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

DAVID GROCHOCINSKI, not individually but solely in his capacity as the Chapter 7 Trustee for the bankruptcy estate of CMGT, INC.,	)	
Plaintiff,	)	No. 06 C 5486
v.	)	Judge Virginia M. Kendall
MAYER BROWN ROWE & MAW LLP and RONALD B. GIVEN	)	Magistrate Judge Morton Denlow
Defendants.	)	

DEFENDANTS' RESPONSE TO PLAINTIFF'S MEMORANDUM IN SUPPORT OF HIS PRIVILEGE LOG ASSERTIONS

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I. SUMMARY OF RESPONSE

Plaintiff claims that the following six categories of documents are protected from disclosure by the attorney-client privilege and/or work-product doctrine:

- Memoranda drafted by Plaintiff's attorneys that were disclosed to Spehar Capital, LLC ("SC");
- Correspondence between Plaintiff and his attorneys that was disclosed to SC;
- Correspondence between Plaintiff and his attorneys that was not disclosed to SC;
- Internal notes and memoranda drafted by Plaintiff's attorneys;
- Documents drafted by SC and provided to Plaintiff or his attorneys before the Complaint was filed; and
- Documents drafted by SC and provided to Plaintiff or his attorneys after the Complaint was filed.

For the reasons set forth in the Argument section below, Plaintiff waived any attorney-client privilege or work-product doctrine protection that might otherwise apply to these documents by placing them "at issue" in response to the defenses that the parties and Court have at various times referred to as the "absurd result," "unclean hands" or "fraud on the court" defenses (the "Defenses"). For this reason alone, Plaintiff should be ordered to produce all of these documents.

Alternatively, even if Plaintiff did not waive the attorney-client privilege and work-product doctrine by placing all of these documents "at issue," Plaintiff should still be ordered to produce most of them because: (a) in some cases, they were disclosed to a third-party -- i.e., SC -- thus waiving the attorney-client privilege; and (b) in other cases, Defendants have a substantial need for

the documents and no way to obtain their substantial equivalent, thus taking them outside the protections offered by the work-product doctrine under Fed. R. Civ. P. 26(b)(3)(A).

Each of the reasons why these documents should be produced is discussed in the Argument section below. However, this Response will first address two preliminary matters. First, it will summarize the procedural history by which this discovery dispute now comes before this Court. Second, it will address Plaintiff's procedurally improper argument in its opening brief that the Defenses are somehow without merit. As a threshold matter, the merits of the Defenses is not an issue referred to this Court, and Plaintiff's attempt to have this Court pass substantive judgment on the Defenses should be rejected out of hand. This is especially so since Judge Kendall has already: (a) expressly stated that Defendants' position is "extremely persuasive;" (b) expressly admonished Plaintiff to stop referring to the Defenses as "baseless allegations;" and (c) taken the extraordinary step of bifurcating this case to allow the Defenses to be litigated and decided before any consideration of Plaintiff's legal malpractice claim.

II. PROCEDURAL HISTORY

On September 21, 2004, Plaintiff was appointed Chapter 7 Trustee of the bankruptcy estate of CMGT, Inc. ("CMGT"). On August 23, 2006, Plaintiff filed his Complaint in the Circuit Court of Cook County, Illinois. The Complaint asserts two counts of legal malpractice, alleging that Defendants: (a) negligently advised CMGT not to settle a claim asserted against it by SC before that claim ripened into litigation; and (b) negligently advised CMGT not to appear in, and defend against, the litigation that SC ultimately filed.

On October 10, 2006, Defendants removed this case to this Court. Thereafter, Defendants moved to dismiss the Complaint (the "Dismissal Motion") based upon the Defenses and because the

Complaint fails to state a claim for legal malpractice. By Memorandum Opinion and Order dated June 28, 2007, the Court granted part, but denied the bulk, of the Dismissal Motion, including its argument based on the Defenses.

On July 13, 2007, Defendants filed their motion to reconsider the denial of the Dismissal Motion (the "Reconsideration Motion"). On October 30, 2007, the Court orally denied the Reconsideration Motion, finding that the Defenses raised factual questions that could not be decided on a motion to dismiss. However, observing that this is a "very odd case" and "very unique situation," the Court expressly stated three times that Defendants' arguments based on the Defenses were "extremely persuasive" or "very persuasive." (10/30/07 Transcript, attached hereto as Exhibit A, at pp. 2-3, 6.) The Court then bifurcated the case to allow for discovery and a summary judgment process regarding the Defenses before any discovery on Plaintiff's malpractice claims. (Id., pp. 2-3, 7-8.) The Court's approach is best summarized by the following excerpt from its oral ruling on the Reconsideration Motion:

> I am denying the motion to reconsider, because I still believe that there are many fact disputes that need to be resolved and that it is not a situation where I can dismiss on a motion to dismiss. But let me tell you where I'm coming from as far as how we're going to move forward.
>
> I find defendant's position extremely persuasive, and I think the issue of unclean hands, for lack of a better term -- he's 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 in 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 [default judgment], 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, so that I can have facts in front of me and decide whether the case should be dismissed based upon that issue.

> It's a fact dispute that I'm having the problem with. I think there are disputed issues of fact that I can't get rid of this on a dismissal, but I find your argument extremely persuasive. It is a very unique situation. It's a very odd case. (Id., pp. 2-3.)

