**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DISTRICT**

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| 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, | ) | Magistrate Judge Morton Denlow |
| Defendants. | ) | |

# PLAINTIFF'S MEMORANDUM IN SUPPORT OF HIS PRIVILEGE LOG ASSERTIONS

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## I. INTRODUCTION

On September 21, 2004, Plaintiff David Grochocinski, in his capacity as the Chapter 7 trustee for the bankruptcy estate of CMGT, Inc. ("Plaintiff"), was appointed the Chapter 7 trustee for the bankruptcy estate of CMGT, Inc. (hereinafter, "Estate" or "CMGT's bankruptcy estate.") After Plaintiff was appointed trustee, he learned that the Estate may have claims against its former attorneys, Defendants here, for legal malpractice. However, because Plaintiff had no involvement with CMGT prior to its bankruptcy, he did not (and does not) have first-hand knowledge of the occurrence facts that were eventually alleged in his complaint against Defendants. 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, speaking with occurrence witnesses and reviewing documents relating to CMGT. Relevant to this motion, Plaintiff (and his attorneys) had discussions with Gerry Spehar ("Spehar") about CMGT and related matters that were eventually alleged in Plaintiff's complaint. As explained in Plaintiff's complaint, Spehar is the principal of Spehar Capital, LLC ("SC"), which CMGT hired pursuant to a written contract to locate and secure sources of financing for CMGT. Plaintiff's claims relate directly to SC and events in which SC was involved. Thus, Spehar has first-hand knowledge of most of the occurrence facts alleged in Plaintiff's complaint. Because Spehar is a key fact witness and a creditor of the Estate, Plaintiff's attorneys spoke with Spehar as part of their pre-lawsuit investigation. During those discussions, Plaintiff's attorneys raised questions about various factual and legal issues.

On more than one occasion, Spehar responded in writing to Plaintiff's attorneys' questions. These Spehar memoranda were prepared for Plaintiff and/or Plaintiff's attorneys for

the purpose of answering Plaintiff's attorneys' questions regarding the Estate's potential claims. Predictably, these Spehar memoranda contain his summaries/descriptions of Plaintiff's and Plaintiff's attorneys' mental impressions, legal theories and legal strategies. Similarly, Spehar's summaries/descriptions of Plaintiffs' counsel's work product, and Spehar's own thoughts about questions/issues raised by Plaintiff's attorneys are contained in other documents such as letters and e-mails. Additionally, Plaintiff's attorneys prepared memoranda, hand written notes and correspondence (such as emails, letters and faxes) as part of their pre-lawsuit investigation and analysis of Plaintiff's claims. Most of the documents listed on Plaintiffs' privilege logs are the above described memoranda, notes and correspondence. For the reasons set forth below, Plaintiff respectfully requests that this Court sustain Plaintiff's attorney-client privilege and work product assertions set forth in his privilege logs.

## II. RELEVANT BACKGROUND

### A. Plaintiff Files His Two-Count Complaint

On August 23, 2006, Plaintiff filed a 25 page complaint containing 77 allegations against Defendants. Plaintiff attached 17 exhibits to his complaint in support of his allegations. In summary, Count I of Plaintiff's complaint alleges that:

(a) in August 2003, SC and CMGT became engaged in a dispute over whether SC's contract applied to a financing deal with a CMGT shareholder with whom Spehar had previously had discussions (the "Newco" deal),

(b) upon learning about the SC dispute, Defendants (who were CMGT's attorneys) negligently failed to negotiate a settlement with SC (and failed to advise CMGT to settle with SC) before the dispute escalated into litigation, which CMGT could not afford to be involved in at that time, and

(c) instead, Defendants took a hard-line stance regarding SC's potential claim and invited SC to "bring it on." Count I also alleges that Defendants negligently pushed CMGT to accept the Newco deal over other deals because the Newco deal favored Defendants' interests (i.e., Defendants had a conflict of interest with CMGT).

In summary, Count II of Plaintiff's complaint alleges that:

(a) because of Defendants' negligence as alleged in Count I, the SC dispute evolved into a lawsuit by SC against CMGT (the "Spehar Lawsuit," which SC filed in California) so that SC could (i) obtain injunctive relief to prevent the Newco deal from closing until (ii) the California court ruled on SC's claim that Newco was within the scope of SC's contract and (iii) the court (in the underlying SC litigation) entered an order compelling CMGT to comply with the terms of SC's contract;

(b) upon learning about the Spehar Lawsuit, Defendants negligently advised CMGT to do nothing because Defendants believed that CMGT was not subject to personal jurisdiction in California; and

(c) as a result of Defendants' negligent advice, SC obtained injunctive relief against CMGT and, several months thereafter, a $17 million default judgment.[1]

With respect to proving the "case within the case" element of Count II of Plaintiff's complaint, Plaintiff's position is that if Defendants had defended the Spehar Lawsuit, then (1) SC would not have obtained the injunctive relief it was seeking, regardless of the merit of its claim that the Newco deal was within the scope of its contract because, for example, CMGT could have convinced the California court to condition injunctive relief on SC paying a bond (and SC could not afford such a bond); (2) all of CMGT's assets (but not its debts and liabilities) would have been purchased in the Newco transaction; and (3) SC would not have proceeded with a claim for damages against CMGT after the Newco transaction closed because CMGT would have been an asset-less shell.[2]

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[1] Plaintiff's understanding of SC's theory with respect to injunctive relief in the underlying case is that SC reasonably believed that it would be irreparably harmed if the Newco deal (which was an asset purchase deal) closed before SC's breach of contract claim was resolved because any judgment it would receive against CMGT after it sold its assets to Newco would be uncollectible. Obviously, SC did not want an uncollectible judgment. Therefore, SC was hopeful that CMGT would either settle with SC soon after SC filed its lawsuit or that the Newco deal would close after the court ruled that the Newco deal was within the scope of SC's contract so that SC would be a CMGT shareholder at the time of the Newco deal's closing. When the Newco deal did not close, SC proceeded with a claim for damages against CMGT, but continued to try to negotiate a settlement with CMGT and to find financing because SC realized that it would not collect much (if anything) against CMGT without the Newco deal (or some other deal) closing.

