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

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

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

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I. INTRODUCTION

In his opening Memorandum, Plaintiff described Defendants' affirmative defenses and Plaintiff's responses to those defenses, because that information is relevant to Defendants' "at issue" waiver argument. In response, Defendants baselessly accuse Plaintiff of including those facts so this Court will *sua sponte* rule on the merits of Defendants' affirmative defenses. Defendants' baseless accusation should be ignored because, although Plaintiff disagrees with nearly everything stated at pages 5-12 of Defendants' response, Plaintiff agrees that the merits of the defenses are not before this Court. Accordingly, Plaintiff's Reply is limited to the issues that are before this Court.

At this point, there are only a few issues before this Court. In that regard, Defendants concede the general applicability of the attorney-client privilege and the work product doctrine, but argue that Plaintiff has waived the privilege and protection. Defendants also argue that they have a "substantial need" for the withheld work product documents, and that they cannot obtain substantially equivalent information elsewhere without "undue hardship." As explained in Plaintiff's Memorandum and below, Defendants have not met their burden of establishing a waiver, "substantial need" or "undue hardship." Thus, Plaintiff's attorney-client privilege and work product assertions should be sustained.

II. ARGUMENT

A. Plaintiff Has Not Committed an "At Issue" Waiver

1. "At Issue" Waiver is Determined from the *Evidence* Submitted

Plaintiff cited several cases explaining that it is the nature of the evidence submitted in support of an argument or denial that determines whether there has been an "at issue" waiver. Pl. Br. at pp. 18-20. In response, Defendants argue that "at issue" waiver occurs upon a party

asserting an argument that could be supported (or rebutted) by privileged communications regardless of the evidence that is actually submitted in support of the argument. For support, Defendants rely on *Claffey v. River Oaks Hyundai*, 486 F. Supp. 2d 776 (N.D. Ill. 2007) and *U.S. v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991.) Def. Resp. Br. at pp. 16-20. Defendants' reliance on these cases is misplaced. In fact, as explained below, these cases support Plaintiff's position. Defendants also try to distinguish the cases cited by Plaintiff, but as shown below, their attempt fails.

a. Claffey v. River Oaks, Hyundai

In *Claffey*, the plaintiffs alleged that Capital One Auto Finance, Inc. ("Capital One") willfully violated the Fair Credit Reporting Act ("FCRA"). After Capital One denied the willfulness allegation, plaintiffs moved for a finding that Capital One waived the attorney-client privilege as a result of its denial. In their response brief, Defendants incorrectly state that the *Claffey* court held that if Capital One went "one step further" from denying the willfulness allegation and "affirmatively argued that it maintained reasonable procedures to ensure compliance with the Act, including consultation with counsel -- it would waive the privilege." Def. Resp. Br. at pg. 18 (emphasis added.) The actual *Claffey* holding, however, was much different than Defendants' characterization. The court stated:

> If, therefore, [Capital One] 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. [Capital One] has, by its response to plaintiffs' motion, indicated its intention to rely on such evidence. The Court does not wish, however, to lightly assume a waiver of the attorney-client privilege. For this reason, now that [Capital One] knows where the Court has drawn the line, the Court will give [Capital One] the opportunity to make a final determination [of] what it intends to use to support its argument in this case.

Claffey, 486 F. Supp. 2d at 779 (emphasis added).

Thus, the *Claffey* court did not hold that Capital One could waive the attorney-client privilege simply by asserting an argument. Rather, the *Claffey* court held that Capital One would waive its privilege only if it actually relied on documents or other evidence that tend to suggest that its procedures included consultation with counsel. Therefore, *Claffey* supports Plaintiffs' position that it is the nature of the evidence actually relied on that determines whether there has been an "at issue" waiver.

b. *U.S. v. Bilzerian*

In *Bilzerian*, the defendant was indicted on criminal charges for violating federal securities laws. Before trial, the defendant moved *in limine* for an order permitting him to testify about his good faith belief in the lawfulness of his actions, without being subjected to cross-examination about his attorney-client communications. The district court refused to rule on the issue in the abstract, but stated that if the defendant testified about his belief in the legality of his actions, then on cross-examination of that testimony, the plaintiff could inquire about his attorney-client communications on that subject. *Bilzerian*, 926 F.2d at 1291. After trial, the defendant appealed the district court's denial of his motion *in limine*.

