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United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Virginia M. Kendall	Sitting Judge If Other than Assigned Judge	
CASE NUMBER	06 C 5486	DATE	10/28/2008
CASE TITLE	GROCHOCINSKI vs. MAYER BROWN ROWE & MAW et al		

DOCKET ENTRY TEXT

Defendants are given to November 12, 2008 to file objections to the alternative ruling. In addition, Defendants' Unopposed Motion to Reset the Discovery Deadline is granted so that discovery may be completed pending the resolution of these privilege issues. Discovery is ordered closed January 31, 2009.

■ [For further details see text below.]

Notices mailed by Judicial staff.

STATEMENT

Plaintiff David Grochocinski ("Grochocinski"), in his capacity as Chapter 7 Trustee for the bankruptcy estate of CMGT, Inc., brought suit against Defendants Mayer Brown Rowe & Maw LLP, Ronald B. Given and Charles v. Trautner (collectively "Defendants"), alleging legal malpractice. Defendants brought a Motion to Dismiss, arguing in part that Grochocinski's case should be dismissed because it amounted to a fraud on the Court, or, as this Court has framed it, because he filed the suit with "unclean hands." This Court denied the Motion to Dismiss and the Motion to Reconsider that followed; however, it found Defendants' "unclean hands" argument very persuasive. As such, this Court bifurcated the case and ordered the parties to conduct discovery solely on the issue of "unclean hands" so that this Court, with all the relevant facts in front of it, could decide whether the case should be dismissed on that basis. Grochocinski then brought a Motion for a Protective Order, and following discussion of some of the relevant privilege issues, this Court ordered Grochocinski to prepare a privilege log listing any document to which he wanted to assert privilege and submit it to Magistrate Judge Denlow for his review. In addition, this Court referred all issues regarding the discovery of privilege matters to Judge Denlow.

Grochocinski argued in Judge Denlow's Court that documents related to his pre-lawsuit investigation and mental impressions of his case were privileged and thus not discoverable. Defendants argued that such documents were not privileged because the pre-lawsuit investigation had been put at issue and because Grochocinski waived the attorney-client and work product privileges. Judge Denlow issued a Memorandum Opinion and Order on June 9, 2008 granting in part and denying in part Grochocinski's Motion for a Protective Order. Specifically, he granted the protective order regarding communications that took place after the filing of the lawsuit but denied the protective order regarding communications that preceded the filing of the lawsuit. In so ruling, Judge Denlow held that this Court's orders placed the communications preceding the filing of the instant lawsuit "at issue" and thus waived any privilege that would otherwise apply. Specifically, Judge Denlow stated that the pre-filing communications were "exactly the type of information Judge Kendall intended the

STATEMENT

parties to discover, in order to resolve the issue of whether Plaintiff filed this lawsuit in good faith." Judge Denlow also issued an alternative ruling addressing "at issue" waiver by a party, attorney-client privilege, and work product doctrine and granting the Motion for a Protective Order in full. Such alternative ruling comes into play only if this Court sets aside the original Order. Grochocinski objected to Judge Denlow's order, arguing that this Court did not and in fact could not order the production of privileged documents.

Here, Judge Denlow misinterpreted this Court's referral. This Court did not intend to inherently put all privileged communications regarding Grochocinski's motivation for filing the instant lawsuit at issue by opening discovery on the "unclean hands" issue. The Court merely opened discovery regarding Grochocinski's motivation for filing this lawsuit, and he must now make his own decisions as to what potentially privileged communications to reveal in order to support his case. As such, this Court intended, by its referral, for Judge Denlow to address the privilege issues that would and did arise as a result of this Court opening discovery on the "unclean hands" issue. Therefore, this Court rejects Judge Denlow's primary ruling.

This Court intends to adopt Judge Denlow's alternative ruling. Defendants are given two weeks from the date of this order to file objections to the alternative ruling. In addition, Defendants' Unopposed Motion to Reset the Discovery Deadline is granted so that discovery may be completed pending the resolution of these privilege issues. Discovery is ordered closed January 31, 2009.

So ordered.

B

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,)

v.)

MAYER BROWN ROWE & MAW LLP and)
RONALD B. GIVEN)

Defendants.)

No. 06 C 5486

Judge Virginia M. Kendall

Magistrate Judge Morton Denlow

DEFENDANTS' OBJECTION TO THE
"ALTERNATIVE RULING" IN MAGISTRATE JUDGE
DENLOW'S JUNE 9, 2008 MEMORANDUM OPINION AND ORDER

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I. INTRODUCTION

By Order dated October 28, 2008 (the "October 28 Order," attached hereto as Exhibit A), this Court stated that it intends to adopt the "Alternative Ruling" in Magistrate Judge Denlow's June 9, 2008 Memorandum Order and Opinion (the "Magistrate Order"). However, this Court granted Defendants until November 12, 2008 to file their objections to that Alternative Ruling. As set forth below, the Alternative Ruling is in error and should not be adopted by this Court because Plaintiff put all documents relating to his (and his attorneys') pre-filing investigations at issue in this case. Accordingly, Plaintiff should be ordered to produce all documents on his privilege logs that pre-date the filing of his Complaint.

Alternatively, even if this Court believes that Plaintiff has not yet put these documents at issue, the privilege question cannot finally be decided at this time. In such event, "Plaintiff must make his own decision as to what potentially privileged communications to reveal to support his case." (October 28 Order, p. 2.) Accordingly, if the Court adopts the Alternative Ruling, Defendants reserve the right to reassert waiver based on what happens in discovery, summary judgment or other proceedings with respect to the defenses that have at various times been referred to as the "absurd result," "unclean hands" or "fraud on the court" defenses (the "Defenses").

II. PROCEDURAL HISTORY¹

A. The Privilege Dispute

On October 30, 2007, this Court stated that the Defenses are very persuasive. (10/30/07 Transcript, attached hereto as Exhibit C, pp. 2-3 & 6; see also, October 28 Order, p. 1 --

¹ The Procedural History set forth herein is limited to those events that relate directly to the Alternative Ruling. A more comprehensive Procedural History was set forth in Defendants' Response to Plaintiff's Objection to the Magistrate Order (at pp. 1-5) -- which is attached hereto as Exhibit B and incorporated by reference as if set forth fully herein.

"Defendants' 'unclean hands' argument [is] very persuasive.") Accordingly, this Court bifurcated this case to allow for discovery and a summary judgment process regarding the Defenses before any discovery on Plaintiff's malpractice claims. (Ex. C, pp. 2-3 & 7-8.)

Following bifurcation, Defendants served written discovery regarding the Defenses on Plaintiff and Spehar Capital, LLC ("SC"). Plaintiff objected to this discovery and filed a Motion for a Protective Order (the "Protective Motion"), based on the work product doctrine. As a result of the Protective Motion, this Court ordered Plaintiff to produce a privilege log identifying the documents that he claims are privileged. This Court also referred to Magistrate Denlow any discovery issues arising out of Plaintiff's privilege log designations.

Thereafter, Plaintiff produced his privilege logs -- which asserted the attorney-client privilege and work product doctrine with respect to many documents responsive to Defendants' discovery requests. Defendants objected to Plaintiff's privilege log designations because, among other things, Plaintiff put these documents "at issue" in this case. Magistrate Denlow considered the parties' privilege dispute and, on June 9, 2008, issued the Magistrate Order.

B. The Magistrate Order

The Magistrate Order contains a "Primary Ruling" and an "Alternative Ruling." In relevant part, the Primary Ruling required Plaintiff and SC to produce all documents on the privilege logs that pre-date the filing of the Complaint in this case. The Primary Ruling reasoned that those documents were put "at issue" by this Court -- by virtue of its analysis of the Protective Motion and Defendants' motion to reconsider the denial of their motion to dismiss.

The Magistrate Order also contained an "Alternative Ruling" that, by its own terms, would apply only if this Court did not intend to put the pre-filing documents "at issue" and reversed the

Primary Ruling. In relevant part, the Alternative Ruling held that: (1) "Plaintiff has affirmatively stated that his pre-filing investigations and that of his attorneys led him to file this suit in good faith;" but (2) Plaintiff has not yet committed an "at issue" waiver because he has not yet "referred to specific documents or communications between himself and his attorney to support this assertion." (Mag. Ord, p. 16; emphasis added.)