In addition, Judge Kendall repeatedly signaled her belief that the scope of discovery regarding the Defenses is broad and includes Plaintiff's pre-filing investigation. For example, at the October 30, 2007 hearing on the Reconsideration Motion, Judge Kendall asked Defendants what discovery they anticipated regarding the Defenses. (Id., p. 4.) Defendants stated that -- in addition to discovery from Plaintiff and SC -- they would likely take discovery from some of CMGT's shareholders to show the inadequacy of Plaintiff's pre-filing investigation. (Id., pp. 4-5.) Among other things, Defendants stated that they believed these shareholders would testify that: (a) they do not support the Complaint; (b) Plaintiff did not contact them to verify or discuss the Complaint's allegations (which are made largely "on information and belief"); and (c) had they been contacted by Plaintiff before he filed the Complaint, they would have told Plaintiff they do not support his Complaint. (Id., p. 5.) Judge Kendall said all of this discovery was "okay." (Id.)[1]

Then, on December 13, 2007, when Plaintiff presented his motion for protective order (the "Protective Motion"), Plaintiff argued that discovery as to the Defenses was limited to Plaintiff's decision not to try to vacate the default judgment that SC obtained against CMGT. Judge Kendall expressly rejected Plaintiff's position:

> Unclean hands could cover [Plaintiff's] behavior throughout the whole period of time. It's really getting to the issue as to what was the motivation for the filing of the lawsuit, whether the -- I mean, all of the steps leading up to the failure to move to dismiss the suit could potentially show intent or a pattern of behavior or some theory by defendants as to why this would be unclean hands. (12/13/07 Transcript, attached hereto as Exhibit B, at p. 6.)

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[1] The Court confirmed its oral denial of the Reconsideration Motion in a minute order entered on October 30, 2007.

At the same hearing, Plaintiff's counsel belittled the Defenses, but was quickly told to stop. Specifically, counsel argued that Defendants "take the position now that because they made a baseless allegation against [Plaintiff] and he denied it that suddenly all of his attorney work product [has been waived]." (Id., p. 9.) Judge Kendall immediately admonished Plaintiff's counsel that "you need to get off the baseless accusation, otherwise I wouldn't have ordered the discovery." (Id.)

Following bifurcation, Defendants served Plaintiff and SC with written discovery regarding the Defenses. Plaintiff initially objected to Defendants' discovery, and filed the Protective Motion, based upon the work-product doctrine. On December 13, 2007, this case was referred to this Court to resolve any dispute arising out of Plaintiff's objections. Thereafter, Plaintiff added an objection to certain of Defendants' discovery based upon the attorney-client privilege. Ultimately, on January 24, 2008, Plaintiff served his privilege logs, submitted the withheld documents "in camera" and filed his supporting memorandum asserting protection under both the work-product doctrine and attorney-client privilege ("Memorandum" or "Mem. at ___").

III. THE DEFENSES

Section A below will first provide a general description of the Defenses and the bases therefor. Section B will then address Plaintiff's improper attempt to have this Court adjudicate the merits of the Defenses even though Judge Kendall: (a) already indicated her belief that this "is a very odd case" and that the Defenses are "extremely persuasive"; and (b) did not refer any issues regarding the merits of the Defenses to this Court.

A. The Defenses

The Defenses are based on a series of events, each of which will now be discussed.

1. SC Is Retained, But Fails To Find Financing

In 2001, CMGT retained SC to locate financing for its start-up business. (Compl., ¶24.) Pursuant to the parties' written agreement (the "Agreement"), SC was retained on a "non-exclusive basis" and was entitled to a "finders fee" upon the successful closing of financing from a list of prospects that was attached to the Agreement. (Id., Ex. 2).

By 2003 -- a full two years later -- SC still had not secured any financing. At that point, CMGT was out of money; its shareholders were not willing to commit any more capital; most of its officers and employees were gone; and Louis Franco ("Franco"), CMGT's chief executive officer and sole remaining officer, had not been paid in months and was facing personal bankruptcy. (Id., Exs. 5 and 16.) Put simply, CMGT did not have the financial ability to continue in business. (Id.)

2. The Newco Deal

Accordingly, in mid-2003, CMGT pursued a deal with Charles Trautner ("Trautner"), one of its own shareholders, pursuant to which Trautner and a group of outside investors would form a new entity ("Newco"), which would be capitalized with $2.5 million. (Id., ¶41.) Newco would then purchase CMGT's assets for (at CMGT's option) either: (a) $500,000 in cash; or (b) a 20% ownership interest in Newco (the "Newco Deal"). (Id.) On Franco's recommendation, CMGT's shareholders overwhelmingly approved the Newco Deal and voted to take a 20% interest in Newco. (Id., Exs. 5 and 12.)

The Newco Deal was initiated and negotiated without SC's assistance, and neither Trautner nor Newco was on the list of prospects attached to the Agreement. (Id., Exs. 2 and 9.) Accordingly, SC was not entitled to any compensation under the Agreement. Nevertheless, when SC found out about the Newco Deal, it demanded compensation and the right to participate in Newco's future

financing activities. (Id., ¶42 and Ex. 8; 2/26/04 Transcript, attached hereto as Exhibit C, at p. 5.) CMGT rejected SC's demand because SC did not bring the Newco Deal to CMGT and neither Trautner nor Newco was covered by the Agreement. (Compl., Exs. 9, 11 and 12.)