The Second Circuit held that the district court's refusal to grant blanket protection from an implied waiver of the attorney-client privilege was not an abuse of discretion. *Id.* at 1293. As Defendants here note, the Second Circuit stated that waiver would have applied to defendant's testimony about his belief in the legality of his actions if he had testified. *Id.* at 1292. Defendants fail to disclose, however, that the Second Circuit also noted that: (1) if the defendant made an argument about his good faith without testifying, there could be no waiver, and (2) the district court "took great pains to point out that application of the privilege would hinge on the testimony elicited on direct examination." *Id.* at 1293. In other words, the Second Circuit held

that there could be a waiver only if the defendant testified in support of his purported good faith. Thus, the legal principle in *Bilzerian* and *Claffey* is the same -- *i.e.*, an "at issue" waiver is determined from the evidence submitted in support of an argument, not from the mere assertion of the argument.

A subsequent Second Circuit decision makes this point crystal clear. In *John Doe Co. v. United States*, 350 F.3d 299 (2d Cir. 2003) the appellant, "Doe," was the subject of a grand jury investigation. When Doe learned about the investigation, its attorneys submitted a letter (the "Letter") to the U.S. Attorney's office, asserting that Doe had proceeded in a good faith belief that its actions were lawful. The district court held that Doe waived work product protection by sending the Letter, but the Second Circuit reversed, explaining that a party does not commit a waiver merely by stating its position:

> In [*Bilzerian* and *Nobles*] the courts ruled that the defendant would forfeit the privilege with respect to certain materials, but *only if* the defendant gave certain testimony at trial before the jury. Here, the government contends that Doe's mere act of telling the prosecutor its position results in such a waiver. In *Nobles* and *Bilzerian* each defendant had informed the prosecutor, and also the court, of his position and his possible intention to give such testimony. Under the government's present theory, those defendants would have already waived their privilege, merely by telling the judge and prosecutor, regardless [of] whether they went on to so testify before the jury. The courts of course made no such ruling.

John Doe Co., 350 F.3d at 304-305 & n.3 (emphasis in original).

Thus, as the *John Doe Co.* decision makes clear, the test for "at issue" waiver focuses on the testimony or other evidence submitted in support of an argument or denial -- not the mere assertion of the argument or denial.

c. *Murata Mfg. Co., Ltd. v. Bel Fuse, Inc.*, *Quality Croutons, Inc. v. George Weston Bakeries, Inc.*, and *Trustmark Ins. Co. v. General & Cologne Life*.

Plaintiff cites three cases -- *Murata Mfg. Co. Ltd v. Bel Fuse, Inc.*; *Quality Croutons, Inc. v. George Weston Bakeries, Inc.*; and, *Trustmark Ins. Co. v. General & Cologne Life* -- to support his argument that he has not committed an "at issue" waiver. Pl. Br. at pp 19-20. Defendants try to distinguish *Murata*, *Quality Croutons* and *Trustmark* on the basis that the issues raised by the plaintiffs in those cases did not require examination of privileged communications. But those cases did not focus on the evidence that was required to support a claim or defense; rather, those cases properly focused on the evidence that the parties had actually relied on to support a claim or defense. *See Murata Mfg. Co., Ltd.*, 2007 WL 781252 at *7, where the court focused on whether the plaintiff relied on privileged communications to reach its finding that the plaintiff did not waive the attorney-client privilege. *See also*, *Quality Croutons, Inc.*, 2006 WL 2375460 at *4, where the court found that "at issue" waiver did not apply because the party asserting the privilege had "not used privileged communications or information in its defense," and *see Trustmark Ins. Co.*, 2000 WL 1898518 at *7-8, where the court stated that "a party must affirmatively try to use the privileged communication to defend itself or attack its opponent in the lawsuit before the 'at issue' waiver may apply."

It makes sense that the waiver test is based on an examination of the evidence a party has actually relied on, because a party can always choose to protect his privilege over advancing an argument or defense. Thus, Defendants' attempt to distinguish *Murata*, *Quality Croutons* and *Trustmark* fails.

In summary, both the courts in this district and the Second Circuit follow the rule that an "at issue" waiver occurs only if a party affirmatively offers testimony or other evidence that puts

privileged or protected communications at issue. Below, Plaintiff applies the foregoing rule to the facts of this case to demonstrate that there has been no such waiver here.