C. Objections To The Magistrate Order

Plaintiff timely objected to the Primary Ruling, and that objection was fully briefed and submitted to this Court. Defendants timely objected to the Alternative Ruling. However, because the Alternative Ruling (and Defendants' objection thereto) were contingent on the outcome of Plaintiff's objection to the Primary Ruling, Defendants asked that briefing on their objection to the Alternative Ruling be stayed until this Court ruled on Plaintiff's objection to the Primary Ruling.

In its October 28 Order, this Court sustained Plaintiff's objection to the Primary Ruling, stating that:

This Court did not intend to inherently put all privileged communications regarding [Plaintiff's] motivation for filing the instant lawsuit at issue by opening discovery on the "unclean hands" issue. The Court merely opened discovery regarding [Plaintiff's] motivation for filing this lawsuit, and [Plaintiff] must now make his own decisions as to what potentially privileged communications to reveal in order to support his case. . . . Therefore, this Court rejects Judge Denlow's [P]rimary [R]uling. (October 28 Order, p. 2.)

This Court's rejection of the Primary Ruling triggered the Alternative Ruling and Defendants' objection thereto. And, as will now be shown, Defendants' objection to the Alternative Ruling should be sustained -- and Plaintiff and SC should be ordered to produce all documents that pre-date the filing of the Complaint -- because Plaintiff voluntarily and affirmatively put those

documents at issue in this case. In so doing, Plaintiff waived any attorney-client privilege or work product protection that might otherwise apply to those documents.

III. ARGUMENT

An "at issue" waiver of the attorney-client privilege and/or work product doctrine occurs when the privilege holder: (A) voluntarily injects a factual or legal issue into the case; and (B) truthful resolution of that issue requires an examination of privileged communications. Lorenz v. Valley Forge Ins. Co., 815 F.2d 1095, 1098 (7th Cir. 1987). See also, Garcia v. Zenith Electronics Corp., 58 F.3d 1171, 1175 at n. 1 (7th Cir. 1995) ("attorney-client privilege is generally waived when the client asserts claims or defenses that put his attorney's advice at issue in the litigation").

The rationale for 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 privileges as both a shield and a sword.

But, that is exactly what happened here. Specifically, as will now be shown: (A) Plaintiff voluntarily injected into this case his and his attorneys' pre-filing investigations as the purported basis for filing this case in good faith; and (B) the truthful resolution of this issue requires an examination of Plaintiff's purportedly privileged communications that were part of those alleged investigations.

A. Plaintiff Injected The Pre-Filing Investigations As An Issue In This Case

No one disputes that Plaintiff affirmatively argued that the Defenses should be rejected because he filed this case in good faith based upon his and his attorneys' pre-filing investigations. Indeed, the Magistrate Order so holds, and Plaintiff did not object to that holding. (See Mag. Ord., p. 16 -- "Plaintiff has affirmatively stated that his pre-filing investigations and that of his attorneys led him to file this suit in good faith.") (Emphasis added.)

This unobjected-to holding in the Magistrate Order is entirely consistent with Plaintiff's position from the get-go. In response to Defendants' motion to dismiss, Plaintiff affirmatively argued that it was his decision to file this case -- signifying that he had a good faith basis to do so. (Docket No. 25, pp. 25-26.) Likewise, in response to Defendants' motion to reconsider the denial of their motion to dismiss, Plaintiff affirmatively argued that he is pursuing this case in good faith based upon his pre-filing investigation:

- [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. (Docket No. 53, p. 6; emphasis added.)

Finally, Plaintiff affirmatively argued in his Protective Motion that, as a result of his and his attorneys' pre-filing investigations, he filed this case in good faith:

- 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. (Docket No. 72, ¶6.)

As such, there is no question that Plaintiff voluntarily injected into this case the issue of whether he filed this case in good faith based upon his and his attorneys' pre-filing investigations.

B. Truthful Resolution Requires Examination Of Privileged Materials

Plaintiff's argument that he filed this case in good faith based upon the pre-filing investigations cannot be truthfully resolved without examining the entire content of those investigations -- including any privileged material therein. Indeed, an examination of those materials is the only way this Court can truthfully resolve the questions that naturally arise out of Plaintiff's argument. These questions include, without limitation, the following:

- Did an investigation actually take place?
- If so, what did that investigation consist of?
- Was it a legitimate investigation that critically examined conflicting or contradictory information -- or did Plaintiff accept as true any information supporting his claim while ignoring (or not even looking for) any information that refuted it?
- Did Plaintiff do any investigation other than to accept as true everything he was told by SC -- who is the party funding this case and stands to gain the most from it?
- What was the result of the investigation and would an objective Bankruptcy Trustee have filed this case given the result of the investigation?
- Did Plaintiff consider moving to vacate the underlying judgment that SC obtained against CMGT?
- Given all the information available to Plaintiff, was it objectively reasonable for him to decide to pursue this malpractice case instead of (or without first seeking to) vacate the underlying judgment?

Without an examination of the documents relating to the purported pre-filing investigations, this Court cannot truthfully answer any of these questions. Rather, as it stands right now, none of these questions will be fully examined or truthfully resolved. Instead, if the Affirmative Ruling stands, all we will ever know is what is contained in the non-privileged documents that Plaintiff

chooses to produce and whatever other non-privileged information is revealed through other discovery. But, since Plaintiff has affirmatively raised, and relied upon, the pre-filing investigations as the basis for his decision to file this case, Plaintiff cannot now choose what evidence will be made available to resolve that issue. Instead, by affirmatively raising the issue, Plaintiff has put all of the relevant evidence at issue.

C. Not Necessary For Plaintiff To Rely On A Specific Document

Although the Magistrate Order acknowledges that Plaintiff voluntarily injected the pre-filing investigations as an issue in this case, the Alternative Ruling holds that no at issue waiver occurs until Plaintiff relies on a specific privileged document to support this argument:

[I]f Plaintiff wishes to use documents or other privileged communications from its pre-filing investigations to show that he filed the lawsuit in good faith, then he will waive the privilege. Plaintiff asserts, however, that he does not intend to use such communication[s] to defend these allegations. Therefore, because Plaintiff has not yet used specific communications to defend the allegations, and because Plaintiff states that he does not intend to do so, the Court finds Plaintiff has not yet put these privileged communications at issue, and has accordingly not waived any communications that are otherwise protected by [the] attorney-client privilege or the work product doctrine. (Mag. Ord., pp. 17-18.)

Respectfully, this result would allow Plaintiff to use the privilege as a sword and shield and defeat the rationale for the at issue waiver doctrine set forth in Abbott Labs. Specifically, the Alternative Ruling means that the outcome of the Defenses may turn on an issue about which Plaintiff and/or SC control all of the evidence. Yet, Plaintiff is now asserting the privilege to prevent access to all of that evidence and, instead, to restrict the record to the non-privileged information that Plaintiff chooses to use in support of its arguments. If the Alternative Ruling stands, Defendants will never have access to all of the evidence regarding Plaintiff's pre-filing investigation/good faith

argument and will have no opportunity to discover if there is information in the supposedly privileged files that contradicts the argument that Plaintiff injected into this case.

Consider the following scenario that would seem to be permitted by the Alternative Ruling. Plaintiff could take the stand and testify that he filed this case in good faith based upon his and his attorneys' pre-filing investigation. If he said nothing more, Plaintiff would not have relied upon any specific privileged communications and, therefore, under the Alternative Ruling, no waiver will have occurred. But, if this happens, Plaintiff will clearly create the impression -- even if he does not specifically so testify -- that his attorneys did a legitimate investigation and that, after that investigation, those attorneys blessed this case and had no reservations about it being filed. Yet, without access to the documents and other "privileged" information relating to the investigation, Defendants will be at a significant disadvantage and will lack the full ability to challenge that investigation.