3. The California Injunction

CMGT had no money to pay SC, and SC was unwilling to consider a settlement unless Newco accepted SC as its financial advisor with the right to be involved in all of Newco's future financial transactions. (Id., Exs. 5, 12 and 16.) Accordingly, CMGT and SC were unable to resolve their dispute. As a result, SC sued CMGT in California state court seeking, and ultimately obtaining, an injunction preventing the closing of the Newco Deal (the "California Action").

From the get-go, the California Action was illogical, unfair to CMGT/Newco and self-defeating for SC. Indeed, SC's bad faith was obvious. Why would a rational broker claiming entitlement to compensation upon the closing of a deal "kill the golden goose" by preventing that very deal from closing in the first place? Had SC been acting in good faith, it would have filed a lawsuit allowing the Newco Deal to close, but seeking to freeze CMGT's proceeds from the Deal until SC's right to compensation (if any) could be decided.

Recognizing that Plaintiff must come up with some explanation for SC's irrational California Action, the Memorandum (at 3) contends that SC believed it needed an injunction because, if the Newco Deal closed, CMGT would have sold all of its assets to Newco and a money judgment against it would "be uncollectible." (Mem. at p. 3, n. 1.) But this after-the-fact explanation is just as backwards as the California Action itself. Without the money from the Newco Deal, CMGT was broke and had nothing. Conversely, had the Newco Deal closed, CMGT would at least have had a 20% interest in Newco, which -- according to SC -- ultimately would have been worth almost $200

million -- more than enough to pay any judgment. (2/26/04 Transcript, Ex. C, at p. 4.) Thus, even assuming that SC had a right to compensation, SC precluded itself from any possibility of recovery by killing the Newco Deal.

The Memorandum (at 3) also argues that Plaintiff can prevail on the "case within the case" element of his malpractice claim because, if Defendants would have appeared in the California Action, they would have defeated SC's injunction because they "could have convinced the California court to condition injunctive relief on SC paying a bond (and SC could not afford such a bond)." (Mem. at p. 3.) As a threshold matter, Plaintiff could never prove this speculative theory without proving what the California judge would have done if, hypothetically, Defendants had appeared and demanded that SC post a bond. In all events, how can Plaintiff seriously argue that SC would not have posted a bond? After all, the parties to the Newco Deal valued that deal at $500,000 -- the stated cash equivalent of a 20% interest in Newco. How could Plaintiff ever prove that SC would not have posted a $500,000 bond in order to pursue damages that SC claimed totaled $17 million? Indeed, what we do know is that the California judge required a $25,000 bond, and that SC posted it. (See 10/3/03 Order, attached hereto as Exhibit D, at p. 4.)

4. The California Default Judgment

Even though CMGT was dead without the Newco Deal, SC was not deterred. Rather, knowing that CMGT had no money, SC amended its California Action to seek money damages. In so doing, SC pursued the very same "uncollectible judgment" against CMGT that Plaintiff now says SC would never have wanted! (See Mem. at p. 3, n. 1.)

SC ultimately obtained a $17 million default judgment against CMGT (the "Default Judgment") based on SC's far-fetched and speculative testimony that, if CMGT had followed SC's

advice (which had failed for over two years already): (a) CMGT promptly would have obtained $2.5 million in financing; (b) within two years, CMGT would have been wildly successful and worth almost $200 million; and (c) CMGT then would have done an IPO, CMGT would have hired SC to do the IPO, and SC would have received more than $16.5 million therefrom. (2/26/04 Transcript, Ex. C, at pp. 2-6.)

Even the California judge noted the suspect nature of SC's purported damages -- commenting that they are contingent on events that have not yet occurred. (Id., p. 5.) Nevertheless, the California judge entered the Default Judgment because he did not expect that SC would ever collect it. Indeed, as the hearing came to a close, the judge stated: "They will set it aside, walk away from the company or they will go bankrupt. It's one of those three things that will happen." (Id., p. 7.) Judge Kendall also noted the speculative nature of the Default Judgment, commenting that "it appears to this Court that the majority of the [Default Judgment] is based upon nothing more than the speculation of [SC's] principle, Gerry Spehar." (6/28/07 Memorandum Opinion and Order at p. 3, n. 1.)

The absurdity of the Default Judgment is driven home by the fact that SC later acquired the "valuable" CMGT assets that -- according to SC's own testimony -- would have made the company worth more than $200 million, for a grand total of $1,500. (9/2/05 Order granting Plaintiff's Application to Enter into Post-Petition Secured Financing, attached hereto as Exhibit E, at ¶10.)

5. The Involuntary Bankruptcy

Using the Default Judgment to create creditor status, SC next filed a single-creditor involuntary bankruptcy against CMGT. From the outset, this bankruptcy should have been a non-event. After all, CMGT had next to no assets and very few non-shareholder creditors (other than

SC).[2] Further, Plaintiff could have sought -- and likely would have obtained -- a vacation of the Default Judgment. Indeed, 11 U.S.C. §108 extended the time for Plaintiff to do so, and -- as explained above -- the California judge as much as invited a motion to vacate. But, Plaintiff did not do so. Instead, SC and Plaintiff looked for the proverbial "deep pocket."

6. The Malpractice Suit -- SC and Plaintiff's Unholy Alliance

There never was a valid malpractice claim against Defendants and, if this case ever reaches the merits of the malpractice claim, the evidence will show that the claim is illogical, contrary to the facts and seeks the same speculative damages on which the Default Judgment was based. Nevertheless, the only deep pocket available was Defendants.