2. Plaintiff Has Not Put any Privileged or Protected Communications "At Issue."

According to Defendants, the components of their affirmative defenses are (1) SC's alleged bad faith decision to file the California Action, (2) Plaintiff's failure to move to vacate the default judgment in the California Action, (3) Plaintiff's agreement with SC, (4) Plaintiff's purported failure to conduct an "easy and dispositive pre-filing investigation" and (5) Plaintiff's alleged bad faith decision to file this case. Def. Resp. Br. at pg. 11.[1] In support of their waiver argument, Defendants assert that Plaintiff first put the adequacy of his pre-filing investigation and his alleged bad-faith at issue when he (1) responded to Defendants' motion to dismiss, (2) responded to Defendants' motion to reconsider, and (3) filed a motion for a protective order. Def. Resp. Br. at pp. 12-15. As shown in Plaintiff's Memorandum and below, Defendants' waiver argument is baseless.

a. Response to Motion to Dismiss

Without a doubt, Defendants first raised Plaintiff's conduct as an issue in this case when they argued that this case is a "fraud on the court" and that it should be dismissed on the pleadings as a sanction to remedy the purported fraud. (*See e.g.*, Mot. to Dismiss at pg. 2, where Defendants argue that, with Plaintiff's "complicity," Spehar is trying to "parlay the wrongful and worthless Default Judgment into a $17 million bonanza.") Thus, Defendants' contention that Plaintiff injected his conduct as an issue in this case is simply not true. More importantly, however, it is not relevant that Plaintiff denied Defendants' accusations -- instead, the relevant inquiry is whether Plaintiff has submitted any evidence that puts privileged or protected

[1] As explained in Plaintiff's opening Memorandum, this is a case where Plaintiff has defeated Defendants' motion to dismiss, largely because of the non-privileged documentary evidence attached to Plaintiff's complaint.

communications "at issue." *See* pp. 1-6 *supra* and Pl. Br. at pp. 18-20. As explained in Plaintiff's Memorandum, he has not. Pl Br. at pp. 20-23. Thus, there has been no waiver here.

Defendants also argue that Plaintiff "unequivocally used its good faith and pre-filing investigation positions to defeat the Dismissal Motion." Def. Resp. Br. at pg. 18. This is also not true. In response to the motion to dismiss, Plaintiff argued that (1) Defendants' only authority submitted in support of their sanction request involved allegedly fraudulent conduct by a litigant -- not a third party -- and (2) Defendants failed to present any evidence that Plaintiff -- and not just Spehar -- committed a fraud. Pl. Resp. to Mot. to Dismiss at pp. 25-26. Thus, contrary to Defendants' baseless assertion, Plaintiff did not "use" his good faith or his "pre-filing investigation positions" to defeat the motion to dismiss. In fact, Judge Kendall expressly based her denial of Defendants' sanction request on their failure to meet their burden of proof. (*See* Judge Kendall's Memorandum Opinion and Order at pg. 7, where she states that the only case cited by Defendants stands for the "unremarkable proposition that federal courts have the inherent authority to sanction litigants for bad-faith or fraudulent conduct and that the available sanctions include dismissal with prejudice," and that Defendants failed to meet their burden of proving that Plaintiff had orchestrated a fraud on the judicial system.)[2]

The bottom line is that because Plaintiff did not rely on any privileged or protected documents when he responded to Defendants' motion to dismiss, he did not waive the attorney-client privilege or the work product doctrine.

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[2] Even if the court had based its ruling on an argument by Plaintiff that he acted in good faith or that he conducted an "adequate" pre-filing investigation, that would not result in an "at issue" waiver. As explained at pp. 1-6 *supra*, an "at issue" waiver is based on the evidence submitted in support of an argument, not the argument itself. Aside from the fact that Plaintiff said nothing about his good faith or about his pre-filing investigation in response to Defendants' motion to dismiss, he could not have supported those phantom arguments with evidence because he was responding to a motion to dismiss -- a matter limited to the four-corners of the complaint (including exhibits).

b. Response to Motion to Reconsider

Defendants argue that, in response to their motion to reconsider, 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." Def. Resp. Br. at pg. 14. Defendants are wrong again. In response to that motion, Plaintiff did not argue that he is "innocent" or that he conducted an adequate pre-filing investigation. Instead, Plaintiff argued that Defendants had the burden of proving that he committed a fraud, and that they failed to meet their burden. Pl. Resp. to Def. Mot. for Reconsideration at pp. 3-9. Moreover, even if Plaintiff had "affirmatively" argued his good faith or the adequacy of his pre-filing investigation, such an argument could not be the basis of an "at issue" waiver because an "at issue" waiver must be based on the evidence relied on in support of an argument, not the mere assertion of the argument. *See* pp. 1-6 *supra* and Pl. Br. at pp. 18-20.[3] Therefore, Plaintiff has not waived the attorney-client privilege or the work product doctrine.

