for the

00:00:17 9 plaintiff.

00:00:18 10 THE COURT: Good morning.

00:00:18 11 MR. CARROLL: Rob Carroll, C-a-r-r-o-l-l.

00:00:22 12 THE COURT: Good morning.

00:00:22 13 All right, gentlemen. I have reviewed this
00:00:24 14 high and low and inside and out, and here's what I'm
00:00:28 15 going to do:

00:00:29 16 I am denying the motion to reconsider,
00:00:32 17 because I still believe that there are many fact
00:00:35 18 disputes that need to be resolved and that it is not a
00:00:39 19 situation where I can dismiss on a motion to dismiss.
00:00:43 20 But let me tell you where I'm coming from as far as how
00:00:47 21 we're going to move forward.

00:00:48 22 I find defendant's position extremely
00:00:50 23 persuasive, and I think the issue of unclean hands, for
00:00:55 24 lack of a better term -- he's used the term repeatedly
00:00:59 25 fraud on the court, I think there might be a few other

00:01:03 1 variations of what that issue is -- but there is a
00:01:06 2 question lurking about why this was handled in the way
00:01:10 3 it was and issues as to the trustee's position in coming
00:01:15 4 forward and being paid by this entity, issues regarding
00:01:20 5 why the trustee didn't go in and move to vacate the
00:01:23 6 dismissal, and I think what we need to do is we need to
00:01:27 7 do discovery solely on that, what I would call, unclean
00:01:32 8 hands issue first, so that I can have facts in front of
00:01:37 9 me and decide whether the case should be dismissed based
00:01:40 10 upon that issue.

00:01:41 11 It's a fact dispute that I'm having the
00:01:44 12 problem with. I think there are disputed issues of fact
00:01:47 13 that I can't get rid of this on a dismissal, but I find
00:01:54 14 your argument extremely persuasive. It is a very unique
00:01:54 15 situation. It's a very odd case.

00:02:03 16 MR. JOYCE: Judge, why is this something
00:02:03 17 that the District Court resolves as opposed to the
00:02:03 18 bankruptcy court? Because in the bankruptcy court it's
00:02:03 19 not the least bit unique. It's a regular -- it happens
00:02:06 20 all the time.

00:02:06 21 THE COURT: I don't think it happens all the
00:02:07 22 time that you have an entity that has a defaulted
00:02:11 23 judgment that has gone in -- you're coming in on a
00:02:15 24 malpractice count. How often have you seen a
00:02:18 25 malpractice claim with the only asset in the estate

00:02:20 1 being the value of the defaulted judgment?

00:02:24 2 MR. JOYCE: I'm focusing on -- the creditors
00:02:26 3 very often fund --

00:02:28 4 THE COURT: Oh, fair enough. That's one
00:02:29 5 issue; that's one issue.

00:02:30 6 MR. JOYCE: Correct.

00:02:31 7 THE COURT: In many. Fair enough. That's
00:02:32 8 one issue in many.

00:02:34 9 But as has been laid out at the motion to
00:02:37 10 reconsider hearing in the motion to dismiss, I think
00:02:40 11 that we need to get to the fact disputes that can aid me
00:02:44 12 in resolving whether it is common, whether it is
00:02:47 13 something that was a normal business strategy. It
00:02:52 14 doesn't sound like it, based upon the unique set of
00:02:56 15 facts here.

00:02:56 16 So I'd like to ask you what you think the
00:02:58 17 discovery would be that would get to the bottom of that
00:03:01 18 issue that we can resolve it first before we go into the
00:03:04 19 malpractice issue? What do you believe would be
00:03:07 20 necessary?

00:03:08 21 MR. NOVACK: I would imagine, your Honor,
00:03:09 22 that there would be discovery taken of the trustee,
00:03:13 23 probably in the form of a deposition of the trustee;
00:03:16 24 probably deposition of Mr. Spehar, who's the principal
00:03:21 25 of the entity that got the default judgment; and

00:03:25 1 probably some depositions of the key shareholder, slash,
00:03:31 2 officers of the debtor.