So SC and Plaintiff agreed to sue Defendants for malpractice, with SC to advance the costs and end up with up to 90% or more of any net recovery (i.e., after payment to Plaintiff's contingent fee lawyers).[3] Worse still, SC and Plaintiff agreed to file this case knowing that -- as part of the underlying "case within the case" -- they must prove that SC had no right to recovery in the California Action in the first place -- i.e., that, if Defendants had simply appeared and defended CMGT in the California Action, then CMGT would have without doubt defeated SC's claims. (Compl., ¶¶58-65.) Indeed, there are only two possibilities. Either: (a) SC had a legitimate claim against, and right to recovery from, CMGT -- in which case Defendants did not cause any loss by

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[2] According to Plaintiff, "[t]here are less than 5 non-investor creditors." (Trustee's Response to Motion for Judgment on the Pleadings by Spehar Capital, LLC, attached hereto (without its exhibits) as Exhibit F, at p. 4.)

[3] This Court should not be fooled by Plaintiff's wrongful assertion that SC would "only" get "45-54% of the recovery." (Mem. at 4.) That percentage was based on the gross amount of any recovery, pretending that Plaintiff's attorneys get nothing. The real point is that SC would walk away with the lion's share of any available recovery after attorneys' fees.

failing to defeat that meritorious claim; or (b) SC had no legitimate claim against, and no right to recovery from, CMGT -- in which case it would be absurd and fraudulent for SC to now recover from CMGT's lawyers on that very same meritless claim. Either way, Defendants should win this case.

Alternatively, if Plaintiff were to somehow win this case, the result would be that a party with a meritless claim -- and who destroyed CMGT by asserting it -- would be rewarded with a multi-million dollar recovery for having done so. Apparently, it was precisely this unjust scenario that led Judge Kendall to say this is "a very odd case" that presents "a very unique situation," and that defendants' position is "extremely persuasive."

* * *

All of the foregoing -- including: (1) SC's initial bad faith and meritless California Action; and (2) Plaintiff's failure to move to vacate the Default Judgment, his entry into the unholy alliance with SC, his failure to properly conduct what would have been an easy and dispositive pre-filing investigation and his wrongful filing and prosecution of this case -- makes up the Defenses.

B. The Merits Of The Defenses

The Memorandum repeatedly attacks the merits of the Defenses. Yet, this Court has no authority to address that subject. It was not referred to this Court, and resolution of the limited discovery matter that was referred does not require any analysis of the substantive merits of the Defenses. E.g., Campbell v. HSA Managed Care Sys., Inc., No. 97 C 1622, 1998 WL 417505, at *5 (N.D. Ill., July 21, 1998) (magistrate judge's jurisdiction limited to issues referred by district judge or matters consented to by the parties). Nor could this Court overrule Judge Kendall's repeated prior pronouncements that Defendants' position is "extremely persuasive" and that

Plaintiff's case is "a very odd case." Put simply, the parties would not be in front of this Court with this discovery dispute if Judge Kendall did not already believe that the Defenses were worthy of consideration.

IV. ARGUMENT

A. Plaintiff Waived The Attorney-Client Privilege And Work-Product Doctrine By Placing All Of The Documents "At Issue"

1. Applicable Law

The attorney-client privilege and/or work-product doctrine are waived when a party voluntarily injects either a factual or legal issue into the case, the truthful resolution of which requires an examination of the confidential communications. Lorenz v. Valley Forge Ins. Co., 815 F.2d 1095, 1098 (7th Cir. 1987); Pyramid Controls, Inc. v. Siemens Indus. Automations, Inc., 176 F.R.D. 269, 272 (N.D. Ill. 1997).

The rationale for the at issue waiver is as follows:

> [I]t would be entirely unfair for a case to turn on an issue upon which one party has no knowledge and is barred from access to the necessary information while the other party is able to use the information to establish its claim while shielding it from disclosure.

Abbott Labs. v. Alpha Therapeutic Corp., 200 F.R.D. 401, 410-11 (N.D. Ill. 2001). In short, the at issue waiver ensures that a litigant cannot use the attorney-client privilege or work-product doctrine as both a shield and a sword.

2. Plaintiff Placed His Own Conduct "At Issue"

Here, Plaintiff has repeatedly placed at issue his alleged pre-filing investigation and "good faith" belief that he has a legitimate malpractice claim against Defendants. Indeed, as will now be

shown, at every step of the way since the Defenses were first raised, Plaintiff has affirmatively attempted to defeat them by relying upon his alleged "investigation" and "good faith" beliefs.

a. Dismissal Motion

The Defenses were first raised in the Dismissal Motion. One basis for that Motion was that this entire lawsuit is a fraud on the judicial system because, if successful, it would allow SC to parlay a claim for which it had no right to recovery into a multi-million dollar windfall. (Dismissal Motion, pp. 1-2, 7.) Defendants did not initially argue that Plaintiff was acting in bad faith or that he failed to conduct an adequate pre-filing investigation. (Id.) Rather, the Dismissal Motion was focused on SC's conduct and SC's attempt to secure a fraudulent and unjust windfall:

- "[T]his Court should exercise its supervisory authority to put an end to this case and stop Spehar's continuing perversion of the civil and bankruptcy systems." (Id., p. 2; emphasis added.)
- Sanction of dismissal with prejudice "is appropriate here to defeat Spehar's attempt to perpetrate a fraud on three courts and the system of justice generally." (Id., p. 7; emphasis added.)