[2] Plaintiff is generally describing his theory for this element because the gist of Defendants' erroneous "fraud" and "unjust result" defenses (which are discussed below) is that Plaintiff must "admit" that SC's underlying claim was "meritless" to win this case. Defendants are wrong.

## B. Defendants Raise Their So-Called "Fraud on the Court" Defense[3]

On November 30, 2006, Defendants moved to dismiss Plaintiff's complaint. Most of Defendants' motion (12 out of 20 pages) was based on Rule 12(b)(6) and argued that Plaintiff failed to establish the elements of a legal malpractice claim for each of the alleged acts of malpractice. (Mot. to Dismiss at pp. 8-20.) Separate from their Rule 12(b)(6) arguments, Defendants also argued (in less than one page) that this case should be dismissed with prejudice as a sanction because it is a purported "fraud on the judicial system."[4] (*Id.* at pg. 7.)

In support of their "fraud" defense, Defendants argued that the purported "fraud" began in California when SC filed the Spehar Lawsuit. (*Id.*) According to Defendants, the Spehar Lawsuit and this lawsuit are part of a fraudulent scheme because: (a) at the time SC filed the Spehar Lawsuit in California, it knew that CMGT could not afford to defend itself, (b) as a creditor of CMGT, SC could receive anywhere from 45% to 54% of any settlement or judgment in this case (pursuant to a "sharing agreement" discussed below) and (c) as a result of its financial interest in this case, SC has "admitted" that its claim in the Spehar Lawsuit was "meritless." (*Id.*) In support of their "fraud" argument, Defendants relied on just two documents: (1) the valid and enforceable default judgment (which has never been collaterally attacked or vacated) that was entered in the Spehar Lawsuit, and (2) an application by Plaintiff that was presented to and approved by the bankruptcy court to enter into a post-petition financing

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[3] In response to a motion for protective order that Plaintiff filed with Judge Kendall before any documents were produced, Defendants argued that Plaintiff waived work product protection for all documents that relate to any investigation or evaluation of this case, including Plaintiff's attorneys' memoranda, notes, etc. (Def. Resp. to Pl. Mot. for Prot. Order at pp. 5-8.) Specifically, Defendants argued that when Plaintiff responded to Defendants "fraud" defense (which is discussed below), Plaintiff put all of those documents "at issue." (*Id.*) Plaintiff reasonably anticipates that Defendants will raise the so-called "at issue" waiver doctrine in response to this motion. For that reason, Plaintiff has included in this motion facts relating to Defendants' ever-changing "fraud" defense, Plaintiff's responses to those arguments and Judge Kendall's ruling regarding the scope of allowable discovery as to the limited issue of "unclean hands."

[4] The title of the heading for that argument was "The Complaint Should be Dismissed as a Fraud on the Judicial System." (Mot. to Dismiss at pg. 7.)

arrangement. (*Id.*) Pursuant to that application, SC agreed to advance up to $18,500 to the Estate and Plaintiff agreed that SC's share of any recovery in this case would be determined according to a sliding scale "sharing agreement," which was attached to the application and also presented to and approved by the bankruptcy court. (*Id.*)

In response to Defendants' "fraud" defense, Plaintiff argued that his complaint and the exhibits attached thereto establish that this case is not a fraud because it states several meritorious claims for legal malpractice. (Resp. at pg. 25.) Plaintiff further argued that Defendants failed to present any evidence that SC's default judgment from California was fraudulently obtained or that Plaintiff has engaged in any fraudulent conduct. (*Id.*) On June 28, 2007, in a 19-page memorandum opinion, Judge Kendall denied the bulk of Defendants' motion to dismiss, including Defendants' request that the complaint be dismissed as a fraud on the judicial system. (A copy of the court's opinion is attached hereto as Exhibit 1.) With respect to Defendants' "fraud" defense, Judge Kendall held that, "[i]t would be inappropriate to levy so harsh a sanction as dismissal upon the Trustee absent clear and convincing evidence that the Trustee – and not just Spehar – orchestrated a fraud on the judicial system. At this point, the only evidence before this Court is a copy of the facially valid default judgment entered by the California Court." (Op. at pg. 7.)

**C. Defendants Change Their "Fraud" Defense and Argue that this Case Should be Dismissed Regardless of Whether a Fraud was Committed in California, Because if Plaintiff Wins, the Result will be "Absurd."**

On July 13, 2007, Defendants filed a motion for reconsideration of the court's denial of their motion to dismiss. In relevant part, Defendants argued that the court "overlooked" the purportedly "critical fact" that SC is the "true party in interest" here because it stands to recover the "lion's share" of any recovery by Plaintiff. (Mot. to Reconsider at pg. 1.) Just as they had

done in their motion to dismiss, Defendants pointed to the default judgment from the Spehar Lawsuit and to Plaintiff's post-petition financing application (approved by the bankruptcy court) in support of their argument that the court should have dismissed Plaintiff's complaint on the basis that SC is the "true party in interest." (*Id.* at pp. 1-2.) Defendants also argued that Plaintiff "deliberately or through inadvertence made no effort to vacate the Default Judgment...instead, [Plaintiff] decided to partner with Spehar to pursue this case." (*Id.* at pg. 2.)