00:03:33 3 THE COURT: And --

00:03:34 4 MR. NOVACK: And those things would be
00:03:36 5 needed to show --

00:03:37 6 THE COURT: What would the shareholders show
00:03:40 7 you?

00:03:41 8 MR. NOVACK: Well, I think, among other
00:03:42 9 things, the shareholders are going to show that they
00:03:45 10 were not contacted by the trustee to even ask them about
00:03:49 11 the allegations that we think are completely
00:03:53 12 unsupported. They're on information and belief. But
00:03:56 13 the people that had the information about this
00:03:59 14 complaint, I think, will testify that they were never
00:04:02 15 contacted by the trustee, that they don't believe in
00:04:05 16 this complaint, and had they been asked by the trustee
00:04:08 17 they would have so told him.

00:04:09 18 THE COURT: Okay. And what do you think
00:04:10 19 would resolve any fact dispute which would justify the
00:04:13 20 proper procedure of moving forward in the case?

00:04:15 21 MR. JOYCE: Well, I haven't seen your
00:04:17 22 opinion, and I'm concerned that --

00:04:18 23 THE COURT: Well, my opinion -- I don't have
00:04:20 24 a new opinion on the motion to reconsider. You just
00:04:22 25 heard my opinion.

00:04:23 1 MR. JOYCE: Okay; okay.

00:04:24 2 THE COURT: My opinion and order was the one
00:04:25 3 that was issued over a month ago.

00:04:27 4 MR. JOYCE: Okay. Here's my concern: My
00:04:29 5 concern is that when you give Mr. Novack a limited bite,
00:04:36 6 he's going to get the whole apple. So I'm going to
00:04:41 7 submit for deposition twice --

00:04:41 8 THE COURT: Well, you may be going on merits
00:04:43 9 of discovery. Who said it's going to be a limited bite?

00:04:46 10 What's important here is that if it is an
00:04:49 11 unclean hands situation -- and I'm using that term, I'm
00:04:52 12 not so sure that is the -- I think that's a more
00:04:55 13 appropriate term rather than the fraud on the court that
00:04:58 14 you've used, but that's just my analysis of it.

00:05:01 15 If that's the case, then we're not going to
00:05:03 16 go for full discovery. So it's my coordination of the
00:05:09 17 case, because I find the motion to reconsider very
00:05:13 18 persuasive. But, as I've said, I think there's fact
00:05:17 19 disputes in this case that I can't get to the bottom of.
00:05:19 20 And maybe your fact disputes will show that it needs to
00:05:23 21 go forward for full discovery. And it may be that you
00:05:25 22 will need to have your clients be deposed on other
00:05:28 23 issues other than that later on. But it's my
00:05:31 24 coordination of this issue and this discovery first that
00:05:34 25 I think is the appropriate way to go.

00:05:35 1 MR. JOYCE: So he's then going to be limited
00:05:37 2 to asking questions that would go to the area of unclean
00:05:40 3 hands?

00:05:40 4 THE COURT: That's correct; that's
00:05:41 5 absolutely correct.

00:05:42 6 MR. JOYCE: That's fine.

00:05:43 7 THE COURT: That's right.

00:05:43 8 And I -- how long do you think that would
00:05:45 9 be? 60 days?

00:05:46 10 MR. NOVACK: Judge, I was going to suggest
00:05:48 11 90 only because 60 gets us bumped up against the end of
00:05:51 12 the year and the holidays.

00:05:52 13 THE COURT: Fair enough. 90 days.

00:05:54 14 I am sure you're going to have a dispute as
00:05:56 15 to what is covered, I bet, and you're going to come back
00:05:58 16 to me.

00:05:59 17 MR. JOYCE: It's a bad bet for me.

00:06:00 18 THE COURT: Just -- I can see you and I can
00:06:02 19 see that that's where we're headed. But that's okay. I
00:06:05 20 will be here and I will resolve whether it is limited or
00:06:07 21 not. Rather than sending this off to a magistrate
00:06:10 22 judge, let me resolve it.