Plaintiff could have responded to these arguments without putting his own good faith or pre-filing investigation at issue. For example, Plaintiff could have argued: (i) that it would not be unjust for SC to recover millions of dollars; and/or (ii) that Defendants have the burden of proving that Plaintiff -- not just SC -- is attempting to perpetrate a fraud on the Court, but that Defendants failed to meet that burden. However, Plaintiff chose to go further and to rely on his own conduct to defeat the Defenses. For example, in his response, Plaintiff argued that it was his decision to file this case, signifying that he had a good faith belief to do so and a conviction that he had a valid malpractice claim against Defendants regardless of SC's involvement. (Plaintiff's Response to Dismissal Motion, pp. 25-26.)

b. Reconsideration Motion

Plaintiff again affirmatively raised his own alleged good faith and pre-filing investigation in response to the Reconsideration Motion. In that Motion, Defendants argued that the Court previously overlooked the critical fact that SC was the true party in interest because, if this case succeeds, SC could get over 90% of the recovery after payment of attorneys' fees. (Reconsideration Motion, pp. 1-2.) Defendants further argued that it should not matter that this case is technically being prosecuted by Plaintiff because SC had no way to recover anything from CMGT until he put the company into bankruptcy and then paid Plaintiff to file this case. (Id., p. 2.) Ironically, Plaintiff admitted as much in a recent filing in CMGT's bankruptcy when he argued that this malpractice case is a "lawsuit that Spehar lacked standing to bring on his own behalf." (See Trustee's Response to Motion for Judgment on the Pleadings, attached hereto as Exhibit F, at p. 7.)

In response, Plaintiff could have simply denied Defendants' arguments by asserting, for example, either: (i) that there is nothing wrong with SC obtaining a substantial recovery; or (ii) that Defendants failed to present sufficient evidence to show that Plaintiff was a knowing participant in any wrongdoing. But, again, Plaintiff went much further and relied on his own conduct. Plaintiff affirmatively argued that he is innocent and cannot be punished because he is pursuing this case in good faith based upon his pre-filing investigation. Let Plaintiff's own words speak for themselves:

- If [Plaintiff] is not a participant in the purported fraud, and if he filed this case with a good-faith belief that the malpractice claims are meritorious, then this case cannot be a fraud. (Plaintiff's Response to the Reconsideration Motion, p. 1.)

- [I]f Plaintiff decided to file this case because he believes that the claims against [D]efendants are meritorious (which he did), then this case cannot be a fraud. (Id., p. 6; emphasis added.)

c. **Protective Motion**

Plaintiff again affirmatively relied upon his good faith and pre-filing investigation in his Protective Motion -- which sought to establish the procedure by which SC would respond to the subpoena issued by Defendants. Again, Plaintiff argued that, as a result of his alleged pre-filing investigation -- and that of his attorneys -- he was proceeding in good faith on claims he believed to be meritorious:

> • At the conclusion of his (and his attorneys') pre-lawsuit investigation, Plaintiff concluded that meritorious claims exist against at least [Defendants] and Charles Trautner. Thus, Plaintiff filed this case. (Protective Motion, ¶6.)

* * *

Thus, it is clear that Plaintiff survived the Dismissal and Reconsideration Motions, and won the Protective Motion, because of his allegations that he conducted a valid pre-filing investigation and filed this malpractice claim based on a good faith belief that it is meritorious. It is also clear that Plaintiff intends to attempt to defeat the Defenses by arguing that: (i) he conducted a full and fair pre-filing investigation; (ii) as a result of that investigation, he believed in good faith that CMGT has a valid malpractice claim against Defendants; and (iii) because of this good faith belief, there is nothing improper about this case. But, in making these arguments, Plaintiff has put squarely at issue what pre-filing investigation was done and what he and his counsel learned during that investigation as the bases for his ultimate conclusion that there was a valid malpractice claim against Defendants.

3. **Plaintiff Waived The Attorney-Client Privilege And Work-Product Doctrine**

Despite the foregoing, Plaintiff argues that he has not placed his conduct or pre-filing investigation at issue because he simply denied the Defenses. But, as shown above, Plaintiff has

done far more than simply deny the Defenses. Plaintiff has affirmatively attempted to defeat the Defenses by arguing that he conducted a valid investigation, is acting in good faith and legitimately believes in this malpractice case. By doing so, Plaintiff has waived any attorney-client privilege or work-product doctrine that might otherwise apply to the communications and documents that were part of Plaintiff's investigation or that form the basis of his purported good faith belief.

In this regard, U.S. v. Bilzerian, 926 F.2d 1285 (2d Cir. 1991), is directly on point. In Bilzerian, the defendant was charged with securities fraud. At trial, the defendant wanted to respond to these charges -- and defeat the element of intent -- by arguing that he did not intend to violate the securities laws and that he believed in good faith that his conduct was legal. Before proffering such testimony, however, the defendant filed a motion *in limine* for a ruling that such testimony would not result in a waiver of the attorney-client privilege. The district court denied that motion and stated that, if the defendant testified regarding his good faith belief in the legality of his conduct, then he would open the door to cross-examination about all sources of that good faith belief -- including his otherwise privileged communications with his attorney. The defendant ultimately did not testify about these matters, was convicted, and appealed that conviction, in part, based on the district court's denial of his motion *in limine* and its related privilege waiver ruling.

The Second Circuit affirmed, holding that the defendant would have waived the attorney-client privilege by taking the stand and testifying about his good faith belief. The court stated:

> The waiver principle is applicable here for [the defendant's] testimony that he thought his actions were legal would have put his knowledge of the law and the basis for his understanding of what the law required in issue. His conversations with counsel regarding the legality of his schemes would have been directly relevant in determining the extent of his knowledge and, as a result, his intent. Id. at 1292.