Defendants also argue that Plaintiff "used his good faith and pre-filing investigation positions to defeat" Defendants' motion to reconsider. Def. Resp. Br. at pg. 18. This is also not true. There is simply nothing in the record indicating that Judge Kendall denied Defendants' motion to reconsider on any basis other than the basis she used to deny their motion to dismiss – i.e., that Defendants failed to meet their burden of proving that Plaintiff committed a fraud on the court. Accordingly, Defendants' argument that Plaintiff waived the attorney-client privilege and the work product doctrine should be rejected.

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[3] As explained in Plaintiff's Memorandum, Plaintiff does not intend to rely upon any testimony or other evidence that could put privilege/protected communications "at issue." Pl. Br. at pp. 20-23.

c. Motion for Protective Order

On December 7, 2007, after Judge Kendall had already denied Defendants' motion to dismiss and motion to reconsider, but before Spehar/SC responded to Defendants' third-party subpoena, Plaintiff filed a motion for protective order. That motion 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 the court can resolve any disputes about the privilege assertions.

In the "background" section of that motion, Plaintiff briefly explained the nature of his pre-filing investigation so that Judge Kendall would understand why Spehar and SC likely have possession of documents protected by the work product doctrine. In paragraph 6 of the "background" section of his motion, Plaintiff stated that:

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

(Mot. For Protective Order at ¶6.)

In their response brief, Defendants lift this statement out of context to argue that Plaintiff "responded to the [affirmative] 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." Def. Resp. Br. at pp. 17 & 19 (emphasis added). As Defendants know, Plaintiff's motion for protective order had nothing to do with the merits of Defendants' affirmative defenses, and that motion in no way "responded" to those defenses. Defendants' calculated misuse of Plaintiff's statement from his motion for protective order demonstrates the weakness of their position.

Pursuant to all of the legal authorities discussed in this Reply, Plaintiff's above-quoted statement in his motion for protective order did not put any privileged or protected documents "at issue."

Defendants' amazing lack of candor is then compounded by their baseless assertion that Plaintiff "prevailed" on his motion for protective order because of his statement at paragraph 6 of that motion. Def. Resp. Br. at pp. 15 & 17. Defendants know full well that the premise of Plaintiff's motion was the need for a procedure to ensure that privileged documents were not inadvertently produced by Spehar or SC. Although Judge Kendall never expressly granted or denied Plaintiff's motion, she did approve the procedure he requested. Pl. Br. at Ex. 4, pp. 13-15. The propriety and efficiency of that procedure has nothing to do with Defendants' affirmative defenses or with paragraph 6 of the motion for protective order.

Moreover, even if Judge Kendall approved the discovery procedure requested by Plaintiff because of his statement at paragraph 6 of his motion, how are Defendants prejudiced by that decision? Judge Kendall simply allowed Plaintiff to review the Spehar Documents and to assert a privilege as to those documents before producing them to Defendants. Obviously, Judge Kendall did not preclude Defendants from challenging Plaintiff's privilege assertions, as that is the very issue before this Court now. Therefore, Judge Kendall's reason for approving Plaintiff's requested discovery procedure is not relevant to any issue before this Court.

In sum, the fact is Plaintiff has not waived the attorney-client privilege or the work product doctrine because he has not affirmatively relied upon any testimony or other evidence that puts privileged or protected documents "at issue." Accordingly, Plaintiff's attorney-client privilege and work product assertions should be sustained.