In this regard, this case is no different than a claim to impose liability against an employer for the sexual harassment of one its employees by another employee. In that context, the employer-defendant frequently attempts to avoid liability by arguing that it consulted counsel and conducted a good faith investigation after becoming aware of the situation. In Johnson v. Rauland-Borg Corp., 961 F. Supp. 208 (N.D. Ill. 1997), for example, the employer-defendant asserted that it acted reasonably by employing outside counsel to investigate the matter. Id. at 210. The Johnson court held that the assertion of this defense resulted in an at issue waiver:

Whether the [employer] acted reasonably will depend on the advice it received from [outside counsel] following her investigation. Since the [employer] placed the reasonableness of its conduct following notification of [the plaintiff's] sexual harassment allegations at issue, it must reveal the legal advice it received. Id.

And, this waiver occurs merely by placing the investigation at issue -- even before specific privileged materials are relied upon. This issue was directly confronted in Harding v. Dana Transport, Inc., 914 F.Supp. 1084 (D.N.J. 1996). There, the employer-defendant tried to defeat this type of sexual harassment claim by asserting that it conducted an investigation involving outside legal counsel. The employer-defendant in Harding specifically disclaimed any reliance upon the specifics of that investigation and stated that it was relying only on the fact that the investigation took place. Id. at 1093. Even with this limitation, the Harding court found that the employer-defendant waived the attorney-client privilege and work product doctrine by putting the investigation at issue.

The Harding court reasoned that "[w]ithout having evidence of the actual content of the investigation, neither the plaintiffs nor the fact-finder at trial can discern its adequacy." Id. at 1096. In the end, the Harding court held that an employer-defendant relying on an investigation by outside counsel puts at issue, among other things: what information was conveyed between the party and counsel; were all the material facts provided to counsel; did counsel give a well-informed decision; and was counsel's advice followed. Id. at 1095. As noted above, these are the exact questions that are raised by Plaintiff's reliance on his and his attorneys' pre-filing investigations in this case. None of these questions can be answered unless all of the materials from the investigations are produced.

Here, Plaintiff chose to voluntarily inject the investigations as an issue in this case. Indeed, Plaintiff already used that argument to prevail on Defendants' motion to dismiss, Defendants' motion to reconsider and Plaintiff's Protective Motion. Having already asserted and obtained relief based upon this issue, Plaintiff has waived the attorney-client privilege and work product doctrine.

Another apt analogy is a case where the defendant asserts an advice of counsel defense. There, the mere assertion of the advice of counsel defense -- even without reliance upon a specific

privileged document -- results in a waiver because the only way to prove that defense is to introduce the advice -- which is privileged -- into evidence. Blackhawk Molding Co. v. Portola Packaging, Inc., No. 03 C 6060, 2004 WL 2211616, at *1 (N.D. Ill. Oct. 1, 2004) ("a party who relies on an advice-of-counsel defense waives attorney-client privilege with respect to the subject matter of the legal advice relied upon"). Courts have likewise found waiver in the context of other claims that, by definition, implicate privileged materials. See Transp. Ins. Co. v. Post Express Co., No. 91 C 5750, 1996 WL 32877, at *3 (N.D. Ill. Jan. 25, 1996) (waiver following assertion of claim for bad faith denial of insurance claim); Med. Waste Techs. L.L.C. v. Alexian Bros. Med. Ctr., Inc., No. 97 C 3805, 1998 WL 387705, at *2 (N.D. Ill. June 24, 1998) (waiver following assertion of affirmative defense that necessarily implicated attorneys' files relating to formation of a company). Accordingly, Plaintiff's "good faith" response to the Defenses -- which can be proven only by introducing the content of the pre-filing investigations -- results in a waiver.

D. Case Law Does Not Require Reliance On A Specific Privileged Communication

I. The Dexia and Beneficial Franchise Cases

The Alternative Ruling (at 17) cites two cases -- Dexia Credit Local v. Rogan, 231 F.R.D. 268 (N.D. Ill. 2004) and Beneficial Franchise Co., Inc., 205 F.R.D. 212 (N.D. Ill. 2001) -- in support of its holding that an at issue waiver does not occur until Plaintiff actually relies upon a specific privileged communication. Respectfully, these two cases do not apply because neither one holds that a party can maintain the privilege after affirmatively injecting into the case an issue that can be truthfully resolved only by examining privileged communications.

Dexia: Dexia involved a fraud claim that was not based upon, and did not by definition implicate, privileged materials. However, the defendant argued that privileged materials should,

nonetheless, be produced because they were relevant to the case and vital to its defense. Dexia, 231 F.R.D. at 275. The Dexia court rejected that at issue waiver argument because the plaintiff did not seek to use any of the documents that it claimed were privileged. Id.

In contrast, Plaintiff here is attempting to defeat the Defenses by affirmatively raising an issue that is based upon, and by definition, implicates his attorneys' pre-filing investigation and communications. As such, unlike the plaintiff in Dexia, Plaintiff put these purportedly privileged documents at issue, and they are relevant and vital to an issue affirmatively raised by Plaintiff.

Beneficial Franchise: In Beneficial Franchise, the court did not even address the question of whether a party must rely upon a specific communication before waiver occurs. Rather, the issue in that case was whether the defendant's mere denial of the plaintiff's allegation of bad faith -- i.e., without an affirmative argument that the defendant acted in good faith -- was enough to cause a waiver. The Beneficial Franchise court held that it was not.

Again, that is not the issue before this Court. If Plaintiff here had just denied the Defenses, then under Beneficial Franchise, he arguably may have been entitled to assert the privileges. But, Plaintiff chose to go further. As the unobjected-to portion of the Magistrate Order (p. 17) establishes, "Plaintiff has affirmatively stated that his pre-filing investigations and that of his attorneys led him to file this suit in good faith." Because Plaintiff is not just denying the Defenses, but is affirmatively trying to defeat them based on his "good faith"/pre-filing investigations argument, an at issue waiver has occurred and Beneficial Franchise does not apply.

2. Cases Cited In Dexia And Beneficial Franchise

Dexia and Beneficial Franchise rely principally upon two cases -- Fischel & Kahn, Ltd. v. Van Straaten Gallery, Inc., 301 Ill. App. 3d 336 (1998) and Hayes v. Burlington No. and Santa Fe

Railway Co., 323 Ill. App. 3d 474 (2001) -- neither one of which applies here. Both Fischel & Kahn and Hayes address arguments that an at issue waiver occurred because the party asserting the privilege raised an issue about which privileged documents were relevant. However, in both cases, the claim raised was not based upon, and did not necessarily turn on, the privileged documents or the information contained therein. Rather, those documents and that information was merely relevant to the claim. That is much different than this case, in which Plaintiff's attempt to defeat the Defenses is expressly premised on purported pre-filing investigations that consist primarily of the very documents that Plaintiff now claims are privileged.

3. Other Cases

Finally, the Alternative Ruling and Plaintiff have cited several other cases relating to the at issue waiver doctrine but, as will now be shown, none of them applies.

Claffey v. River Oaks Hyundai, 486 F. Supp. 2d 776 (N.D. Ill. 2007): The Claffey plaintiff alleged a willful violation of the Fair Credit Reporting Act ("FCRA"). In response, the defendant asserted that it did not act willfully because it adopted "reasonable procedures" to ensure compliance with the FCRA. The plaintiff argued that the defendant's "reasonable procedures" argument waived the privilege because one of the "reasonable procedures" was consultation with an attorney. Like Plaintiff here, the defendant in Claffey argued that there was no waiver until it relied on a specific privileged communication to support its argument.

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; emphasis added).

This analysis helps Defendants. Here, any reference to Plaintiff's reliance on his attorneys' pre-filing investigation would create the impression that Plaintiff's attorneys blessed this case and/or that their investigation supports the Complaint. But, under Claffey, Plaintiff is not allowed to create this impression without waiving the privilege. Accordingly, Plaintiff has already waived the privilege by relying upon his attorneys' pre-filing investigation in an attempt to defeat the Defenses.

Murata Man. Co. v. Bel Fuse, Inc., No. 03 C 2934, 2007 WL 781252 (N.D. Ill. Mar. 8, 2007): This case is inapplicable because the Murata court stated twice that a waiver did not occur because the issues raised did not rely upon, or require examination of, any privileged communications. Id. at *7-8. In contrast, as set forth above, Plaintiff's "good faith"/pre-filing investigation argument can be truthfully resolved only by examining the privileged documents.