In response to Defendants' motion to reconsider, Plaintiff argued that regardless of whether SC is the "true party in interest" here, the court correctly concluded that Defendants failed to present any evidence that either SC or Plaintiff committed a fraud on the court. (Resp. at pp. 3-9.) In their reply, Defendants then departed from the "fraud" argument they made in their motion to dismiss and argued, for the first time, that this case should be dismissed even absent evidence of fraud because the result will be "absurd" if Plaintiff wins. (Reply at pg. 1.) Defendants argued (incorrectly) that if Plaintiff wins this case, the result will be absurd because: (1) in order to prove Count II of his complaint, Plaintiff must establish that SC's claim that CMGT breached its contract was "meritless," (2) as a result of its "sharing agreement" with Plaintiff, SC will recover 90% (after payment of attorney's fees) of a $17 million judgment in this case and, therefore, (3) SC is the "true party in interest" and, as such, has "admitted" that its claim in the California lawsuit was meritless.[5] (*Id.* at pp. 2-6.)

On October 30, 2007, the court denied Defendants' motion to reconsider, but expressed concern about the fact that Plaintiff had not moved to vacate the default judgment that was entered in the underlying Spehar Lawsuit, SC's involvement in financing the costs of this litigation and Plaintiff's motivation for filing this case. In that regard, when Judge Kendall

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[5] Without citation to any authority, Defendants incorrectly argued that Spehar is the only person with an interest in this case. (*Id.* at pg. 5.)

denied Defendants' motion to reconsider and ordered the parties to engage in limited discovery regarding, what she called the "unclean hands" issue, Judge Kendall stated:

> I find defendant's position extremely persuasive, and I think the issue of unclean hands, for lack of a better term -- [defendants have] used the term repeatedly fraud on the court, I think there might be a few other variations of what that issue is -- but there is a question lurking about why this was handled the way it was and issues as to the trustee's position in coming forward and being paid by this entity, issues regarding why the trustee didn't go in and move to vacate the dismissal, and I think what we need to do is we need to do discovery solely on that, what I would call, unclean hands issue first...

(Ex. 2, Tr. dated 10/30/07 at pp.2-3.)[6]

On November 5, 2007, Defendants served Plaintiff with interrogatories and document requests. 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.) On December 7, 2007, Plaintiff filed a motion for a protective order in which he requested that Spehar and SC be required to produce documents to Plaintiff so that Plaintiff could (1) review those documents to determine whether any of them are privileged, (2) prepare a privilege log for the documents Plaintiff believes to be privileged and (3) file a motion for a protective order with respect to those documents so that the court can resolve any disputes about the privilege assertions. (Pl. Mot. for Prot. Order.) In response, Defendants argued that all documents relating to Plaintiff's (and his attorney's) pre-lawsuit investigation and mental impressions about this case are not privileged because Plaintiff put his state of mind at issue simply by denying Defendants' fraud allegations. (Resp. at pp. 5-8.)

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[6] Plaintiff can easily respond to these concerns. In fact, Plaintiff could not have vacated the default judgment. Under California law, a default judgment can be vacated only under two circumstances: first, if the defaulting party [CMGT] can demonstrate to the court that the judgment was entered as a result of the party's (or the party's attorney's) mistake, inadvertence, surprise, or excusable neglect; or second, if the defaulting party [CMGT] obtains an affidavit from its attorney [Defendants] attesting to the attorney's mistake, inadvertence, surprise or neglect. Cal. Civ. Proc. Code § 473(b) (2006). Here, CMGT's failure to appear in SC's California lawsuit was not because of mistake, inadvertence, surprise or excusable neglect; it was because of Defendants' negligence. Moreover, Defendants never would have provided Plaintiff with an affidavit attesting to their negligence. (*See*, Defendants' Responses to Plaintiff's Requests to Admit, attached hereto as Exhibit 3.)

On December 13, 2007, Judge Kendall extended the discovery deadline (with respect to the limited discovery on the unclean hands issue) to March 3, 2008 and ordered Plaintiff to submit privilege logs to this Court by March 10, 2008. Judge Kendall also approved the procedure requested by Plaintiff in his motion for protective order. With respect to the scope of the unclean hands issue, Judge Kendall stated, "It's really getting to the issue as to what was the motivation for the filing of the lawsuit – I mean, all of the steps leading up to the failure to move to dismiss this suit [i.e., to vacate the default judgment in the California lawsuit] could potentially show intent or a pattern of behavior or some theory by the defendants as to why this would be unclean hands." (Ex. 4, Tr. dated 12/13/07 at pg. 6.)