The Second Circuit also rejected the defendant's argument that such a ruling would eviscerate the attorney-client privilege whenever someone is accused of wrong-doing:

> [T]he district court's ruling in the instant case did not prevent defendant from denying criminal intent; the district judge merely said that [the defendant's] own testimony as to his good faith would open the door to cross-examination, possibly including inquiry into otherwise privileged communications with his attorney. Defendant was free to deny criminal intent either without asserting good faith or to argue his good faith defense by means of defense counsel's opening and closing statements and by his examination of witnesses. Id. at 1293 (emphasis added).

The same is, of course, true in this case. Plaintiff could have simply denied the Defenses and demanded that Defendants meet their burden of proof. Instead, Plaintiff did more. He affirmatively responded to the Defenses by arguing that his case is legitimate and that it is being pursued in good faith based upon Plaintiff's pre-filing investigation -- stating, for example, that as a result of "his (and his attorneys') pre-lawsuit investigation, Plaintiff concluded that meritorious claims exist against [Defendants]." (Protective Motion, ¶6.) Plaintiff cannot use his alleged pre-filing investigation and good faith belief as a sword to try to defeat the Defenses while at the same time shielding that information from discovery and examination by Defendants.

4. The Cases Relied Upon By Plaintiff Either Help Defendants Or Do Not Apply

The cases relied upon in the Memorandum do not change the fact that Plaintiff has placed these matters at issue. In fact, one of Plaintiff's cases, Claffey v. River Oaks Hyundai, 486 F. Supp. 2d 776 (N.D. Ill. 2007), confirms Defendants' position. In Claffey, the plaintiff alleged that the defendant willfully violated the Fair Credit Reporting Act (the "Act"). The defendant denied that it acted willfully. But, like Plaintiff here, the Claffey defendant went further and affirmatively

argued that its conduct could not be willful because it maintained reasonable procedures to ensure compliance with the Act, including consultation with legal counsel.

Despite affirmatively raising the "reasonable procedures" issue, the Claffey defendant maintained that it had not put those procedures, including the referenced consultations with legal counsel, at issue. The Claffey court disagreed. Although the Claffey court held that there was no at issue waiver based upon the defendant's prior denial that it acted willfully, the court held that if the defendant went one step further -- and affirmatively argued that it maintained reasonable procedures to ensure compliance with the Act, including consultation with counsel -- it would waive the privilege. Specifically, the Claffey court held that the defendant could not create the impression that it relied on advice from its counsel without waiving the privilege:

> Were [the defendant] allowed to create this impression but still maintain its attorney-client privilege, it would in effect be using the privilege as both a shield and a sword, which is not permitted. [The defendant] cannot have it both ways; it cannot seek refuge in consultation with counsel as evidence of its good faith yet prevent [the plaintiff] from discovering the contents of the communication. If, therefore, [the defendant] actually relies on any documents or other evidence that would tend to suggest that its procedures included consultation with counsel, it will be deemed to have waived its attorney-client privilege.

Id. at 779 (internal citations, alterations and quotation marks omitted).

Here, Plaintiff has gone further than the Claffey defendant and unequivocally used its good faith and pre-filing investigation positions to defeat the Dismissal Motion and Reconsideration Motion and prevail on the Protective Morion. Thus, Plaintiff has already unequivocally placed these matters at issue and, unlike the Claffey defendant, should not be given an opportunity to put the genie back in the bottle.

Plaintiff also relies on Murata Mfg. Co., Ltd. v. Bel Fuse, Inc., No. 03 C 2934, 2007 WL 781252 (N.D. Ill., Mar. 8, 2007). However, that case is inapplicable. Murata was a patent infringement case in which the defendant claimed that the plaintiff engaged in inequitable conduct because it did not disclose relevant prior art during the patent application process. In response, the plaintiff argued that this inequitable conduct defense could never be proven because the prior art was not material to the patent application and the inventors had past experience in the area and would have disclosed the prior art if they thought it was even potentially relevant to their patent application.

Based on this response, the defendant argued that the plaintiff put the inventors' state of mind at issue and, in so doing, waived the attorney-client privilege. Murata rejected the defendant's at issue argument because the plaintiff's assertions could be examined without revealing any attorney-client communications. For example, the plaintiff's assertions regarding materiality could be examined by looking at the public records and patent office files regarding the prior art and the current application. Likewise, the inventors' past experience could be examined by referring to the other patent applications they had filed to determine their course of conduct over time relating to prior art. In short, the Murata court stated twice that an at issue waiver did not occur in that case only because the issues raised by the plaintiff in response to the inequitable conduct defense did not rely upon, or require examination of, any confidential attorney-client communications. Id. at *7-8.

The same is not true in this case. Here, Plaintiff responded to the Defenses by arguing that he has a good faith belief that his malpractice claim is meritorious based on his and his attorney's pre-filing investigation. (Protective Motion, ¶6.) Unlike the plaintiff in Murata, Plaintiff's assertions in this regard cannot be examined or contested without looking at the content of this pre-filing investigation to determine: (a) whether there was, in fact, a legitimate pre-filing investigation;

and (b) whether the result of that investigation, in fact, provided a good faith basis to assert these claims. Put simply the only way to examine those issues is to examine the documents and issues that Plaintiff now claims are protected by the attorney-client privilege and work-product doctrine.