E. Practical Implications

Finally, the holding that there is no at issue waiver unless and until Plaintiff actually relies upon a specific protected communication could give rise to a logistical nightmare. Plaintiff could conceivably wait until an evidentiary hearing or trial to decide to waive the privilege by introducing a specific protected communication into evidence. What happens then? Surely, Plaintiff would not be allowed to ambush Defendants at trial, leaving Defendants with only the opportunity to cross-examine Plaintiff about the privileged communications during trial. But, what is the remedy? Will

the Court adjourn the trial and send the case back to Day One of discovery to allow Defendants to do discovery regarding all of Plaintiff's otherwise privileged communications?

IV. RESERVATION OF RIGHTS

A. Available From Another Source

Defendants argued to Magistrate Denlow that, even if no at issue waiver occurred, the work product doctrine still does not apply because Defendants have: (1) a substantial need for these materials; and (2) no alternative means of obtaining substantially equivalent information. (See Fed. R. Civ. P. 26(b)(3)(A)(ii).) The Alternative Ruling rejected that argument because "Defendants might be able to obtain evidence regarding this issue elsewhere." (Mag. Ord., p. 29.) Among other things, the Alternative Ruling suggests that Defendants can depose Plaintiff, SC and various CMGT shareholders. Defendants will do so and will follow Magistrate Denlow's directive to try to secure substantially equivalent information from another source. However, Defendants reserve their right to re-assert that some or all of the documents listed on Plaintiff's privilege logs are subject to discovery under Fed. R. Civ. P. 26(b)(3)(A) if Defendants cannot obtain substantially equivalent information elsewhere.

B. If No At Issue Waiver

Finally, if this Court concludes that no at issue waiver has occurred at this time, then Plaintiff "must now make his own decisions as to what potentially privileged communications to reveal in order to support his case." (October 28 Order, p. 2.) Accordingly, Defendants reserve the right to re-assert that Plaintiffs committed an at issue waiver based upon the evidence that Plaintiff discloses, or relies upon, during future discovery, summary judgment or other proceedings relating to the Defenses.

V. CONCLUSION

For the foregoing reasons, the Alternative Ruling should be rejected, and Plaintiff should be ordered to immediately produce all documents that pre-date the filing of the Complaint.

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' Objection to the "Alternative Ruling" in Magistrate Judge Denlow's June 9, 2008 Memorandum Opinion And Order 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.
11 S. LaSalle St., Suite 1600
Chicago, IL 60603

on this 12th day of November, 2008.

/s/ Stephen Novack

C

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

4 DAVID GROCHOCINSKI, not)
5 individually but solely in his)
6 capacity as the Chapter 7)
7 Trustee for the bankruptcy)
8 estate of CMGT, INC.,)
9 Plaintiff,) No. 06 C 5486

10 -vs-)
11 MAYER BROWN ROWE MAW LLP and)
12 RONALD B. GIVEN,)
13 Defendants.)

14 The videotaped deposition of DAVID
15 GROCHOCINSKI, called for examination, taken
16 pursuant to the Federal Rules of Civil Procedure of
17 the United States District Courts pertaining to the
18 taking of depositions, taken before LINDA M.
19 STRATTON, CSR No. 84-2613, a Notary Public within
20 and for the County of DuPage, State of Illinois,
21 and a Certified Shorthand Reporter of said state,
22 at the offices of Novack and Macey LLP, 100 North
23 Riverside Plaza, Suite 1500, Chicago, Illinois, on
24 January 19, 2009, at 9:21 a.m.

1 THE VIDEOGRAPHER: Good morning. We're going
2 on the video record at 9:21 a.m.

3 My name is Kevin Dailey, and I'm a legal
4 videographer in association with Esquire Deposition
5 Services. Our address is 311 West Monroe, Chicago,
6 Illinois. The court reporter today is Linda
7 Stratton, also of Esquire Deposition Services.

8 Here begins the videotaped deposition of
9 David Grochocinski taking place at 100 North
10 Riverside Plaza, Chicago, Illinois. Today's date
11 is January 19th, 2009.

12 This deposition is being taken in the
13 matter of David Grochocinski versus Mayer, Brown,
14 Rowe & Maw, LLP, in the United States District
15 Court, Northern District of Illinois.

16 Will counsel please state their names
17 for the record.

18 MR. JOYCE: My name is Ed Joyce, J-O-Y-C-E.

19 MR. MARINELLO: My name is Mitchell Marinello.

20 MR. CISZEWSKI: And Steven Ciszewski.

21 THE VIDEOGRAPHER: Will the reporter now swear
22 in witness, please.

23 (WHEREUPON, the witness was duly
24 sworn.)

1 PRESENT:

2
3 EDWARD T. JOYCE & ASSOCIATES, P.C.,
4 (11 South LaSalle Street, Suite 1600,
5 Chicago, Illinois 60603,
6 312-641-2600), by:
7 MR. EDWARD T. JOYCE,
8 appeared on behalf of the Plaintiff;

9
10 NOVACK AND MACEY LLP,
11 (100 North Riverside Plaza, Suite 1500,
12 Chicago, Illinois 60606,
13 312-419-6900), by:
14 MITCHELL L. MARINELLO,
15 MR. STEVEN J. CISZEWSKI,
16 appeared on behalf of the Defendants.

17
18 ALSO PRESENT:

19 MR. KEVIN DAILEY, Legal Videographer,
20 Esquire Deposition Services.

21
22
23 REPORTED BY: LINDA M. STRATTON, CSR, RPR, CRR
24 CSR Certificate No. 84-2613

1 DAVID GROCHOCINSKI,
2 called as a witness herein, having been first duly
3 sworn, was examined and testified as follows:

4 EXAMINATION

5 BY MR. MARINELLO:

6 Q. Good morning. You are the trustee for
7 CMGT?

8 A. I am.

9 Q. All right. And we're taking your
10 deposition pursuant to a notice which I'm going to
11 ask the court reporter to mark as Exhibit 1 just
12 for the record.

13 (WHEREUPON, a certain document was
14 marked Defendant's Exhibit No. 1,
15 for identification, as of
16 01/19/2009.)

17 BY MR. MARINELLO:

18 Q. Mr. Grochocinski, is it -- is it -- may
19 I refer to you as David sometimes?

20 A. Sure.

21 Q. All right, great. Isn't it true that
22 your compensation as a trustee for CMGT is largely
23 based on -- on how much money you bring into the
24 estate?

Page 5

1 A. Yes. I -- I'm not compensated on an
 2 hourly basis. It's based on commissions under
 3 11 USC 326.
 4 Q. And is it true that the Bankruptcy Court
 5 has to approve your fees as reasonable?
 6 A. Yes.
 7 Q. Do you keep records of how much time you
 8 spend working on the estate?
 9 A. For the most part.
 10 Q. And do you also keep a record of what
 11 you do for the estate?
 12 A. Yes.
 13 Q. All right. What form do you keep those
 14 records in?
 15 A. Time slips generally.
 16 Q. I -- do you still have those time slips?
 17 A. I would assume.
 18 Q. Okay. I -- I just want to say that I --
 19 I believe those time slips are responsive to our
 20 document request, and I'd request that they be
 21 produced in -- in the case.
 22 A. Okay. Now, I should supplement that
 23 that some of the -- some of the time that I have is
 24 taken on a pen basis or on a hand basis, and we

Page 6

1 only put that -- that into time slips from time to
 2 time in trustee cases.
 3 Q. So how do you keep a record of that
 4 time?
 5 A. Well, sometimes I'll notate times on
 6 various sheets. If I sent an e-mail, it might have
 7 a -- a time listed on it. We don't usually put
 8 that into time slips until I'm ready to ask for
 9 compensation, especially in a case that has few or
 10 if any, assets in it.
 11 Q. All right.
 12 A. So --
 13 Q. But you have -- you have the records of
 14 those things you --
 15 A. It would be a monumental task for me to
 16 input that data and give it to you at this time. I
 17 mean, I -- I suppose I could do that, but it would
 18 be very, very difficult.
 19 Q. Am I correct that you have some time
 20 slips to this point?
 21 A. There may be. I have to go back and
 22 look. I -- it's not necessary for me to look at
 23 it, because I'm nowhere near compensation in this
 24 matter.