On January 21, 2008, Plaintiffs served Defendants with a privilege log for the documents produced by Spehar. On January 29, 2008, Plaintiffs served Defendants with a privilege log for the documents produced by Plaintiff. On January 31, 2008, Plaintiff served Defendants with a corrected privilege log for the initial Spehar production and a corrected privilege log for the documents produced by Plaintiff. As explained in Plaintiff's January 31, 2008 letter to Defendants (which is attached hereto as Exhibit 5), the corrections that Plaintiff made were due to typographical and/or editing errors. (The corrected version of Plaintiff's privilege log for Spehar's initial production is attached hereto as Exhibit 6.) On January 25, 2008, January 28, 2008 and January 30, 2008, Plaintiffs received additional documents from Spehar. On January 31, 2008, Plaintiff produced a privilege log for the Spehar documents produced to Plaintiff on January 28, 2008. (Plaintiff did not withhold any documents on the basis of privilege from Spehar's January 25, 2008 and January 30, 2008 supplemental productions.) On February 19, 2008, Plaintiff served Defendants with (1) Plaintiff's Amended Privilege Log for Trustee's Documents and (2) Plaintiff's Amended Privilege Log for Spehar Documents Received by

Plaintiff on January 28, 2008, both of which are attached hereto as Exhibits 7 and 8, respectively.[7]

As instructed by this Court, Plaintiff divided the documents in the privilege logs into different categories. Those categories are set forth below in the Argument section of this motion. (For the convenience of the Court, Plaintiff attached hereto as Exhibit 10 a chart in which Plaintiff identifies by "Log Number" to which category each document on the privilege logs fits.) For the reasons set forth herein, Plaintiff respectfully requests that this Court sustain Plaintiff's privilege log assertions.

## III. ARGUMENT

### A. Documents Protected by the Attorney-Client Privilege

Because Plaintiff's legal malpractice claims arise under Illinois law, his claims of attorney-client privilege are also governed by Illinois law. *See* Fed.R.Evid. 501; *Abbott Laboratories v. Alpha Therapeutic Corp.*, 200 F.R.D. 401, 404 (N.D.Ill. 2001). "The purpose of the attorney-client privilege is to encourage and promote full and frank consultation between a client and legal advisor by removing the fear of compelled disclosure of information." *Fischel & Kahn, Ltd. v. Straaten Gallery, Inc.*, 189 Ill. 2d 579, 584-85 (2000.) The elements of the privilege are: (1) where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived. (*Id.* at 584.)

While disclosure to a third-party typically waives the privilege, that is not the case where the parties are linked by a common interest. *Dexia Credit Local v. Rogan*, 231 F.R.D. 268, 273

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[7] Attached hereto as Exhibit 9, is a copy of a letter that was sent to Defendants explaining the amendments that were made to these two privilege logs.

(N.D.Ill 2004.) Under the common interest doctrine, "where two or more persons jointly consult an attorney concerning a mutual concern, 'their confidential communications with the attorney, although known to each other, will of course be privileged in the controversy of either or both of the clients with the outside world...'" *Id.* "The purpose of the common interest doctrine is to 'foster communication' between parties that share a common interest and to protect the confidentiality of communications where a joint effort or strategy has been decided upon or undertaken by the parties and their respective counsel." *Id.* "It is the commonality of interests which creates the exception." *Id.* Therefore, "parties who assert a common interest as the basis for their assertion of privilege (where otherwise it would not exist due to shared communications), must simply demonstrate 'actual cooperation toward a common legal goal' with respect to the documents they seek to withhold." *Id.* "The shared interest must be identical, not simply similar." *Id.* The following documents are protected from disclosure by the attorney-client privilege:

1. **Memoranda prepared by Plaintiff's Attorneys for Plaintiff that were shared with SC and, in some instances, SC's attorneys**

Before Plaintiff filed his complaint, Plaintiff's attorneys prepared memoranda containing their mental impressions, legal strategies and legal theories for various potential claims against Defendants. Plaintiff's attorneys prepared these memoranda for Plaintiff in anticipation of this litigation. Plaintiff had an expectation that these documents would remain confidential, except to the extent he chose to share them with Spehar (with whom he shares a common interest). Thus, putting aside (forward) the fact that these memoranda were shared with Spehar, they are otherwise protected by the attorney-client privilege. So, the question becomes, did Plaintiff waive the attorney-client privilege by sharing these memoranda with Spehar? Under the common interest doctrine, the answer is "no."

As Defendants themselves pointed out in their motion to dismiss and motion to reconsider, SC has an interest in this case as a creditor of the CMGT bankruptcy estate. In fact, Defendants have characterized SC as the "true party in interest" in this litigation. (Def. Mot. to Reconsider at pg. 1.) Therefore, it is indisputable that SC and Plaintiff have a common interest in the outcome of this litigation. The memoranda in this category were shared with SC in furtherance of that common interest -- *i.e.*, Plaintiff, Plaintiff's attorneys, SC and SC's attorneys were all working together to develop legal strategies and theories for this case. Accordingly, Plaintiff did not waive the attorney-client privilege by sharing his counsel's memoranda with SC and SC's attorney.

**2. Correspondence between Plaintiff and his Attorneys that were shared with SC and, in some instances, SC's Attorneys**

As part of Plaintiff's (and his attorneys') pre-lawsuit investigation, Plaintiff and his attorneys exchanged correspondence regarding Plaintiff's (and his attorneys') mental impressions, legal theories and litigation strategies for this case. Those written communications were prepared in anticipation of this litigation and, except when shared with SC (and, in some cases, SC's attorneys), were made in confidence. Therefore, putting aside (for now) the fact that these written communications were shared with SC, they are otherwise protected by the attorney-client privilege. Moreover, just as the memoranda from Category 1 were shared, these written communications were shared with SC (and, in some cases SC's attorneys) in furtherance of the common interest of evaluating claims against Defendants and developing legal theories and strategies for Plaintiff's claims against Defendants. Thus, these documents are protected from disclosure by the attorney-client privilege.