B. The Common Interest Doctrine Applies Here

In his opening Memorandum, Plaintiff argued that certain communications that were shared with Spehar are protected by both the attorney-client privilege and the work product doctrine. Pl. Br. at pp. 10-11, 14 and 17. With respect to the attorney-client privilege, Plaintiff argued that he did not waive the privilege by sharing the communications with Spehar, because he and Spehar share a "common interest." Pl. Br. at pp. 10-11. In support of his argument, Plaintiff relied on *Dexia Credit Local v. Rogan*, 231 F.R.D. 268 (N.D. Ill. 2004). *Id.* Defendants responded to Plaintiff's "common interest" doctrine argument by arguing that Plaintiff has misinterpreted the *Dexia Credit* decision.

While Plaintiff believes that his interpretation of *Dexia Credit* is correct, it is ultimately for this Court to determine how that case should be interpreted. If this Court agrees with Plaintiff's interpretation, then the work product doctrine and the attorney-client privilege apply to the memoranda and correspondence that were shared with Spehar. If, however, this Court agrees with Defendants' interpretation, then only the work product doctrine applies to the memoranda and correspondence that were shared with Spehar. In either situation, the documents shared with Spehar are protected.

C. The Withheld Work Product Documents are not Discoverable Because they are "Opinion" Work Product

Defendants do not dispute Plaintiff's designation of the documents on his privilege logs as "opinion" work product. Significantly, "Rule 26 draws a distinction between 'opinion' work product and ordinary work product." *Trustmark Ins. Co.*, 2000 WL 1898518 at *3. In that regard, "even when a showing has been made sufficient to require production of attorney work product, 'the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the

litigation. This suggests that the protection of opinion work product (as opposed to ordinary work product) is for 'all intents and purposes absolute.'" *Id.*

Defendants ignore the well-established distinction between "opinion" and ordinary work product, arguing that the withheld documents should be treated as ordinary work product because Defendants believe Plaintiff's attorneys' opinions are relevant facts. Def. Resp. Br. at pg. 26. In essence, Defendants are asking this Court to create a new (and absurd) exception to the nearly absolute protection afforded "opinion" work product -- an exception that allows courts to treat "opinion" work product as ordinary work product in any case where a party claims the need to see the opposing attorney's opinions. Defendants' argument should be rejected because (1) it is not supported by any legal authority and (2) it would create an improper "end run" around the legal authority that limits the "at issue" waiver to situations where a party's evidence puts his attorney's opinions at issue.

In addition, Defendants' argument should be rejected because it would be unfair and prejudicial to Plaintiff to require production of his attorney's opinion work product. In their response, Defendants disingenuously state that they are not interested in the opinions of Plaintiff's attorneys to help them respond to Plaintiff's claims or to determine Plaintiff's litigation strategy. That statement cannot be true, but even if it is true, once the documents are produced the bell cannot be un-rung. In that regard, if Defendants gain possession of Plaintiff's "opinion" work product, they will have unfettered access to Plaintiff's attorney's thoughts and strategies, and will be able to use those documents to gain an unfair advantage in defending this case. This is exactly the type of unfairness and prejudice that the "opinion" work product doctrine was designed to protect against. *Trustmark Ins. Co.*, 2000 WL 1898518 at * 2. Thus, Plaintiff's work product assertions should be sustained.

D. Even if Some of the Withheld Documents are "Fact" Work Product, Defendants Cannot Demonstrate "Substantial Need" or "Undue Hardship"

Because all of the work product documents withheld by Plaintiff are "opinion" work product, this Court does not need to address Defendants' "substantial need" and "undue hardship" arguments. However, even if some of the withheld documents are found to be "fact" work product, Plaintiff's work product assertions should be sustained because Defendants failed to meet their two-part burden of establishing (1) they have a substantial need for the withheld documents, and (2) they cannot obtain the substantial equivalent by other means without undue hardship.

The burden of establishing a "substantial need" and "undue hardship" is on Defendants. *Trustmark Ins. Co.*, 2000 WL 18998518 at *3. "This is a difficult burden to meet, and is likely to be satisfied only in rare situations such as those involving witness unavailability." *Id.* To meet their burden, Defendants speculate that the withheld documents may show that Plaintiff (1) did not conduct a complete pre-filing investigation, (2) ignored evidence that contradicts or defeats his allegations and claims, or (3) does not truly believe in his claim. Def. Resp. Br. at pg. 25.[4] Defendants also argue that they do not have access to substantially equivalent information because Plaintiff's and Spehar's depositions are unreliable sources of information.