Page 7

1 Q. Um-hum. All right. And you have the
 2 actual records that -- that -- that have your notes
 3 of time on them?
 4 A. Yeah, I -- I assume I do somewhere in
 5 there, yeah.
 6 Q. Okay. On -- on August 25th, 2004, an
 7 involuntary petition was filed against CMGT by
 8 Spehar Capital, is that right?
 9 A. I don't remember the exact date. But I
 10 do know that they filed an involuntary, right.
 11 Q. Okay. As Exhibit 2 I've marked a copy
 12 of what I believe to be the involuntary petition.
 13 Let me ask you if you can identify that.
 14 MR. JOYCE: She's going to give you the
 15 official exhibit.
 16 (WHEREUPON, a certain document was
 17 marked Defendant's Exhibit No. 2,
 18 for identification, as of
 19 01/19/2009.)
 20 BY THE WITNESS:
 21 A. That looks like the involuntary petition
 22 that was filed in the case, yes.
 23 BY MR. MARINELLO:
 24 Q. Okay. That petition is signed by Jerry

Page 8

1 Spehar on behalf of Spehar Capital?
 2 A. That's what it says, right.
 3 Q. And he's the owner of Spehar Capital, is
 4 that correct?
 5 A. To the best of my knowledge.
 6 Q. And is he also the sole shareholder of
 7 the company?
 8 A. I don't know that to be the case, but I
 9 think so.
 10 Q. All right. And he's the president of
 11 the company?
 12 A. To the best of my knowledge, I think so,
 13 but I don't know for sure.
 14 Q. Is -- is there any other officer OF the
 15 company that you are aware of other than him?
 16 A. I'm not aware of anyone else.
 17 Q. Okay. And is he the sole employee of
 18 Spehar Capital?
 19 A. I don't know that to be the case.
 20 Q. Are you aware of any other employees of
 21 Spehar Capital besides him?
 22 A. I am not, but I've never asked the
 23 question, so I don't know.
 24 Q. All right. On September 21st, 2004,

Page 9

1 about a month after Mr. Spehar filed the petition,
 2 you were appointed the Chapter 7 bankruptcy trustee
 3 for CMGT, correct?
 4 A. That's about right.
 5 Q. All right. Had you ever heard of CMGT
 6 prior to your appointment?
 7 A. No.
 8 Q. Had you had any contact with any of the
 9 shareholders or officers of CMGT before then?
 10 A. No.
 11 Q. Okay. And had you had any contact with
 12 Mr. Spehar or with his company before then?
 13 A. No.
 14 Q. Prior to the filing of the involuntary
 15 petition, had you had any contact with any of
 16 Mr. Spehar's attorneys?
 17 A. Oh, I've talked to Mr. Todhunter on a --
 18 not in -- not regarding CMGT.
 19 MR. JOYCE: He said prior to.
 20 THE WITNESS: Prior to --
 21 MR. JOYCE: The filing.
 22 THE WITNESS: But I thought he meant do I
 23 know any --
 24

Page 10

1 BY THE WITNESS:
 2 A. I -- I'm sorry. I misunderstood.
 3 Maybe --
 4 BY MR. MARINELLO:
 5 Q. Do you know Mr. Todhunter?
 6 A. Oh, sure. We've been -- I think we went
 7 to law school together, so...
 8 Q. And what's your relationship been with
 9 him over the years?
 10 A. Just -- I mean, we're friends. I mean,
 11 law school acquaintances.
 12 Q. Are -- do you see him socially?
 13 A. Once in a great while.
 14 Q. Would you describe him as a friend?
 15 A. An acquaintance.
 16 Q. Have you done work with him
 17 professionally besides the CMGT case?
 18 A. I think I've hired his firm when he was
 19 with Holleb & Coff in another case that I had, and
 20 then we've had contact over the years. I mean,
 21 it's -- yeah.
 22 Q. Okay. How about Mr. Klenda; do you have
 23 any prior relationship with him?
 24 A. No.

Page 11

1 Q. Prior to the filing of the petition, had
 2 you had any contact with Mr. Given?
 3 A. No.
 4 Q. And how about with Mayer Brown?
 5 A. Only in relation to bankruptcy cases
 6 that I might have either filed and -- I believe
 7 that one of Mayer Brown's partners is a trustee.
 8 Q. Who would that be?
 9 A. You know what? I'm sorry. I don't
 10 remember offhand.
 11 Q. Okay.
 12 A. But there's a trustee on their staff,
 13 and I've -- I've obviously appeared before him on
 14 occasion.
 15 Q. Okay. Let me show you -- I'm going to
 16 ask the court reporter to mark this as Exhibit 3.
 17 This is a copy of Schedule F, Creditors Holding
 18 Unsecured Nonpriority Claims.
 19 (WHEREUPON, a certain document was
 20 marked Defendant's Exhibit No. 3,
 21 for identification, as of
 22 01/19/2009.)
 23 BY MR. MARINELLO:
 24 Q. Is that a true and correct copy of

Page 12

1 Schedule F listing creditors holding unsecured
 2 claims of CMGT?
 3 A. I assume. I mean, I don't -- I haven't
 4 seen this in a long time, but --
 5 MR. JOYCE: If you don't know, just tell him.
 6 BY THE WITNESS:
 7 A. I -- I'm just going to presume that it
 8 is, but -- fine, okay.
 9 BY MR. MARINELLO:
 10 Q. Did you --
 11 A. I've seen --
 12 Q. Did you file this?
 13 A. Yes, I did.
 14 Q. Did you prepare the list?
 15 A. I did.
 16 Q. What do you understand to be the
 17 function of Exhibit F?
 18 A. It's a listing of unsecured creditors of
 19 CMGT to the best of my investigation based on
 20 documents that had been provided to me.
 21 So I prepared the best list I could --
 22 well, this was an involuntary case, no creditors --
 23 no creditor list had been filed in this case
 24 before, and in order to send out appropriate

Page 13

1 notices and -- and let creditors know that CMGT.
 2 filed, I prepared and filed --
 3 Q. Um-hum.
 4 A. --- Schedule F as one of my functions as
 5 trustee.
 6 Q. The record shows that you filed this
 7 approximately on March 10th, 2006. Does that sound
 8 about right?
 9 A. Could be.
 10 Q. That's --
 11 A. I -- I don't know offhand. I don't
 12 remember what the docket says, but if you say so,
 13 okay.
 14 Q. And I notice many of the creditors have
 15 the word "unknown" written under the amount of
 16 their claim. Do you have a more updated list than
 17 this?
 18 A. I have not bothered to look at an amount
 19 that is actually due.
 20 Q. Have you -- and why is that?
 21 A. Not necessary.
 22 Q. Why is it not necessary?
 23 A. I'm not making a distribution yet. The
 24 most important thing is to let the creditors know

Page 14

1 their obligation is to file a proof claim if they
 2 choose to do so.
 3 When it comes time, if it ever comes
 4 time to do a distribution, then I can look further
 5 at CMGT records and make a further inquiry as to
 6 their -- the validity of their claim, the amount of
 7 their claim or the like. It's not necessary yet.
 8 Q. Okay. So as it stands today, you don't
 9 really have more information about the amount of
 10 these people's claims?
 11 A. I -- I haven't bothered to look for more
 12 information.
 13 Q. All right. And do you know if these
 14 people are -- are truly creditors of CMGT?
 15 A. Well, I found them in the records of --
 16 of -- of CMGT that were turned over to me by
 17 Mr. Franco, so I assume that they had some -- some
 18 information.
 19 They may have been paid prior. They may
 20 no longer have a claim, but to the best of my
 21 knowledge at the time, they were people that needed
 22 to at least be given notice they have potential
 23 claim.
 24 Q. But it's possible that some of these

Page 15

1 people are not actually creditors at the present
 2 time of --
 3 A. It's --
 4 Q. -- CMGT?
 5 A. -- always conceivable.
 6 Q. Let me show you what I'm going to have
 7 the court reporter mark as the next exhibit. This
 8 is Schedule D, Creditors -- Creditors Holding
 9 Secured Claims.
 10 (WHEREUPON, a certain document was
 11 marked Defendant's Exhibit No. 4,
 12 for identification, as of
 13 01/19/2009.)
 14 BY MR. MARINELLO:
 15 Q. Is that a copy of the schedule of
 16 secured claims that you prepared for this case?
 17 A. Looks like it.
 18 Q. Okay. And I -- I -- I have on record
 19 that you filed this on March 10th of 2006 also.
 20 Does that sound about right to you?
 21 A. Sounds about right.
 22 Q. Okay. And also here you'll see that --
 23 under the amount of claim, it -- it states
 24 "unknown" under most of these.