Plaintiff's reliance upon Quality Croutons, Inc. v. George Weston Bakeries, Inc., No. 05 C 4928, 2006 WL 2375460, at *4 (N.D. Ill., Aug. 14, 2006), and Trustmark Ins. Co. v. General & Cologne Life, No. 00 C 1926, 2000 WL 1898518, at *8 (N.D. Ill., Dec. 20, 2000), is likewise misplaced because the claims or defenses raised in those cases did not rely upon, nor did their resolution require the examination of, any privileged communications or information. In contrast, Plaintiff's reliance upon the propriety of its pre-filing investigation does require examination of communications that might otherwise be protected communications.

* * *

For all of these reasons, Plaintiff waived any attorney-client privilege or work-product doctrine that might otherwise apply to all of the documents listed on his privilege log. For this reason alone, Plaintiff should be ordered to produce all of the documents that are currently being withheld from production. For completeness, the next portion of this Argument section will demonstrate that, even if Plaintiff did not waive the attorney-client privilege and work-product doctrine by placing these documents at issue, most of the documents should still be produced.

B. Even If There Has Not Been An At Issue Waiver, Plaintiff Should Be Ordered To Produce Most Of The Documents In Dispute

As a threshold matter, Defendants concede that, if the at issue waiver does not apply, then the third category of documents identified by Plaintiff -- correspondence between Plaintiff and his attorneys that was not disclosed to SC -- is privileged and need not be produced at this time.

However, for the following reasons, the five remaining categories of documents should be produced in their entirety.

1. Attorney-Client Privilege Waived By Disclosure To SC

Of the five remaining categories of documents, Plaintiff claims that two categories are protected by the attorney-client privilege. They are: (a) memoranda drafted by Plaintiff's counsel that were disclosed to SC; and (b) correspondence between Plaintiff and his attorneys that was disclosed to SC. (Plaintiff contends that these two categories of documents are also protected by the work-product doctrine. That will be addressed in Section B.2 below.)

Plaintiff admits these two categories of documents were disclosed to a third-party -- SC -- but contends there was no waiver because Plaintiff and SC share a "common interest." As confirmed by Plaintiff's own authority, Dexia Credit Local v. Rogan, 231 F.R.D. 268, 273 (N.D. Ill. 2004), Plaintiff has the burden of proving application of the common interest doctrine. Here, Plaintiff cannot possibly meet this burden because Plaintiff and SC do not share a common legal interest.

Plaintiff's own authority describes the common interest doctrine as follows:

> While often arising in the context of a joint defense, the common interest doctrine more generally applies to any parties who have a "common interest" in current or potential litigation, either as actual or potential plaintiffs or defendants. To maintain the privilege, the common interest must relate to a litigation interest, and not merely a common business interest.

Id. (citation omitted). The Dexia Credit court stated further that the proponent of a common interest doctrine claim must show "actual cooperation toward a common legal goal." Id. (emphasis added).

In this case, Plaintiff and SC have never had a common legal goal. The most obvious reason for this is that -- as Plaintiff himself admits -- only he has standing to assert this legal malpractice

claim. (Ex. F, p. 7.) SC has no standing to assert any claim whatsoever against Defendants. So, this clearly is not the ordinary case for application of the common interest doctrine where, for example, two defendants form a joint defense to defeat common claims against them or multiple plaintiffs join together to pursue common claims they have against a defendant. Here, SC has no legal claim against Defendants, but merely has a financial interest in the outcome of Plaintiff's case. Plaintiff has not cited one case applying the common interest doctrine in such a setting.

If Plaintiff is correct that the common interest doctrine applies whenever one has a financial interest in the outcome of a case, then it would apply to privileged documents disclosed by a trustee to any bankruptcy creditor. After all, each creditor has a financial interest in maximizing the estate's assets. Similarly, under Plaintiff's logic, the common interest doctrine would apply to protect privileged documents disclosed by a corporate litigant to all of its public shareholders because each of them has a financial stake in the case. But, there is obviously no authority so holding. Indeed, in the corporate setting, the attorney-client privilege is expressly restricted to communications involving the "control group," which typically includes only upper management and relevant decision-makers. Rounds v. Jackson Park Hosp. & Med. Ctr., 745 N.E.2d 561, 568 (Ill. App. Ct. 2001) (privilege applies only to communications involving control group, which includes only "top management who have the ability to make a final decision" and those in a direct advisory role to such top management). This alone demonstrates that the common interest doctrine does not apply to disclosures to anyone with a financial interest in the outcome of a case.

Indeed, Plaintiff's case, Dexia Credit, is distinguishable on just these grounds. In Dexia Credit, Peter Rogan was the former owner and CEO of Edgewater Hospital ("Edgewater"). Dexia issued letters of credit to secure Edgewater's bond obligations and relied on information provided

by Rogan regarding Edgewater's financial health in issuing those letters of credit. Subsequently, a Medicaid/Medicare fraud scheme was uncovered pursuant to which Rogan had siphoned money away from Edgewater. Thereafter, Edgewater defaulted on its bond obligations and Dexia was required to pay $56 million under its letters of credit. As these events were unfolding, Dexia and Edgewater joined forces to pursue their various claims against Rogan arising out of his Medicaid/Medicare fraud scheme. Under those facts, the Dexia court found that the common interest doctrine applied to attorney-client communications disclosed between Dexia and Edgewater.