00:06:11 23 So 90 days for the limited discovery on
00:06:13 24 unclean hands. And then from the basis of that
00:06:17 25 discovery, you, if you fully believe it's appropriate,

00:06:21 1 can move for summary judgment on that issue alone. And
00:06:24 2 if it is denied, we go forward for the rest of the case.

00:06:27 3 MR. NOVACK: Thank you very much.

00:06:27 4 THE COURT: And that's the way we're going
00:06:28 5 to handle this.

00:06:29 6 MR. JOYCE: Thank you, Judge.

00:06:30 7 THE COURT: Thank you.

8 (Concluded at 9:20 a.m.)

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C E R T I F I C A T E

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17 I certify that the foregoing is a correct transcript
18 from the record of proceedings in the above-entitled
19 matter.

20

21

22 _____
April M. Metzler, RPR, CRR

Date

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24

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Exhibit 2

**UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 3.0
Eastern Division**

David Grochocinski

Plaintiff,

v.

Case No.: 1:06-cv-05486

Honorable Virginia M. Kendall

Mayer Brown Rowe & Maw LLP, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Tuesday, October 30, 2007:

MINUTE entry before Judge Virginia M. Kendall :Status hearing held. For the reasons stated on the record in open court, motion for reconsideration [50] is denied. Discovery regarding "unclean hands" ordered closed by 1/28/2008. Any motion for summary judgment shall be filed by 2/28/2008. Responses due by 3/28/2008. Replies due by 4/11/2008. Mailed notice(gmr,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at www.ilnd.uscourts.gov.

Exhibit 3

**UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 3.0
Eastern Division**

David Grochocinski

Plaintiff,

v.

Case No.: 1:06-cv-05486

Honorable Virginia M. Kendall

Mayer Brown Rowe & Maw LLP, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Thursday, December 13, 2007:

MINUTE entry before Judge Virginia M. Kendall : Hearing held re motion for a protective order [72]. Deadline to complete discovery is extended to 03/3/08. Case is referred to Magistrate Judge Denlow for issues relating to discovery on this motion. Parties are to produce a privilege log to Judge Denlow no later than 3/10/08. Case set for Further Status hearing before Judge Kendall on 3/19/2008 at 09:00 AM. Mailed notice. (kw,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at www.ilnd.uscourts.gov.

Exhibit 4

**UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 3.0
Eastern Division**

David Grochocinski

Plaintiff,

v.

Case No.: 1:06-cv-05486

Honorable Virginia M. Kendall

Mayer Brown Rowe & Maw LLP, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Monday, December 17, 2007:

MINUTE entry before Judge Virginia M. Kendall : To clarify minute entry #[76] from the hearing regarding Plaintiff's motion for a protective order, the expedited referral to Magistrate Judge Denlow for all discovery [77] includes a referral to Magistrate Judge Denlow for determination of Plaintiff's Motion for a protective order [72]. Mailed notice. (kw,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at www.ilnd.uscourts.gov.

Exhibit 5

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID GROCHOCINSKI, Case No. 1:06-cv-5486
Plaintiff, Chicago, Illinois
December 13, 2007
v. Motion Hearing
MAYER BROWN ROWE & MAW, LLP,
et al.,
Defendants.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE VIRGINIA M. KENDALL
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Edward T. Joyce & Associates
By: Arthur W. Aufmann, and
Robert D. Carroll
11 S. LaSalle St., Ste. 1600
Chicago, IL 60603
(312) 641-2600

For the Defendants: Novack & Macey
By: Stephen Novack, and
Steven J. Ciszewski
100 N. Riverside Plaza, Ste. 1500
Chicago, IL 60606
(312) 419-6900

Court Reporter: April M. Metzler, RPR, CRR
219 South Dearborn St., Rm. 2318-A
Chicago, IL 60604
(312) 408-5154

Proceedings recorded by mechanical stenography;
transcript produced by notereading.

1 (Commenced at 10:06 a.m.)

2 THE CLERK: 06-5486, Grochocinski versus
00:00:04 3 Mayer, Brown.

00:00:08 4 MR. NOVACK: Good morning, your Honor.
00:00:09 5 Steve Novack, N-o-v-a-c-k, on behalf of defendants.

00:00:13 6 THE COURT: Good morning.