### 3. Correspondence between Plaintiff and his Attorneys that were not Shared.

In addition to the pre-filing correspondence described in Category 2 above, Plaintiff and his attorneys exchanged pre-filing written communications regarding Plaintiff's (and his attorneys') mental impressions, legal theories and litigation strategies for this case that were not shared with anyone else. Plaintiff and his attorneys also exchanged written correspondence regarding the status of Plaintiff's attorney's investigation. Because these written communications were prepared in confidence and in furtherance of Plaintiff's attorney's legal advice concerning Plaintiff's claims against Defendants, they are protected from disclosure by the attorney-client privilege.

## B. Documents Protected by the Work Product Doctrine

The work product doctrine is governed by federal law. *Abbott Labratories*, 200 F.R.D. at 405. It gives qualified protection to documents prepared in anticipation of litigation and is broader in scope than the attorney-client privilege. *Christman v. Brauvin Realty Advisors, Inc.*, 185 F.R.D. 251, 255 (N.D. Ill. 1999). 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).

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: (1) documents and tangible things; (2) prepared in anticipation of litigation or for trial; and, (3) 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, as this Court stated in *Caremark, Inc.*, "[w]hether a document is protected [by the work-product doctrine] depends on the motivation behind its preparation, rather than on the person who prepares it." *Id.* at 615.

Work product material can be divided into two categories: (1) "opinion" work product, which reflects or reveals a lawyer's mental process; and (2) "ordinary" or "fact" work product. *Caremark, Inc.*, 195 F.R.D. at 616. "Both are generally protected and can be discovered only in limited circumstances." *Id.* With respect to "fact" work product documents, after the party asserting the protection satisfies its burden of establishing the necessary elements, the party seeking discovery of the documents must demonstrate a substantial need for the information and that it would be exceedingly difficult to obtain the information any other way. *Id.* "Opinion work product is even more scrupulously protected." *Id.* "[I]mmunity from discovery for opinion work product is absolute or nearly absolute." *Id.* The following documents are protected from disclosure by the work product doctrine:

**1. Plaintiff's Attorneys' Handwritten Notes and Internal Memoranda (not shared with anyone)**

As previously explained, before Plaintiff filed his complaint, Plaintiff's attorneys investigated potential claims against Defendants. As part of Plaintiff's attorneys' investigation and evaluation of those claims, Plaintiff's attorneys' prepared handwritten notes and memoranda. Those handwritten notes and memoranda are protected from disclosure as "opinion" work-product because they were prepared by Plaintiff's attorneys in anticipation of litigation and they reveal Plaintiff's attorneys' mental impressions, legal theories and legal strategies for this case. *Ventre v. Datronic Rental Corp.*, No. 92 C 3289, 1993 WL 524377, *2 (N.D.Ill. Dec. 13, 1993.)

(The work product "doctrine protects an attorney's notes, memoranda and mental impressions generated in anticipation of litigation.")

**2. Memoranda prepared by Plaintiff's Attorneys that were shared with SC and, in some instances, SC's Attorneys**

As explained in Category 1 above, Plaintiff's attorneys prepared memoranda in anticipation of litigation in which their mental impressions, legal theories and legal strategies are revealed. Thus, those memoranda are protected from disclosure as "opinion" work product. Some of Plaintiff's attorneys' memoranda were shared with SC (and, in some cases, SC's attorneys). The fact that those memoranda were shared with SC (and SC's attorneys) does not result in 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.* (Emphasis added); *see also*, *Bramlette v. Hyundai Motor Co.*, No 91 C 3635, 1993 WL 338980, at * 3 (N.D.Ill. Sept. 1, 1993) ("[Voluntary disclosure] is not inconsistent with work product protection...so long as the information is maintained in secrecy against the opponent.") (Emphasis added.)

As explained above, as a creditor of the CMGT bankruptcy estate, SC's interests in this litigation are aligned with Plaintiff's interests. In fact, as CMGT's bankruptcy trustee, Plaintiff is the estate's creditors' representative in this case. *Koch Refining v. Farmers Union Central Exchange, Inc.*, 831 F.2d 1339, 1343 (7th Cir. 1987). Stated another way, for purposes of this litigation, Plaintiff is SC's (and the Estate's other creditors') agent. *Met-L-Wood Corp. v. Gekas*, 861 F.2d 1012, 1017 (7th Cir. 1988). Thus, Plaintiff's disclosure to SC of work product material relating to possible claims against Defendants was not inconsistent with maintaining secrecy against those Defendants. Accordingly, Plaintiff did not waive the work product protection by giving SC documents protected by that doctrine. [8]

**3. Memoranda and Correspondence prepared by SC (or SC's attorney) for Plaintiff and/or Plaintiff's Attorneys before the Complaint was filed.**

As part of Plaintiff's and Plaintiff's attorneys' pre-lawsuit investigation and evaluation of claims against Defendants, Plaintiff and Plaintiff's attorneys had multiple conversations with SC about various factual and legal questions/issues. As described in the privilege logs, most of those conversations related to developing a strategy for pleading and proving the damage element of a legal malpractice claim against Defendants. On multiple occasions, Spehar prepared memoranda and correspondence (such as emails and letters) in which he (1) summarized the conversations he had with Plaintiff's attorneys (or Plaintiff), (2) discussed the questions/issues that Plaintiff's attorneys' raised, and/or (3) proposed answers to those questions/issues. The fact that some of the documents were prepared by SC for Plaintiff or Plaintiff's attorneys in response to questions asked of SC does not remove the work product

