

**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' SUPPLEMENTAL  
MEMORANDUM REGARDING 2005 DEXIA CREDIT OPINION**

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## **I. INTRODUCTION**

Defendants Mayer Brown LLP and Ronald B. Given sincerely appreciate the Court's consideration of the parties' prior briefs and oral arguments regarding Plaintiff's privilege assertions. Pursuant to the Court's invitation at the close of oral argument, Defendants submit this Supplemental Memorandum to demonstrate that Dexia Credit Local v. Rogan, 231 F.R.D. 287 (N.D. Ill. 2005), does not support Plaintiff's invocation of the common interest doctrine to protect attorney-client communications that were disclosed to a third-party, Spehar Capital, LLC ("Spehar").

## **II. THE 2005 DEXIA CREDIT OPINION**

### **A. Procedural History**

Both parties discussed Dexia Credit Local v. Rogan, 231 F.R.D. 268 (N.D. Ill. 2004) ("Dexia I") in their briefs. During oral argument, the Court raised the possible application of Dexia Credit Local v. Rogan, 231 F.R.D. 287 (N.D. Ill. 2005) ("Dexia II"). Because the procedural history of the Dexia Credit case is somewhat complex -- but necessary to understand why Dexia II does not apply in the present case -- we first discuss the procedural history of the two Dexia Credit opinions under consideration.

The Dexia Credit case was filed by Dexia Credit Local ("Dexia"), which had issued letters of credit securing the bond obligations of non-party Edgewater Medical Center ("EMC"). Dexia filed the Dexia Credit case against Peter Rogan and various entities controlled by him -- Braddock Management, LP; Bainbridge Management, LP; and Bainbridge Management, Inc. (together, the "Management Companies") -- to recover the amounts it paid under the letters of credit. Dexia alleged that the Management Companies fraudulently misrepresented EMC's true financial condition and were in a position to misrepresent EMC's true financial condition because of a series of Hospital Management Agreements entered into with EMC (the "HMAs"), pursuant to which the Management

Companies in large part controlled EMC's day-to-day operations. Among other things, the Management Companies: (a) could enter into contracts on behalf of EMC; (b) could hire consultants, accountants or attorneys; and (c) had the "sole discretion" to pursue and defend legal claims involving EMC. See Dexia II, 231 F.R.D at 289-90. Dexia alleged that the Management Companies' fraudulent misrepresentation of EMC's true financial condition caused Dexia to issue letters of credit that it otherwise would not have issued. Because of its actual poor financial condition, EMC defaulted on its bond obligations and its bondholders drew upon the letters of credit issued by Dexia.

1. **Dexia I**

In Dexia I, the court considered Rogan's motion to compel the production of communications between EMC and its attorneys, that had been disclosed to Dexia. Dexia claimed that these documents remained privileged despite their disclosure to Dexia because of the common interest doctrine. According to Dexia, it shared a common legal interest with EMC because they both had and were pursuing legal claims against Rogan and the Management Companies arising out of their fraudulent misrepresentations regarding EMC's true financial condition.

The Dexia I court held that the common interest doctrine did apply under those circumstances because both Dexia and EMC shared "a common interest in pursuing a common legal goal: that is, establishing that the defendants in this case [Rogan and the Management Companies] engage[d] in a course of fraudulent conduct that led to the losses claimed by Dexia and by EMC." Dexia I, 231 F.R.D. at 274.

Defendants explained in their prior briefs and at oral argument that Dexia I shows why the common interest doctrine does not apply in this case. That is because both Dexia and EMC were

pursuing legal claims (albeit in different proceedings) -- and had standing to assert them -- against Rogan and the Management Companies arising out of their fraud. Dexia I, 231 F.R.D. at 274. Conversely, in this case, only CMGT (through Plaintiff) has any standing to assert any legal claim against Defendants. Spehar has no legal claim whatsoever against Defendants, so Plaintiff and Spehar have no “common legal goal.” As such, Plaintiff waived the attorney-client privilege by disclosing to Spehar documents that Plaintiff otherwise claims are privileged.

## 2. Dexia II

In Dexia II, the court considered a later discovery dispute between Dexia and the Management Companies regarding documents in the possession of attorney John Tatooles (“Tatooles”). The Management Companies hired Tatooles to do legal work for EMC pursuant to the powers granted to the Management Companies under the HMAs. During discovery, the Management Companies apparently refused to produce Tatooles’ files to Dexia because the Management Companies asserted that they were the only parties with an attorney-client relationship with Tatooles.

In response, Dexia filed a motion arguing that EMC -- not the Management Companies -- was the only party with an attorney-client relationship with Tatooles. Accordingly, Dexia argued that: (a) EMC controlled the attorney-client privilege; (b) Dexia, therefore, was entitled to the production of Tatooles’ files; and (c) the Management Companies were prohibited from accessing or using Tatooles’ files.<sup>1</sup>

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<sup>1</sup> It is not entirely clear from the Dexia II opinion why or how Dexia would automatically be entitled to production of Tatooles’ files if EMC controlled the privilege. Presumably, this is because the Dexia I Court had previously held that Dexia and EMC had a common interest for privilege purposes, but this point is neither stated nor discussed in Dexia II.