00:00:13 7 MR. CISZEWSKI: Good morning, your Honor.
00:00:14 8 Steven Ciszewski, C-i-s-z-e-w-s-k-i, also for the
00:00:19 9 defendants.

00:00:19 10 THE COURT: Good morning.

00:00:19 11 MR. AUFMANN: Good morning, your Honor.
00:00:20 12 Arthur Aufmann and Robert Carroll on behalf of the
00:00:22 13 plaintiff.

00:00:23 14 THE COURT: Good morning.

00:00:24 15 Do you object to the plaintiff's motion for
00:00:26 16 protective order?

00:00:29 17 MR. NOVACK: We do, your Honor. And the
00:00:32 18 reason why we did -- why we made our objection, we have
00:00:35 19 a short fuse on this discovery period. You only gave us
00:00:39 20 until the end of January --

00:00:40 21 THE COURT: That's right.

00:00:41 22 MR. NOVACK: -- to complete discovery. And
00:00:44 23 both the trustee and Mr. Spehar's counsel asked us for
00:00:48 24 extensions of time to respond to our discovery and to
00:00:51 25 extend the deposition dates --

00:00:52 1 THE COURT: Oh, I thought I'm looking at a
00:00:54 2 motion for protective order. Isn't that what I'm
00:00:57 3 looking for? Isn't that what I have up for today?

00:01:00 4 MR. AUFMANN: Correct.

00:01:01 5 THE COURT: All right. It's not a motion to
00:01:03 6 extend time.

00:01:05 7 MR. NOVACK: It is not, but it will have
00:01:06 8 that effect, and that's what I'm saying.

00:01:08 9 THE COURT: Oh, okay. Go ahead.

00:01:09 10 MR. NOVACK: When both those parties asked
00:01:11 11 us for extensions -- and we accommodated them,
00:01:14 12 absolutely accommodated them -- nobody suggested to us
00:01:17 13 that there was going to be another motion, which nobody
00:01:20 14 ever told us about, asking for an interim period whereby
00:01:25 15 Mr. Spehar would produce his documents first to the
00:01:28 16 trustee, the trustee would take a period to do
00:01:31 17 something, and then there would be an intervening motion
00:01:36 18 for -- possibly an intervening motion for work-product
00:01:40 19 privilege claims. So faced with all of that and our
00:01:45 20 impending January 28 cutoff, we objected.

00:01:48 21 And as we were looking at the situation, it
00:01:51 22 occurred to us that without getting into all of the
00:01:54 23 issues of waiver and all the issues of whether this is
00:01:58 24 work product or not, all of which we're reserving, one
00:02:01 25 overarching observation came to us, which is they have

00:02:06 1 put into issue --

00:02:07 2 THE COURT: Right.

00:02:07 3 MR. NOVACK: -- at issue a waiver doctrine
00:02:11 4 we think trumps any possible work-product privilege
00:02:16 5 assertion. And we thought why don't we just shortcut
00:02:19 6 it, and so we responded the way we responded.

00:02:22 7 THE COURT: Okay. Counsel?

00:02:24 8 MR. AUFMANN: Judge, in terms of the at
00:02:27 9 issue waiver argument that the defendants have raised,
00:02:32 10 they've filed their response two days ago. We filed a
00:02:35 11 reply as quickly as we could in order to address that
00:02:38 12 issue --

00:02:38 13 THE COURT: Is there a reply?

00:02:40 14 MR. AUFMANN: It was filed yesterday.

00:02:41 15 THE COURT: Oh, I don't have that.

00:02:42 16 MR. CARROLL: It should have -- I apologize
00:02:44 17 if you didn't get it. I did instruct somebody to
00:02:47 18 deliver it to your chambers.

00:02:48 19 THE COURT: Oh, okay. I don't have that.
00:02:50 20 Well, why don't you go pull it off.

00:03:02 21 Okay. Go ahead.

00:03:02 22 MR. AUFMANN: In any event, I don't think
00:03:04 23 the at issue waiver doctrine applies whatsoever here.