Page 16

1 A. That's right.
 2 Q. Do you have any additional information
 3 as to the amount of the claim, if any, that these
 4 creditors have?
 5 A. Only if these individuals, which are --
 6 look to be all shareholders, over the course of the
 7 case, they filed proofs of claim, and during the
 8 course of some litigation involving these people,
 9 they alleged certain amounts.
 10 I've not updated this. It's not
 11 necessary at this time. Their claims, if any, are
 12 shown in subsequent Court Orders.
 13 And it's -- really was for -- again, for
 14 notice purposes, because I wanted them to know that
 15 the case had been filed and they would get notice,
 16 then, of any bar date for claims or the like.
 17 Q. Um-hum. Now, you mentioned that these
 18 people are all shareholders of --
 19 A. Well, for the most --
 20 Q. -- CMGT?
 21 A. They were. It looks --
 22 Q. Okay.
 23 A. -- like at least -- to the best my
 24 knowledge, that's what it looks like, just briefly

Page 17

1 looking through these.

2 Q. Um-hum. Now, my -- my question to you

3 is, if they are shareholders of CMGT, do you know

4 whether they are also legitimate creditors or

5 whether -- whether they have asserted claims for

6 the investment that they made in the company?

7 A. There's multiple questions there, so

8 maybe you can back up and ask again.

9 Q. Okay. Do you know for a fact that these

10 people have actual claims as creditors?

11 A. Well, they've all filed -- or I

12 shouldn't say all. A -- a good many of them have

13 filed proofs of claim. They were based on notes

14 that originally were given by CMGT on moneys that

15 they had lent.

16 Some of their loans were allegedly

17 converted into shares, but it appears that there

18 may have been a failure of CMGT to properly convert

19 the notes into shares.

20 So these people may have -- have claims.

21 They may not have, but there's a settlement

22 agreement that resolved much of these claims later

23 on in the case that admitted these claims as part

24 of a settlement.

Page 18

1 So while they may have started out being

2 listed as this, the case subsequently has converted

3 into -- a good many of these people into claimants,

4 allowed claimants.

5 Q. Okay. Thank you.

6 A. I hope that -- the best I can do with

7 that.

8 Q. Um-hum.

9 MR. MARINELLO: Would you mark that as the

10 next exhibit, please. Is that 5?

11 THE COURT REPORTER: Yes.

12 (WHEREUPON, a certain document was

13 marked Defendant's Exhibit No. 5,

14 for identification, as of

15 01/19/2009.)

16 BY MR. MARINELLO:

17 Q. As Exhibit 5 --

18 MR. MARINELLO: Oops, sorry.

19 THE COURT REPORTER: Want this?

20 MR. MARINELLO: I've got one.

21 MR. JOYCE: I need one.

22 BY MR. MARINELLO:

23 Q. As Exhibit 5, I'm showing you a list

24 of -- an investor shareholder list as of 6/30/2003.

Page 19

1 Can you identify that as a list of CMGT

2 shareholders as of date that?

3 A. Off the top of my head, I don't know.

4 Looks like a document that I've seen before, but I

5 don't -- it is whatever it is. It was in --

6 contained within the CMGT files.

7 Q. Okay. Do you have -- do you recognize

8 this as a document that you -- you produced in this

9 litigation?

10 A. I believe I did.

11 Q. And you've now been in litigation with

12 some of these shareholders. Do you recognize a lot

13 of names on this list as shareholders of CMGT?

14 A. I do.

15 Q. Do you have any reason to doubt that any

16 of the people that are listed on this list are --

17 are not shareholders of CMGT?

18 A. Well, again, some of these people's

19 claims where they allege to be shareholders were

20 converted into loans, and so some of the people

21 that -- what I call shareholder may actually be

22 simply creditors.

23 But just qualifying what you said, I

24 recognize these people as either -- either being

Page 20

1 lenders or shareholders.

2 CMGT never -- it doesn't look like they

3 ever converted these properly into -- into shares,

4 so I'm trying to be as -- as straightforward as I

5 can with -- with respect to your answer, but I do

6 recognize these people as alleging to be

7 shareholders.

8 Q. All right. Is it true that, apart from

9 CMGT's alleged malpractice claim against

10 Mayer Brown and Ron Given, CMGT has no assets?

11 MR. JOYCE: Can I have that question read

12 back.

13 (WHEREUPON, the record was read by

14 the reporter.)

15 BY THE WITNESS:

16 A. I did sell some software, which was in

17 possession of one of the shareholders or investors.

18 I think his name was Mr. Holman, and Mr. Spehar

19 purchased that.

20 I think it was for 1,500 or 2,000,

21 something of that sort. I have not been able to

22 determine any other liquidatable assets in the

23 estate other than that.

24 Q. All right. Are you aware of any

Page 21

1 preferential payments that have been made by CMGT?
 2 A. Not that I'm aware of, other than the
 3 shareholders who were granted liens on whatever
 4 assets at CMGT, but those shareholders were avoided
 5 in an adversary complaint that I filed against each
 6 one of them.
 7 Q. Okay. So there are no other
 8 preferential payments that you're aware of?
 9 A. To the best of my knowledge, no.
 10 Q. Are there any alleged fraudulent
 11 transfers that you're aware of?
 12 A. Not that I'm aware of.
 13 Q. Are there any improper payments of any
 14 kind by CMGT that you're aware of?
 15 A. Not that I'm aware of.
 16 Q. Are you aware of any fraud or improper
 17 conduct by CMGT?
 18 A. By CMGT?
 19 Q. Yes.
 20 A. It's not been brought to my attention,
 21 so if it exists, I'm not aware of it.
 22 Q. Are you aware of any fraud or improper
 23 conduct by any of CMGT's shareholders in connection
 24 with CMGT?

Page 22

1 A. No, not that I'm aware of. I may have
 2 objections to a claim yet from Mr. Franco who filed
 3 one for a -- oh, I think in excess of \$10 million,
 4 and I may have a -- an objection to that claim.
 5 I'm not -- have not gotten there yet,
 6 because it's not necessary to do anything. There's
 7 no distribution yet, so...
 8 Q. Well, I'm not asking about claims at
 9 this point. I'm asking you about something a
 10 little more specific. Are you aware of any fraud
 11 or --
 12 A. Not that I'm aware of.
 13 Q. -- improper conduct by -- by CMGT's --
 14 any of CMGT's officers?
 15 A. Not that I'm aware of that hasn't
 16 already been resolved in some fashion or another.
 17 Q. Okay. Are you aware of any fraud or
 18 improper conduct by any of C -- CMGT's employees?
 19 A. Not that I'm aware of.
 20 Q. Okay. Now, shortly after you were
 21 appointed trustee of CMGT, Mr. Spehar approached
 22 you and told you that he wanted you to bring legal
 23 malpractice claims against Ronald Given and
 24 Mayer Brown, correct?

Page 23

1 A. Actually, I think his counsel contacted
 2 me after I was appointed.
 3 Q. Who was that?
 4 A. I believe it was Mr. Todhunter initially
 5 who contacted me after my appointment.
 6 Q. Okay. And how soon was it after your
 7 appointment that he contacted you?
 8 A. I -- I don't remember. It -- probably
 9 within ten days or so.
 10 Q. Okay. What did he tell you?
 11 A. He indicated to me that his client,
 12 Spehar Capital, had a judgment that was entered in
 13 California for 15 or \$16 million or thereabouts,
 14 that the judgment had been registered in DuPage
 15 County, that a citation to discover assets had
 16 issued, that Mr. Franco had appeared at a citation
 17 to discover assets, and that they believed after
 18 discussions with Mr. Franco and -- must have been
 19 other information that they had, that perhaps a --
 20 a cause of action might exist against Mayer Brown
 21 arising out of the California litigation.
 22 Q. Okay. Did -- did they explain to you
 23 what the basis for the cause -- for the cause of
 24 action might be?