The Dexia II court first rejected the Management Companies' argument that they alone had an attorney-client relationship with Tatooles. Rather, Dexia II held that EMC had an implied attorney-client relationship with Tatooles because -- even though Tatooles was technically hired by the Management Companies -- that was only because of the broad powers granted to the Management Companies under the HMAs to act on behalf of EMC with respect to its legal affairs. Under the circumstances, Dexia II held that no one could have reasonably believed that Tatooles' communications with the Management Companies -- who were acting on behalf of EMC -- would be kept confidential from EMC. Dexia II, 231 F.R.D. at 293. Thus, EMC (and apparently Dexia) were entitled to have access to Tatooles' files.

The Dexia II court next rejected Dexia's argument that EMC alone had the attorney-client relationship with Tatooles. Rather, relying upon the common interest doctrine, Dexia II held that neither the Management Companies, EMC nor Dexia could assert the attorney-client privilege to keep Tatooles' files from any of the others. The Court found that the Management Companies and EMC had a "common interest" because of the relationship and duties created by the HMAs. Specifically, the HMAs granted the Management Companies broad powers to conduct EMC's legal affairs -- including hiring attorneys and handling EMC's legal matters. Moreover, the HMAs imposed upon the Management Companies both a contractual and fiduciary duty in carrying out these obligations.

Thus, under the unique facts of the case, Dexia II found that EMC and the Management Companies had a "common legal goal" in hiring Tatooles -- namely, getting good legal representation for EMC from Tatooles. Obviously, EMC had this legal goal and interest because its legal rights were being represented by Tatooles. The Management Companies also had the same

legal goal and interest because it was legally required under the HMAs to ensure that EMC's legal rights were adequately represented. Thus, the Dexia II Court concluded that "EMC and the Management Companies had the identical interest that the legal advice Tatooles gave was sound, so that each could rely upon it." Dexia II, 231 F.R.D. at 294. In short, the Management Companies had more than a financial interest in Tatoole's representation of EMC because the Management Companies had a legal duty to make sure that Tatoole's representation of EMC was adequate. Thus, the Management Companies' own legal rights and liabilities were "on the line" by virtue of Tatoole's representation.

**B. Dexia II Does Not Apply In This Case**

As set forth above, the application of the common interest doctrine in Dexia II turned on the fact that both EMC and the Management Companies had a direct legal interest in the content and quality of Tatooles' representation. It went beyond a mere financial interest in the result of that representation. That critical fact upon which the Dexia II decision turned is simply not present in this case because Spehar has only a financial interest in the outcome of this case. Specifically, unlike EMC in Dexia II, Spehar's own legal rights obviously are not being represented by Plaintiff's counsel because Spehar has no legal rights or claims whatsoever against Defendants.

Similarly, unlike the Management Companies in Dexia II, Spehar has no legal interest tied to Plaintiff's counsel because Spehar has no legal duty (be it contractual, fiduciary or otherwise) to ensure that Plaintiff's counsel is right for the job and does an adequate job. Instead, Spehar's only interest in this case is its financial interest in the outcome created by Spehar's funding agreement with Plaintiff. (See Exhibit E to Defendants' Response to Plaintiff's Memorandum in Support of His Privilege Log Assertions.) But, unlike the HMAs in Dexia II, that funding agreement does not

impose any legal obligations upon Spehar that are being carried out by Plaintiff's counsel in this case. Rather, Spehar's only obligations under the funding agreement were to make an initial deposit with the Estate and provide additional funding upon the Trustee's request. (Id. at ¶13.) Thus, Spehar has no legal interest in this case or in Plaintiff's counsel's advice and representation.

Indeed, this point was driven home by Plaintiff himself in the very first brief filed by Plaintiff regarding the Defenses. According to Plaintiff, "it was the Trustee's decision to file this case -- not Spehar's." (See Plaintiff's Response to Lawyer Defendants' Motion to Dismiss, Docket No. 22, at p. 26; emphasis added.) Thus, Plaintiff himself has already admitted that this case is not like Dexia II because, unlike the Management Companies in Dexia II, Spehar does not have any authority under the funding agreement to hire lawyers for Plaintiff nor does Spehar have the "sole discretion" to prosecute legal claims for Plaintiff. Thus, Spehar has no legal claim or rights being prosecuted or represented by Plaintiff's counsel in this case. It, therefore, has no common legal goal with Plaintiff and has only a financial interest in the outcome of this case. That is not enough to trigger the common interest doctrine even as that doctrine is stated in Dexia II. See Dexia II, 231 F.R.D. at 293 (For the common interest doctrine to apply, "[t]he interests must involve a 'common legal goal,' as opposed to a mere business interest.")

### **III. CONCLUSION**

For these additional reasons, the common interest doctrine does not apply and Plaintiff, therefore, waived the attorney-client privilege with respect to all documents disclosed to Spehar.

Respectfully submitted,

MAYER BROWN LLP AND RONALD GIVEN

By:           /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' Supplemental Memorandum Regarding 2005 Dexia Credit Opinion 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 20th day of May, 2008.

/s/ Stephen Novack