00:03:09 24 More to the point, the procedure that we're
00:03:12 25 suggesting, I believe, is entirely reasonable. No one

00:03:15 1 has challenged the fairness or the reasonableness of the
00:03:18 2 procedure we're suggesting. The only issue counsel is
00:03:21 3 really raising is that if this procedure's put into
00:03:25 4 place, it could make it difficult to comply with the
00:03:28 5 Court's discovery cutoff of January 28th. He might be
00:03:33 6 right about that. I don't know what your Honor's
00:03:35 7 feeling is about potentially extending that date. We
00:03:38 8 would certainly have -- since we're the ones who are
00:03:41 9 proposing this procedure -- even though we think it's
00:03:44 10 entirely fair since we are the ones who are proposing
00:03:47 11 this procedure -- we would have no objection to
00:03:49 12 extending that date, that January 28th date, so that
00:03:52 13 this procedure could be engaged in and --

00:03:55 14 THE COURT: Well --

00:03:56 15 MR. AUFMANN: To me, that's the issue that's
00:03:58 16 in front of your Honor.

00:03:59 17 THE COURT: I'm not sure. They're getting
00:04:01 18 me the reply.

00:04:01 19 But I don't understand why the at issue
00:04:04 20 response isn't something that -- you've put this into
00:04:08 21 play filing this lawsuit. We need to address whether or
00:04:12 22 not this is going to be a situation of unclean hands or
00:04:16 23 not.

00:04:17 24 MR. AUFMANN: It's really -- it's really two
00:04:20 25 points, your Honor.

00:04:22 1 THE COURT: Okay.

00:04:23 2 MR. AUFMANN: We have a definite
00:04:24 3 understanding of what your Honor was talking about when
00:04:28 4 you allowed discovery to go forward on the unclean hands
00:04:31 5 issue. We think it was a narrow issue directed to the
00:04:38 6 trustee's decision not to file a motion in California to
00:04:42 7 try and vacate the default judgment. Okay?

00:04:45 8 THE COURT: Well, it may not be. Unclean
00:04:47 9 hands could cover your behavior throughout the whole
00:04:50 10 period of time. It's really getting to the issue as to
00:04:53 11 what was the motivation for the filing of the lawsuit,
00:04:56 12 whether the -- I mean, all of the steps leading up to
00:04:59 13 the failure to move to dismiss this suit could
00:05:03 14 potentially show intent or a pattern of behavior or some
00:05:09 15 theory by the defendants as to why this would be unclean
00:05:12 16 hands.

00:05:12 17 MR. AUFMANN: Right. And one of the things
00:05:13 18 we've tried to address in our reply is that this whole
00:05:16 19 premise that started this unclean hands argument about,
00:05:21 20 Oh, the trustee could have just gone into California and
00:05:23 21 gotten this default vacated, that whole premise is
00:05:27 22 wrong.

00:05:28 23 THE COURT: Well, fine. Fair enough.
00:05:30 24 That's why we're doing this. But it doesn't look like
00:05:32 25 it may be wrong, otherwise I wouldn't have permitted

00:05:35 1 this particular path of discovery to go first, so that
00:05:39 2 we could address why this is set forth in the odd way
00:05:44 3 that it's set forth.

00:05:45 4 MR. AUFMANN: Understood.

00:05:46 5 But one of the things we've done in our
00:05:48 6 reply -- whereas their arguments to you earlier about
00:05:51 7 how easy this would have been to vacate this default did
00:05:54 8 not cite California law, we provided the cite to the
00:05:57 9 statute and the requirements that must be met. And I
00:06:02 10 believe we've demonstrated already that those
00:06:04 11 requirements could not have been met.

00:06:06 12 THE COURT: Meaning what, in discovery, is
00:06:08 13 that what you're saying, or ...

00:06:09 14 MR. AUFMANN: No, in our reply --

00:06:10 15 THE COURT: In the reply that I don't have
00:06:12 16 here? Is that it?

00:06:14 17 MR. AUFMANN: Right.