Defendants' arguments are improperly based on broad generalizations about their defenses and the discovery that is available to support them. A review of the specifics of those defenses makes clear that Defendants cannot meet their burden of establishing substantial need and undue hardship. For example, Defendants have argued that Plaintiff's pre-filing

[4] Again, it bears noting that Defendants were unable to successfully attack the complaint because the exhibits to the complaint support Plaintiff's allegations. If there was actually evidence that contradicts or defeats Plaintiff's claims, we respectfully suggest that Defendants would have filed a motion for summary judgment (instead of a motion to dismiss) and attached that evidence. Instead, Defendants ask this Court to buy into their speculation that Plaintiff's attorneys are holding such evidence -- which they never identify -- and they ask this Court to relieve them of their obligation to use well-established discovery procedures (e.g., depositions) to contest the merits of Plaintiff's claims.

investigation was incomplete because Plaintiff failed to interview CMGT's president and shareholders about the Complaint's allegations. *See* Defendants' Answers to Plaintiff's Interrogatories at Interrogatory Number 1, which are attached hereto as Exhibit 1; *see also*, Def. Resp. Br. at pg. 4. Defendants have acknowledged that they can obtain information regarding Plaintiff's pre-filing communications with CMGT's management and shareholders by taking discovery directly from those individuals. Def. Resp. Br. at pg. 4. Thus, Defendants do not have a "substantial need" for Plaintiff's work product to investigate that aspect of their affirmative defenses.

Aside from their statement that Plaintiff should have interviewed CMGT's management and shareholders, Defendants fail to explain what Plaintiff should have done -- regardless of what he actually did -- as part of his pre-filing investigation of the claims that Judge Kendall found to be legally sufficient. Furthermore, Defendants do not state what facts they think Plaintiff ignored. Defendants cannot meet their burden of establishing a "substantial need" for the withheld documents without explaining what investigation Plaintiff purportedly should have done and what facts he purportedly ignored. Additionally, despite the detailed descriptions that Plaintiff provided for the withheld documents, Defendants did not (1) identify which documents they believe support their affirmative defenses, (2) explain why they believe those documents may support their defenses, and (3) explain why they cannot obtain the information that they believe is in those documents from any other source. Simply stated, Defendants failed to meet their burden of establishing "substantial need" and "undue hardship."

Ironically, Defendants' own explanation of their affirmative defenses defeats their "substantial need" and "undue hardship" arguments. According to Defendants, the basic components of their affirmative defenses are that Plaintiff knowingly or recklessly (1) failed to

uncover all relevant facts, (2) accepted and relied upon facts that are not true, and/or (3) ignored relevant facts, but (4) filed the complaint any way. As the descriptions of the withheld work product documents reveal, those documents relate to Plaintiff's and his attorney's analysis of the law, application of the law to the facts and strategies for prosecuting this case. Thus, those documents are not relevant to any component of Defendants' affirmative defenses. In contrast, documents relating to the facts Plaintiff obtained during his investigation, and on which the Complaint is based, have been produced to Defendants. Defendants can determine what facts Plaintiff obtained, relied on, ignored or failed to obtain by reviewing the non-privileged documents Plaintiff produced, and by taking depositions.

Moreover, Defendants have taken the position that Plaintiff could have conducted an "easy and dispositive" pre-filing investigation. Def. Resp. Br. at pg. 11. Thus, Defendants should be able to "easily" determine whether Plaintiff missed any relevant facts, accepted false facts and/or ignored relevant facts through Defendants' own investigation. In other words, Defendants can do what they contend Plaintiff should have done.[5] Because Defendants have admitted that they can "easily" obtain the "dispositive" facts that Plaintiff purportedly missed or ignored, they cannot meet their burden of establishing "substantial need" and "undue hardship." Accordingly, Plaintiff's attorney-client privilege and work product assertions should be sustained.

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[5] For example, let's say that through their own investigation Defendants uncover a fact that contradicts Plaintiff's allegations. Defendants can present that fact to Plaintiff in his deposition and question him about whether he knew about it, why he did not go through the same steps that Defendants went through to uncover the fact, whether he thinks the fact is fatal to his claims, etc. Based on Defendants' assertion that Plaintiff should have uncovered the contradictory fact during an "easy and dispositive" pre-filing investigation, there is no reason why Defendants cannot uncover the same fact at this time through their own investigation without reviewing Plaintiff's work product.

III. CONCLUSION

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

Dated: April 9, 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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