Page 24

1 A. I'm trying to remember. I think he said
 2 it was a -- that they failed to appear and defend a
 3 case based on -- on a -- a -- some type of a
 4 financing or brokerage financing arrangement that
 5 Spehar Capital had with CMGT, and that's about the
 6 best I remember.
 7 Q. Okay. Now, was anybody on this phone
 8 call other than Mr. Todhunter?
 9 A. I don't think so.
 10 Q. Okay. And as you best recall, his
 11 belief was that -- well, his statement to you was
 12 that Mayer Brown may have committed malpractice by
 13 not appearing to defend the lawsuit that his client
 14 had brought against CMGT?
 15 A. I -- I think he said that in brief,
 16 right.
 17 Q. Okay. What's the -- who is the next
 18 person you spoke with about this claim?
 19 A. Well, I think I asked him to send me
 20 the deposition transcript of -- the citation
 21 transcript of Mr. Franco, and I think I asked him
 22 to send me whatever other information that he had
 23 relative to the entry of the judgment.
 24 And I don't really think I spoke to

Page 25

1 anybody again then for probably another ten days or
 2 so.
 3 Q. Let me interrupt you there for a second.
 4 Did you receive the materials from Mr. Todhunter?
 5 A. I received --
 6 Q. -- that you requested?
 7 A. -- the deposition transcript. That's
 8 essentially what I received.
 9 Q. Did you get a copy of the default
 10 judgment?
 11 A. Only if it was attached in the -- as an
 12 exhibit to the deposition -- to the citation
 13 transcript. I didn't receive anything else other
 14 than the packet.
 15 Q. Did Mr. Todhunter tell you that the
 16 reason that the involuntary petition had been
 17 brought against CMGT was to put CMGT in a position
 18 to bring a malpractice claim against
 19 Mayer Brown and --
 20 A. No.
 21 Q. -- Ronald Given?
 22 Did Mr. Spehar ever tell you that?
 23 A. No.
 24 MR. MARINELLO: Would you mark this as the

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1 next exhibit, please.
 2 (WHEREUPON, a certain document was
 3 marked Defendant's Exhibit No. 6,
 4 for identification, as of
 5 01/19/2009.)
 6 BY MR. MARINELLO:
 7 Q. All right. I have placed in front of
 8 you a -- what we've marked as Exhibit 6. It's a
 9 letter from Steven Klenda to you dated February 24,
 10 2005.
 11 Can you identify that as a letter that
 12 you received from him on or about that date.
 13 A. It's not signed by anybody on Page 2,
 14 but it appears that I've seen this before.
 15 Q. And you received it on or about
 16 February 24th, 2005?
 17 A. I -- I have to assume so. I don't
 18 recall offhand, but I -- I assume that it was sent
 19 about that time. Looks like it -- it might have
 20 been faxed --
 21 Q. Yes.
 22 A. -- so...
 23 Q. If you would look down in the third
 24 paragraph of that letter --

Page 27

1 A. Okay.
 2 Q. -- the second sentence.
 3 A. "Obtaining its judgment --"
 4 Q. Would you read that out loud, please.
 5 A. "Obtaining its judgment, positioning
 6 CMGT to be able to recover against Mayer Brown by
 7 putting it in Chapter 7, and lining up
 8 Mr. Spellmire were not small feats."
 9 Q. Okay. Is -- do you understand that
 10 language to be Mr. Spehar's counsel telling you
 11 that Mr. Spehar deserved some consideration from
 12 you because he had done these things?
 13 A. No.
 14 Q. What do you understand that to mean?
 15 A. Just a statement that CMGT obtained a
 16 judgment and that, subsequent to the judgment,
 17 since nobody came in to defend, they put it into a
 18 Chapter 7, and they wanted to consider whatever
 19 action there might be against Mayer Brown for --
 20 for that action.
 21 Q. Well, doesn't the language of the letter
 22 read, "Positioning CMGT to be able to recover
 23 against Mayer Brown by putting it into Chapter 7?"
 24 A. Well, once the judgment was entered --

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1 MR. JOYCE: Hold on.
 2 BY MR. MARINELLO:
 3 Q. First --
 4 MR. JOYCE: He's asking you if it -- if it
 5 says that.
 6 BY MR. MARINELLO:
 7 Q. I asked you a specific question --
 8 A. Oh.
 9 Q. -- so let's answer that first.
 10 Doesn't the document that you received
 11 say that Mr. -- that Spehar positioned CMGT to be
 12 able to recover against Mayer Brown by putting it
 13 into Chapter 7?
 14 A. That's what the words say. You asked me
 15 what I believed it to mean. That's what I thought
 16 you said. You said what did --
 17 Q. Is that --
 18 A. -- you believe what it said -- I thought
 19 that's what you said.
 20 Q. My last question was, is that what the
 21 words mean -- is that the words say?
 22 A. The word says what it says, "Obtaining
 23 its judgment, positioning CMGT to be able to
 24 recover against Mayer Brown by putting it into

Page 29

1 Chapter 7, and lining up Mr. Spellmire's services
 2 were not small feats," period.
 3 Q. Okay. And Mr. Spellmire was who?
 4 A. Is a -- an attorney in Chicago that I
 5 consulted respecting a -- a potential action
 6 against Mayer Brown.
 7 Q. And is it true that Mr. Spehar is the
 8 person who lined up Mr. Spellmire's services?
 9 A. Well, lined up, I'm not sure -- well --
 10 MR. JOYCE: Objection to the use of the word
 11 "lined up." It's vague.
 12 BY THE WITNESS:
 13 A. Yeah, I --
 14 BY MR. MARINELLO:
 15 Q. Well, did Mr. -- did Mr. Spehar find
 16 Mr. Spellmire?
 17 A. He did, because I asked his counsel to
 18 do so.
 19 Q. Did you specifically know Mr. Spellmire?
 20 A. No.
 21 Q. So you asked -- you asked Mr. --
 22 Mr. Spehar's counsel to find an attorney to talk to
 23 you about the -- to talk about the attorney -- I'm
 24 sorry, the attorney malpractice claim?

Page 30

1 A. Yes.
 2 Q. And they came back to you with
 3 Mr. Spellmire as a suggestion?
 4 A. Yes.
 5 Q. Okay. And did Mr. Spehar talk to
 6 Mr. Spellmire before you did about the possibility
 7 of Mr. Spellmire representing CMGT in a malpractice
 8 claim against Mayer Brown?
 9 A. I have no idea.
 10 Q. When you spoke with Mr. Spellmire, you
 11 couldn't tell whether or not he had already spoken
 12 to Mr. Spehar?
 13 A. Honestly, I don't recall.
 14 Q. Okay. Now, you were starting to say
 15 that after you spoke to Mr. Todhunter, there came a
 16 time when you spoke to someone else about this
 17 malpractice claim. Who was that?
 18 A. I did speak to Mr. Spehar with his
 19 counsel on the phone, and I eventually did speak to
 20 Mr. Klenda.
 21 Q. Now, when you say "with his counsel on
 22 the phone," who was his counsel?
 23 A. It was either Judson Todhunter or
 24 Mr. Klenda, from time to time. Sometimes both.