00:06:14 18 THE COURT: Okay. But, of course --

00:06:21 19 MR. AUFMANN: I'm not saying --

00:06:22 20 THE COURT: -- whether that may be the end
00:06:25 21 result of our first issue really shouldn't be the
00:06:29 22 response as to today's issue, which is you want a
00:06:33 23 protective order and whether or not that protective
00:06:38 24 order can be put into play, whether we adopt the
00:06:41 25 procedure that would delay discovery.

00:06:44 1 MR. AUFMANN: Right. The argument they made
00:06:45 2 about at issue is, Judge, we never need to address any
00:06:49 3 issues of work-product privilege because -- simply
00:06:52 4 because my client in response to an accusation that
00:06:56 5 says, You filed this lawsuit in bad faith, said, No, I
00:06:59 6 didn't file it in bad faith, I filed it in good faith,
00:07:02 7 that does not put at issue any work-product privilege
00:07:09 8 documents.

00:07:09 9 In order to put -- in order to invoke the at
00:07:11 10 issue doctrine, there must be both a claim asserted and
00:07:16 11 reliance on specific defined identifiable privileged
00:07:23 12 material. For example, in the case that they're relying
00:07:26 13 on, you're talking about a situation where the plaintiff
00:07:28 14 said, I did not blow the statute of limitations because
00:07:32 15 my lawyer told me that I first had a claim on
00:07:36 16 such-and-such a date and the discovery rule applies
00:07:39 17 here, and, therefore, the time for my claim to run
00:07:43 18 didn't start running until my lawyer told me. He has
00:07:46 19 not put into issue a specific communication with his
00:07:49 20 lawyer and, thus, cannot sit back and say, No, you can't
00:07:52 21 see that communication with my lawyer, it's privileged.
00:07:55 22 It's the old you can't have your cake and eat it too.

00:07:58 23 The trustee has not done anything like that
00:08:00 24 here. The trustee has not either in support of a claim
00:08:04 25 he's asserting or in defense of something that they're

00:08:06 1 asserting said, No, what I did was justified because I'm
00:08:10 2 relying on a specific piece of work product material.
00:08:15 3 If he had made a specific reference like that and relied
00:08:18 4 on a specific piece of work product material, he
00:08:21 5 couldn't then say, Okay, I'm relying on that, but you
00:08:24 6 can't see it. That's what the at issue waiver doctrine
00:08:27 7 is all about, and that hasn't happened here.

00:08:29 8 All that happened here is they accused my
00:08:32 9 guy of bad faith. We came in on his behalf and said,
00:08:35 10 That's ridiculous, there's no evidence of bad faith. In
00:08:38 11 fact, everything that's been done here is in good faith.
00:08:41 12 And they want to take the position now that because they
00:08:44 13 made a baseless accusation against him and he denied it
00:08:47 14 that suddenly all of his attorney work product is --
00:08:50 15 there's just been a complete blanket waiver? This is
00:08:53 16 not at all the way the at issue doctrine works --

00:08:56 17 THE COURT: Okay. And, again, you need to
00:08:57 18 get off the baseless accusation, otherwise I wouldn't
00:09:00 19 have ordered the discovery.

00:09:01 20 A response?

00:09:02 21 MR. NOVACK: Let me say two things Judge,
00:09:04 22 and who knows maybe it'll become three things, but two
00:09:08 23 things at the outset.

00:09:09 24 No. 1, this was said in their reply brief --

00:09:13 25 THE COURT: I am going to take a few minutes

00:09:15 1 and read the reply brief, but, go ahead and argue it --

00:09:18 2 MR. NOVACK: -- one thing to you before you

00:09:20 3 do.

00:09:21 4 They make a very bold statement in there

00:09:23 5 that in a work product privilege situation there are two

00:09:25 6 requisite elements to raise the at issue waiver. One,

00:09:30 7 that a defense was raised that implicates it.

00:09:32 8 THE COURT: Right.

00:09:33 9 MR. NOVACK: And, two -- and this is what

00:09:34 10 they add, it's beyond the elements that we've put in our

00:09:37 11 case law -- that there must be a specific reference to

00:09:40 12 specific documents by the party claiming the

00:09:43 13 work-product privilege. They cite only two cases for

00:09:46 14 that, both by Magistrate Judge Schenkier, the Beneficial

00:09:50 15 Franchise case and the Quality Croutons case. Both of

00:09:53 16 those cases dealt with the attorney-client privilege,

00:09:57 17 not with the work product privilege.