[8] The document identified as Log number 1 on the privilege log for the Spehar documents that Plaintiff received on January 28, 2008 (i.e., Ex. 8) is a draft response (prepared by Plaintiff's attorneys) to Defendants' motion to dismiss that was shared with SC. Although this document is not a memorandum, Plaintiff included it in this category instead of creating a category for just one document. Log Number 1 is "opinion" work product because it was prepared by Plaintiff's attorneys for plaintiff in anticipation of trial and it reveals Plaintiff's attorneys' mental process.

protection because, as stated by this Court in *Caremark, Inc.*, the relevant inquiry is not who prepared the document, but why it was prepared. *Caremark, Inc.*, 195 F.R.D. at 615; *see also*, *BancBoston Financial Co. v. Gould*, Nos. 87 C 5369, 87 C 5370, 1988 WL 76888, *2 (N.D.Ill July 14, 1988) ("The work product immunity is not limited to investigations conducted by the attorney or client, but also includes investigation for the attorney or client.") Because SC's memoranda and correspondence were prepared for Plaintiff and/or Plaintiff's attorneys in anticipation of this litigation, they are protected from disclosure by the work product doctrine. Moreover, because SC's memoranda and correspondence reflect and reveal Plaintiff's attorneys' mental processes, they are "opinion" work product documents.

Finally, even if this Court concludes that it is relevant to consider who prepared the document, SC, as a creditor of CMGT's bankruptcy estate, is one of Plaintiff's principals for purposes of this case. *Gekas*, 861 F.2d at 1017. Given that the work product privilege extends to documents prepared by agents of a party or party's attorney, it should certainly extend to documents prepared by a party's principal. *See, Ventre*, 1993 WL 524377 at *3 (work product protection extends to party's attorney's agent.) Accordingly, the documents in this category are protected from disclosure by the work product doctrine.

**4. Memoranda and Correspondence prepared by SC for Plaintiff and/or Plaintiff's Attorneys after the Complaint was filed.**

After Plaintiff's complaint was filed, Plaintiff (and his attorneys) continued to communicate with SC regarding legal theories and strategies for this case. In that regard, SC prepared memoranda and correspondence for Plaintiff in which SC discusses strategies for advancing the case, settling the case and responding to arguments made by Defendants in their motion to dismiss and motion to reconsider. Plaintiff's attorneys reviewed and considered the strategies proposed by SC. Moreover, some of SC's proposed strategies are based on prior

conversations that Spehar had with Plaintiff's attorneys in which Plaintiff's attorneys discussed different legal principles and theories that they were considering for this case. Because these memoranda and correspondence were prepared for Plaintiff (and/or Plaintiff's attorneys) in anticipation of trial and because they reveal legal strategies being proposed by Plaintiff's principal (i.e., SC), the documents in this category are protected from disclosure by the work product doctrine.[9] Moreover, because these documents reflect or reveal Plaintiff's attorneys' mental processes, they are "opinion" work product.

**5. Correspondence between Plaintiff and his Attorneys that were shared with SC and, in some instances, SC's Attorneys.**

Before Plaintiff's complaint was filed, Plaintiff and his attorneys exchanged correspondence regarding the status of Plaintiff's attorneys' investigation, the legal analysis of Plaintiff's claims and the legal theories being considered by Plaintiff and his attorneys relating to Plaintiff's claims. Thus, these written communications, which were prepared by Plaintiff and his attorneys in anticipation of this litigation, reveal Plaintiff's and his attorneys' mental impressions, legal theories and strategies for this case. Accordingly, these communications are protected from disclosure as "opinion" work product. As explained in Category 2 above, the fact that these communications were shared with SC (and, in some cases, SC's attorneys) does not result in a waiver of the work product protection afforded these documents.[10]

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[9] Plaintiff further objects to the production of communications between Plaintiff (including Plaintiff's attorneys) and Spehar after the complaint was filed because those post-filing communications are not relevant to the "unclean hands" issue as articulated by Judge Kendall.

[10] The document identified as Log number 29 on the privilege log for Plaintiff's documents (i.e., Ex. 7) is an email from Plaintiff to SC and SC's attorney. Although Log Number 29 does not fit perfectly into this category, Plaintiff included it here instead of creating a new category for just one document. Log number 29 is protected by the work product doctrine because it was prepared by Plaintiff in anticipation of litigation and it reveals Plaintiff's mental impressions concerning this case.

### 6. Correspondence between Plaintiff and his Attorneys that were not Shared.

As explained in Category 5, before this case was filed, Plaintiff and his attorneys exchanged written communications regarding Plaintiff's (and his attorneys') mental impressions, legal theories and litigation strategies for this case. Because these written communications were prepared by Plaintiff and his attorneys in anticipation of this litigation, they are protected from disclosure as "opinion" work product doctrine.