That is a much different situation than the present case. Dexia and Edgewater both had legal claims against Rogan arising out of the same facts -- i.e., his Medicaid/Medicare fraud scheme. Thus, Dexia and Edgewater both had a common legal interest in proving Rogan's fraud. In contrast, Plaintiff and SC did not have a common legal interest because, as Plaintiff admits, SC had no standing to assert any legal claim against Defendants. If anything, Plaintiff's and SC's legal interests were polar opposites in that SC had a legal interest in proving that it had a valid right to recover against CMGT, while Plaintiff's legal interest was to show that SC had no such right to recovery.

2. The Work-Product Doctrine Does Not Apply

Plaintiff asserts that the remaining five categories of documents are protected by the work-product doctrine. However, these documents should be produced pursuant to Fed. R. Civ. P. 26(b)(3)(A), which provides as follows:

> Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

As a threshold matter, Plaintiff does not argue that these documents were not "otherwise discoverable under Rule 26(b)(1)." Thus, the only issues that remain are whether Defendants have: (a) a substantial need for the documents; and (b) no means of obtaining their substantial equivalent without undue hardship. E.g., Lawrence E. Jaffee Pension Plan v. Household Int'l, Inc., 244 F.R.D. 412, 424-25 (N.D. Ill. 2006) (finding that substantial need and undue hardship required production of work product). Both elements are satisfied in this case.

As a practical matter, these two elements are frequently analyzed as one because they are in many ways related. Jaffee is particularly instructive on both issues. There, a class of investors alleged various securities fraud claims arising out of predatory lending practices. The defendant retained an accounting firm to analyze its lending practices. The plaintiffs sought discovery of documents relating to the accounting study, but the defendant objected, arguing that they were protected by the work-product doctrine. In the resulting discovery dispute, the court ordered that the accounting study be produced. The court held that the "substantial need" element was satisfied because the study went "to the heart of the substantive claims in [the] case" and was directly relevant to three elements of the plaintiff's case -- falsity, scienter and materiality. Id. The court also held that the substantial equivalent could not be obtained without undue hardship because, among other things, the plaintiffs did not have access to the data used by the accountants and it was not clear that deposition testimony would generate their substantial equivalent. Id. at 424.

Here, the same analysis shows that all of the remaining documents should be produced in this case. First, the materials are directly relevant to the Defenses. Among other things, if Defendants can show that Plaintiff: (a) did not conduct a complete pre-filing investigation; (b) ignored information that contradicts or defeats his allegations and claims; or (c) does not truly believe in his claim, it will prove beyond debate that this case is bogus and a fraud on the judicial system.

Second, Defendants have no access to the substantial equivalent of these materials. Indeed, in great part, the documents are the investigation. Obviously, Defendants have no access to Plaintiff's or SC's files reflecting the pre-filing investigation and/or Plaintiff's good faith belief except through discovery in this case. And, we are before the Court because Plaintiff did not produce documents relative to these topics. In addition, as in Jaffee, it is not clear that Plaintiff's and SC's depositions will yield the substantial equivalent information. They most likely will not. Among other things, the key questions raised by the Defenses are not objective facts that can be verified or contradicted by other evidence or testimony from other witnesses. Instead, the key issues relate to Plaintiff's and SC's state of mind, knowledge, motive and intent. Under the circumstances, to find that depositions of Plaintiff and SC would provide substantially equivalent information, one would have to assume that, if appropriate, Plaintiff and SC would confess their guilt.

And, even assuming that Plaintiff and SC will be truthful no matter the consequences, these depositions still will not provide substantially equivalent information unless these witnesses have a clear and unequivocal recollection of what they said to whom or what they were told by whom during an investigation that took place over two years ago. Such recall is made all the more difficult here because the Defenses are not based on the facts as we know them today. Instead, the Defenses revolve around the facts that were known and/or communicated to Plaintiff several years ago as he

conducted his pre-filing investigation. So, for Defendants to obtain substantially equivalent information through depositions, one would have to further assume that the witnesses will be able to, without error, remember precisely what facts they knew when -- and not confuse the facts as they knew them during the pre-filing investigation with the facts as they know them now.

Finally, any distinction between "opinion" work-product and "fact" work-product is irrelevant. That is because under the unique circumstances of this case, the relevant fact is the opinion of Plaintiff's attorneys. In other words, Defendants are not interested in the opinions of Plaintiff's attorneys to help Defendants respond to the substance of Plaintiff's claims or determine Plaintiff's substantive strategy relating to his claims. Instead, Defendants are interested in these opinions only because the opinions (and the bases therefore) are relevant facts relating to the Defenses. Among other things, these opinions and their respective bases are facts that bear directly on the question of whether Plaintiff (or his attorneys) conducted an adequate pre-filing investigation and/or had a good faith basis for filing this case.

For all of these reasons, even if the at issue waiver does not apply, Plaintiff should still be ordered to produce all of the documents in the five remaining categories (i.e., all documents except correspondence between Plaintiff and his attorneys that was not disclosed to SC).

Respectfully submitted,

MAYER BROWN LLP AND RONALD GIVEN

/s/ Stephen Novack
One Of Their Attorneys

CERTIFICATE OF SERVICE

Stephen Novack, an attorney, hereby certifies that he caused a true and correct copy of the foregoing Defendants' Response to Plaintiff's Memorandum in Support of His Privilege Log Assertions to be served through the ECF system upon the following:

Edward T. Joyce
Arthur W. Aufmann
Robert D. Carroll
Edward T. Joyce & Assoc., P.C.
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on this 26th day of March, 2008.

/s/ Stephen Novack