00:09:58 18 We know that those privileges are different.

00:10:01 19 They're governed by separate standards. Attorney-client

00:10:05 20 privilege is governed by this law of the state of the

00:10:08 21 forum. The work product is federal law.

00:10:11 22 Judge Denlow's decision in Eagle which is

00:10:14 23 cited in -- I can't remember if we cited it or they

00:10:19 24 cited it, frankly --

00:10:19 25 THE COURT: Okay.

00:10:20 1 MR. NOVACK: -- in the earlier briefs points
00:10:21 2 out that the standards governing attorney-client
00:10:24 3 privilege and work-product privilege are different.

00:10:27 4 So the second element, well, it may well
00:10:29 5 apply to an attorney-client privilege. It has nothing
00:10:32 6 whatsoever to do with work-product privilege.

00:10:35 7 Secondly, the notion that they didn't raise
00:10:39 8 their good faith as a defense, Judge, I would say to you
00:10:43 9 that from cradle to grave they raised it every step of
00:10:48 10 the way. In response to the motion to dismiss they
00:10:51 11 said -- and they convinced your Honor, because you
00:10:53 12 denied our motion to dismiss, that we failed to present
00:10:57 13 evidence that plaintiff acted fraudulently or in bad
00:11:00 14 faith. Your Honor agreed and said it's not just
00:11:02 15 Spehar's conduct we have to look to; we have to look to
00:11:05 16 the trustee.

00:11:06 17 On reconsideration they said to your Honor
00:11:08 18 that if they filed the case with a good-faith belief
00:11:12 19 that the malpractice claims were meritorious, then the
00:11:14 20 case cannot be a fraud on the Court. They said the
00:11:18 21 critical element to defendants' fraud theory -- they're
00:11:23 22 interpreting our theory -- is not whether Spehar has a
00:11:27 23 financial interest in the case. According to the
00:11:28 24 plaintiff, it is whether the trustee knowingly filed
00:11:31 25 meritless or untrue claims. That's what we're trying to

00:11:34 1 get at.

00:11:34 2 And when your Honor made your bifurcation
00:11:37 3 ruling and granted us the discovery and you asked me
00:11:40 4 what I was going to do, and I said, Well, we'll take the
00:11:43 5 trustee's deposition, which we've noticed, we'll take
00:11:47 6 Spehar's deposition, which we've noticed, and I said we
00:11:49 7 may need discovery from the former shareholders and
00:11:52 8 officers. And your Honor said, Well, why do you need
00:11:54 9 that?

00:11:54 10 I said, Because they are -- We believe they
00:11:57 11 will testify that they were never -- this is from the
00:11:59 12 transcript, I'm quoting. I said this: That we believe
00:12:02 13 that they will testify that they were never contacted by
00:12:05 14 the trustee before he filed the complaint, that they
00:12:08 15 don't believe in this complaint, and had they been asked
00:12:11 16 by the trustee they would have told him so.

00:12:13 17 Your Honor's response was, Okay. And there
00:12:16 18 was no objection. Mr. Aufmann wasn't here; Mr. Joyce
00:12:20 19 was. There was no objection to that. It was clear to
00:12:22 20 everybody when your Honor ruled that one of the avenues
00:12:25 21 of discovery was what was the good faith --

00:12:28 22 THE COURT: Okay. I am not going down
00:12:31 23 another motion that wasn't filed. I'm dealing with the
00:12:34 24 protective order, and I'm going to read all of this, and
00:12:36 25 I'll be out in a few minutes. Okay?

00:27:24 1 (Recess taken.)

00:27:24 2 THE COURT: Okay. Gentlemen, I have
00:27:26 3 reviewed all of the papers now, which I'm sorry I didn't
00:27:29 4 have the reply brief in hand. It was filed -- I don't
00:27:34 5 know what time that it came in, but I have read it now,
00:27:37 6 and this is what I'm going to do.