## C. The "At-Issue" Waiver Doctrine Does Not Apply Here

Because Plaintiff reasonably anticipates that Defendants will raise the so-called "at-issue" waiver doctrine in their response to this motion, Plaintiff addresses that doctrine here. Under Illinois law, "the attorney-client privilege may be waived as to a communication put 'at issue' by a party who is a holder of the privilege." *Shapo v. Tires 'N Tracks, Inc.*, 336 Ill. App. 3d 387, 394 (1st Dist. 2002) (emphasis added). A recent Illinois Appellate Court decision elaborated on the scope of the "at-issue" waiver. *Estate of Wright*, No. 2-07-0541, 2007 WL 4302722, at *4 (2nd Dist. Dec. 3, 2007). In *Estate of Wright*, the court cited with approval the dissent of a previous Illinois Appellate Court decision in which the dissent "suggested a rule, adopted by several courts, under which waiver occurs only 'if the litigant directly puts the attorney's advice at issue in the litigation.'" *Id.* "Such jurisdictions 'limit the extent of the at-issue waiver doctrine to circumstances in which the privilege-holder injects the privileged material into the case.'" *Id.*

The same "at issue" waiver principle applicable to claims of attorney-client privilege governs documents subject to work product protection. *A.O. Smith Corp. v. Lewis, Overbeck & Furman*, No. 90 C 5160, 1991 WL 192200 at *4-5 (N.D.Ill. Sept. 23, 1991).[11] The at-issue

[11] Although there are few cases in this district that discuss at-issue waiver in the context of the work-product doctrine in the same detail as cases that discuss at-issue waiver in the context of the federal common law attorney-

waiver doctrine applies "when the client asserts claims or defenses that put his attorneys' advice at issue in the litigation." *Claffey v. River Oaks Hyundai*, 486 F.Supp.2d 776, 778 (N.D.Ill. 2007). For this waiver to apply, Plaintiff has to have done more than merely deny Defendants' allegations. *Id.* Plaintiff must have injected a new factual or legal issue into the case. *Id.* In that regard, at-issue waiver does not apply here unless Plaintiff has put his communications with his counsel or his work product at issue in this litigation by "affirmatively" trying to use the privileged communication to defend himself. *Trustmark Ins. Co. v. General & Cologne Life Re of America*, No. 00 C 1926, 2000 WL 1898518 at * 7 (N.D.Ill. Dec. 20, 2000); *see also, Quality Croutons, Inc. v. George Bakeries, Inc.*, No. 05 C 4928, 2006 WL 2375460, at * 4 (N.D. Ill. Aug. 14, 2006.) and *Murata Manufacturing Co., Ltd. v. Bel Fuse, Inc.*, No. 03 C 2934, 2007 WL 781252 at * 6 (N.D.Ill. March 8, 2007).

In *Murata Manufacturing Co., Ltd.*, the defendant sought production of documents protected by the attorney-client privilege on the basis that the plaintiff had waived that privilege by placing its state-of-mind at issue in response to defendant's inequitable conduct defense. Rejecting application of the at-issue waiver doctrine where a party has done nothing more then deny a charge of inequitable conduct, the court stated:

> If accepted, a defendant charged with inequitable conduct would find itself between Scylla and Charybdis: it would either have to waive its attorney client privilege in order to defend itself or concede liability in order to preserve the privilege, which would become valueless...Any defendant in any patent infringement case could destroy its opponent's attorney-client privilege by leveling the rather common charge of inequitable conduct before the patent office. The plaintiff denies the charge, thereby placing its state of mind at issue and *voila*, the defendant has access to the plaintiff's privileged communications with its

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client privilege, the at-issue waiver doctrine is applied the same in both contexts. *See Abbot Laboratories*, 200 F.R.D. at 410-11. (In its finding that plaintiff waived work product protection by filing claim for indemnification that was based on an indemnification agreement and that injected plaintiff's negligence as an issue in the case, the court relied on *Lorenz v. Valley Forge Ins. Co.*, 815 F.2d 1095 (7th Cir. 1987), which discussed "at issue" waiver in the context of the attorney-client privilege.)

> counsel. It would happen in every case. That it has not is persuasive evidence that the argument is unsound and should be rejected.

(2007 WL 781252 at * 4 and 8.) The court further stated that "the mere fact that one's 'state of mind' becomes an issue in a case does not necessarily mean that the attorney-client privilege has been waived. It is the manner of proof involved that determines whether there has been a waiver." (*Id.* at * 6.) (emphasis added.)

Based on the foregoing legal principles, to determine whether Plaintiff has waived the attorney-client privilege or work product protection by virtue of the "at-issue" waiver doctrine, the relevant inquiry is what affirmative defense is Plaintiff responding to that purportedly put privileged or protected communications "at issue," and what proof has Plaintiff offered in response to that affirmative defense?

The answer to the first question is that Plaintiff is responding to Defendants' "unclean hands" defense. With respect to the unclean hands defense, Judge Kendall has indicated that she is interested in determining (1) why Plaintiff did not file a motion to vacate the default judgment that was entered in the underlying California lawsuit, (2) was there any bad faith involved in Plaintiff's decision to agree to the post-petition financing application that was approved by the bankruptcy court, and (3) was Plaintiff's motive for filing this case tainted with bad faith?

With respect to the second part of the waiver inquiry (i.e., what proof has Plaintiff offered to rebut Defendants' unclean hands defense), Plaintiff made the following statements in response to Defendant's motion to dismiss and motion to reconsider:

- "[Defendants] also fail to present any evidence that [Plaintiff] acted fraudulently or in bad faith." (Pl. Resp. to Def. Mot. to Dismiss at pg. 26.) This statement merely points out Defendants' failure to present evidence of a fraud on the court. It is not a submission of privileged or protected material as evidence of Plaintiff's good

faith. Thus, this statement did not put "at issue" any privileged or protected documents.