00:27:39 7 It is true that my issue, I think, is
00:27:42 8 broader than the way the plaintiffs have narrowly
00:27:45 9 defined it. That being said, all of these
00:27:48 10 communications are going to start to percolate up as
00:27:51 11 potential privileged disputes. And as such I'm
00:27:55 12 extending this issue of discovery to March 3rd. I am
00:27:59 13 ordering that a privilege log be prepared for any
00:28:03 14 document that you assert privilege on and that that
00:28:06 15 privilege log be prepared and submitted to Judge Denlow,
00:28:11 16 who's going to review it, who is your magistrate judge
00:28:13 17 on this case, by January -- well, let's see.

00:28:19 18 If I give you discovery to March 3rd, I'll
00:28:25 19 have to give you 'til shortly thereafter. It should be
00:28:28 20 something that you're generating as you're doing
00:28:30 21 discovery. So I'm going to require that you give it to
00:28:33 22 Judge Denlow by March 10th, so one week after the close
00:28:37 23 of discovery. I don't think that is too short of a
00:28:40 24 period of time, because as requests are made they can be
00:28:43 25 brought to Judge Denlow's attention.

00:28:44 1 I'm referring any issues regarding the
00:28:48 2 discovery of privilege matters to Judge Denlow. And
00:28:51 3 then I will see you all again on March 19th, so strike
00:28:54 4 any other schedule, except this one, and we'll readdress
00:28:58 5 where we're headed with this issue on the 19th.

00:29:01 6 So move forward with your requests, and if
00:29:03 7 you believe that it's something that's privileged and
00:29:05 8 shouldn't be turned over, you're going to need to
00:29:08 9 address it with Judge Denlow.

00:29:09 10 MR. AUFMANN: Is March 19th a status date?

00:29:11 11 THE COURT: It is for me, not Judge Denlow.
00:29:13 12 And I'm going to give Judge Denlow a call right now and
00:29:17 13 explain the situation so he knows what's coming. Okay?

00:29:19 14 MR. NOVACK: Judge, could I ask one thing --

00:29:21 15 THE COURT: Yes.

00:29:21 16 MR. NOVACK: -- to be included in the order?

00:29:23 17 Because it sounds like what's going to
00:29:25 18 happen is Spehar, instead of producing it to us, it
00:29:27 19 sounds like it's going to be produced to the trustee.
00:29:30 20 And I just wonder if the order could require that Spehar
00:29:34 21 Bates stamp all the documents that it produces to the
00:29:37 22 trustee, keep a copy, so there's never --

00:29:40 23 THE COURT: I think that's a very helpful
00:29:42 24 idea, and that's something I've done in the past when I
00:29:45 25 was litigating and I think that's very helpful.

00:29:47 1 So as you give it to the trustee, it would
00:29:50 2 be Bates stamped so we know exactly what he is
00:29:52 3 reviewing, and then that set goes to the judge and the
00:29:55 4 judge reviews it. You should be fine with that.

00:29:58 5 MR. NOVACK: Well, it's actually --

00:30:00 6 MR. AUFMANN: Thank you.

00:30:00 7 MR. NOVACK: Spehar isn't here today. What
00:30:03 8 they're asking for is that instead of Spehar responding
00:30:06 9 to our subpoena -- I believe this is what they asked
00:30:08 10 for --

00:30:08 11 THE COURT: I know.

00:30:09 12 MR. NOVACK: -- he send it to them.

00:30:11 13 THE COURT: Right.

00:30:11 14 MR. NOVACK: So I'm asking Spehar --

00:30:13 15 THE COURT: Yes, that is fine.

00:30:17 16 MR. CARROLL: We understand. And we'll put
00:30:17 17 the Bates number of the documents being withheld on the
00:30:18 18 basis of privilege on the privilege log.

00:30:21 19 THE COURT: Exactly. That's the way it
00:30:23 20 should be. Okay. Thank you.

00:30:24 21 MR. NOVACK: Thank you, your Honor.

00:30:24 22 THE COURT: Thank you.

23 (Concluded at 10:36 a.m.)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

April M. Metzler, RPR, CRR

Date

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