- "If [Plaintiff] filed this case with a good-faith belief that the malpractice claims are meritorious, then this case cannot be a fraud." (Pl. Resp. to Def. Mot. to Reconsider at pg. 1.) At most, this statement is as a denial of Defendants' fraud defense. This statement certainly does not constitute a submission of privileged or protected material as evidence of Plaintiff's good faith. In fact, because this statement was made in response to Defendants' motion to reconsider the court's denial of their motion to dismiss, Plaintiff did not and could not submit any evidence (other than the exhibits attached to the complaint) to prove his good faith. Thus, this statement did not put any privileged or protected documents "at issue."
- "The critical element to defendants' fraud theory is not whether Spehar has a financial interest in this case -- it is whether [Plaintiff] knowingly filed meritless or untrue claims." (*Id.* at pg. 5.) This statement is just Plaintiff's interpretation of the premise of Defendants' fraud defense. By making this statement, Plaintiffs did not put any privileged or protected documents at issue. Indeed, by making this statement, Plaintiff did not offer any evidence, much less privileged documents, in response to Defendants' fraud defense. Moreover, in their reply in support of their motion to reconsider, Defendants argued that Plaintiff's interpretation of their affirmative defense is wrong because their defense is not dependent on a finding of fraud by Plaintiff. (*See*, Def. Reply in Support of Mot. to Reconsider at pp. 1-2.) It is disingenuous of Defendants to argue that Plaintiff's interpretation of their

defense -- with which Defendants disagree -- resulted in an "at issue" waiver of all pre-lawsuit work product and attorney-client privileged documents.

- "absent evidence that [Plaintiff] knowingly pled false allegations in the complaint, this case cannot be a fraud." (Pl. Resp. to Def. Mot. to Reconsider at pg. 5.) As an initial matter, when Judge Kendall ordered limited discovery on the "unclean hands" issue, she did not express any concern about Plaintiff lying in his complaint. In fact, Judge Kendall based at least part of her denial of Defendants' motion to dismiss on the 17 exhibits attached to Plaintiff's complaint. Therefore, the truth of Plaintiff's allegations is not a part of the limited "unclean hands" defense that is currently at issue. But, even if the truth of Plaintiff's allegations is considered to be part of the unclean hands defense, the foregoing statement by Plaintiff did not put any privileged or protected documents at issue.
- And, "If [Plaintiff] decided to file this case because he believes that the claims against defendants are meritorious (which he did), then this case cannot be a fraud." (Plaintiff's Resp. to Def. Mot. To Reconsider at pg. 6.) This statement is simply a denial of Defendants' assertion that this case is a fraud on the court. By making this statement, Plaintiff did not submit any privileged or protected material as proof that Plaintiff believed his claims are meritorious. The merit and veracity of Plaintiff's claims can be tested by non-privileged documents -- the same non-privileged documents that Plaintiff would have to submit to prove his claim irrespective of Defendants' fraud defense.

In summary, because Plaintiff has not offered any privileged or protected documents to support his denial of Defendants' unclean hands defense, Plaintiff has not put any privileged or

protected material at issue. Moreover, after reviewing and considering the three issues that are apparently concerning Judge Kendall, Plaintiff does not anticipate offering any privileged or protected material in response to the unclean hands defense. In that regard, with respect to the first unclean hands issue (i.e., why Plaintiff did not file a motion to vacate the default judgment that was entered in the underlying lawsuit), Plaintiff can (and will) answer that question without relying on any documents listed on his privilege log.[12] In fact, none of the documents listed on the privilege log are relevant or responsive to that question.

With respect to the second unclean hands issue, (i.e., was there any bad faith involved in Plaintiff's decision to agree to the post-petition financing application that was approved by the bankruptcy court), Plaintiff does not intend to rely on any privileged or protected material to address this question. Moreover, in response to request number 9 of Defendants' document requests, Plaintiff produced all documents relating to "any agreement with Spehar" including all documents relating to any negotiations of any agreement with Spehar. Therefore, none of the documents listed on the privilege log are relevant or responsive to this issue.

With respect to the third unclean hands issue, (i.e., was Plaintiff's motive to file this case tainted with bad faith), Plaintiff does not intend to offer any privileged or protected material to address this issue. As explained above, Plaintiff can verify the legitimacy of this case by relying on non-privileged documents that support his claims, such as the 17 exhibits attached to his complaint.

Because Plaintiff has not relied on any documents protected from disclosure by the attorney-client privilege or the work product doctrine to respond to Defendants' unclean hands defense, Plaintiff has not waived the attorney-client privilege or work product doctrine with respect to any of the documents listed on Plaintiff's privilege logs.

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12 *See* footnote 6 *supra*.

## IV. CONCLUSION

Wherefore, for all of the foregoing reasons, Plaintiff respectfully requests that this Court enter an order sustaining Plaintiff's assertions in his privilege logs of attorney-client privilege and/or work product protection.

Dated: February 20, 2008

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
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## CERTIFICATE OF SERVICE

The undersigned attorney certifies that he caused the attached **PLAINTIFF'S MEMORANDUM IN SUPPORT OF HIS PRIVILEGE LOG ASSERTIONS** to be served upon

Stephen Novack
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**NOVACK AND MACEY LLP**
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via electronic delivery this 20th day of February, 2008.

/s/ Robert D. Carroll