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1 Q. Okay. And -- and what did you learn --
 2 well, what was said during that second telephone
 3 conversation?
 4 A. I don't really recall.
 5 Q. Do you recall any additional information
 6 being given to you with respect to the alleged
 7 malpractice claim?
 8 A. I'm sorry. I don't recall.
 9 Q. Wasn't Mr. Spehar interested in having
 10 you, as the trustee of CMGT, bring that legal
 11 malpractice claim so that Spehar Capital could
 12 collect on its \$17 million default judgment?
 13 A. I think Mr. Spehar was interested in
 14 seeing that CMGT would recover assets for
 15 distribution to creditors. Since Mr. Spehar had a
 16 large judgment, I assume he would be very
 17 interested in finding moneys to be able to pay the
 18 judgment.
 19 Q. Did Mr. Spehar tell you that he was
 20 interested, very interested, in having you collect
 21 on a legal malpractice claim so that he could
 22 collect on his judgment?
 23 A. It's -- yes.
 24 Q. Okay. Now, you -- did there come a

Page 32

1 point in time when you -- when is the next time you
 2 spoke to anybody representing Mr. Spehar or to
 3 Mr. Spehar himself?
 4 A. You know what? I don't know. I -- I
 5 had multiple conversations with -- with Mr.
 6 Todhunter, with Mr. Klenda, with Mr. Spehar, with
 7 the two of them over a period of time on this
 8 matter. This was not a -- I wouldn't be able to
 9 tell you the next time that I spoke to him. It was
 10 just multiples.
 11 Q. Okay. Can you estimate how many
 12 conversations that you had with Mr. Spehar or one
 13 of his attorneys prior to the time that you filed
 14 the legal malpractice claim?
 15 A. I don't think that I can even give a --
 16 a good estimate. A hundred? 200? I don't know.
 17 It's hard to tell. Sometimes we talked several
 18 times during the day. Sometimes there would be
 19 weeks when we wouldn't talk. I -- no way of
 20 knowing.
 21 MR. MARINELLO: Okay. Would you mark that as
 22 the next exhibit, please.
 23 (WHEREUPON, a certain document was
 24 marked Defendant's Exhibit No. 7,

1 for identification, as of
 2 01/19/2009.)
 3 BY MR. MARINELLO:
 4 Q. Okay. As Exhibit 7 I've marked a -- an
 5 e-mail chain. The one -- the e-mail at the very
 6 top is an e-mail from you to Steve Tisdale dated
 7 February 25, 2005 -- I'm sorry, steve@tisdalelaw.
 8 Excuse me.
 9 Can you identify that as an e-mail that
 10 you sent on or about February 25th, 2005?
 11 A. Yes.
 12 Q. And who is Steve -- the Steve that
 13 you're referring to there? Is that Steve Klenda?
 14 A. Yes.
 15 Q. All right. That's one of Mr. Spehar's
 16 counsel, correct?
 17 A. Yes -- well, Spehar Capital's counsel,
 18 right.
 19 Q. Did you -- did you know Mr. Spellmire
 20 prior to the time that Mr. Spehar mentioned him to
 21 you?
 22 A. No.
 23 Q. So you'd never had any dealings with him
 24 or met him or anything like that?

1 think. And I don't recall anything else offhand.
 2 Q. Um-hum. What facts did you tell
 3 Mr. Spellmire?
 4 A. Essentially, the same facts that came
 5 out of the deposition transcript from Mr. Franco.
 6 Q. And what were those?
 7 A. As I said, the -- the judgment entered
 8 in California based on a brokerage contract that
 9 was entered into between CMGT and Spehar Capital,
 10 the nonappearance in the lawsuit filed by Spehar
 11 Capital in California.
 12 I believe Mr. Franco had indicated that
 13 he had been appropriately served, had discussed the
 14 matter with Mr. Given. Mr. Given opted not to
 15 appear or otherwise defend.
 16 A judgment was entered and not vacated
 17 or set aside and resulting in a \$15 or so million
 18 judgment against CMGT.
 19 Q. So the active malpractice that you --
 20 the fact of malpractice, as you understood it, was
 21 the failure to appear in -- in the -- in the case
 22 and not to have --
 23 A. Well, I'm not a malpractice guy, so I
 24 don't --

1 A. No.
 2 Q. Okay. Did you interview Mr. Spellmire?
 3 A. Yes.
 4 Q. When?
 5 A. I don't remember the day.
 6 Q. Approximately when was it?
 7 A. I don't know if it was in January or
 8 February of '05.
 9 Q. Did you --
 10 A. It was cold, I know, so --
 11 Q. Did you make any determination at that
 12 time as to whether you were willing to hire
 13 Mr. Spellmire to represent you with respect to the
 14 alleged malpractice claims?
 15 A. I don't think we had -- I had gotten
 16 that far. I think I explained what I believed to
 17 be the essential, I guess, facts, to the best that
 18 I can explain those as facts, relative to the cause
 19 of action, and asked if he was interested and he
 20 was going to get back to me.
 21 Q. Um-hum. Was --
 22 A. Took about an hour maybe.
 23 Q. Was anybody there besides you?
 24 A. I believe Mr. Todhunter was there, I

1 Q. Well, let me finish my --
 2 A. Okay.
 3 Q. -- question --
 4 A. Sure.
 5 Q. -- okay?
 6 A. I'm sorry.
 7 Q. Whether you're a malpractice lawyer or
 8 not, I'm interested in the facts that you gave to
 9 Mr. Spellmire.
 10 A. Okay.
 11 Q. And my question is, when you spoke to
 12 Mr. Spellmire about what you viewed as the facts of
 13 the alleged malpractice, what -- the facts that you
 14 told him were that Mayer Brown had not appeared in
 15 the litigation that Spehar brought in California?
 16 A. Yeah.
 17 Q. Was there any other fact that you gave
 18 him with respect to malpractice?
 19 A. Probably because that's the only facts
 20 that I was aware of at the time.
 21 Q. So that's the only one you're aware of?
 22 A. Well, that I was aware of at the time.
 23 Q. All right. Did Mr. Spellmire conduct
 24 any -- did he ever get back to you as to whether he

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1 was interested or not?
 2 A. He indicated to me that he was either
 3 too busy or other matters came up and he was not
 4 interested in proceeding.
 5 Q. And when did he tell you that?
 6 A. You know, and I don't remember offhand.
 7 I'm sorry.
 8 Q. Isn't it -- isn't it the case that he
 9 agreed to take on the representation prior to the
 10 time that he told you he was too busy?
 11 A. I don't remember.
 12 Q. Did Mr. Spehar tell you that he was
 13 surprised that Mr. Spellmire was declining to take
 14 the representation because Mr. Spellmire had
 15 previously assured Mr. Spehar that he was going to
 16 do it?
 17 A. I don't remember. If there's some
 18 documentation to that effect, I would be happy to
 19 take a look at it, but I -- you're acting -- asking
 20 for my memory, and I don't remember.
 21 Q. Do you know if Mr. Spellmire interviewed
 22 anyone about the alleged malpractice claims?
 23 A. No, I don't know.
 24 Q. Do you know if he did any investigation

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1 into the alleged malpractice claims?
 2 A. I do not know.
 3 Q. Okay.
 4 MR. MARINELLO: Okay. If you would mark this
 5 as the next exhibit, please.
 6 (WHEREUPON, a certain document was
 7 marked Defendant's Exhibit No. 8,
 8 for identification, as of
 9 01/19/2009.)
 10 BY MR. MARINELLO:
 11 Q. As Exhibit 8 I've marked a -- an e-mail
 12 from Mr. Todhunter to Gary Spehar with a copy --
 13 and to you also dated January 7, 2005.
 14 A. Um-hum.
 15 Q. Did you receive this e-mail and -- and
 16 its attachment on or about that date?
 17 A. It was directed to me. I usually
 18 receive my e-mails, so I assume I did.
 19 Q. Okay. I'm not going to have any
 20 questions about that document right now, sir. You
 21 can put that aside.
 22 MR. MARINELLO: Would you mark this as
 23 Exhibit 9, please.
 24 MR. JOYCE: You got one more?

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1 MR. MARINELLO: Yeah.
 2 MR. JOYCE: Thanks.
 3 MR. MARINELLO: Um-hum.
 4 (WHEREUPON, a certain document was
 5 marked Defendant's Exhibit No. 9,
 6 for identification, as of
 7 01/19/2009.)
 8 BY MR. MARINELLO:
 9 Q. Now, is this an e-mail dated -- I -- as
 10 Exhibit 9 I have marked an e-mail dated July 19,
 11 2005, from Mr. Klenda to you with a copy to Gerry
 12 Spehar. Did you receive this from Mr. Klenda on or
 13 about the date it bears?
 14 A. I assume I did.
 15 Q. Okay. And this e-mail in the second
 16 paragraph refers to George Spellmire saying he's
 17 too busy to do the case, correct?
 18 A. That's what it says.
 19 Q. And he says, "This was quite a shock
 20 given that Spehar Capital relied on
 21 Spellmire & Sommer's commitment to take the case"?
 22 A. That's what it says.
 23 Q. Did you ever determine whether or not
 24 that was true?

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1 A. I really didn't go beyond that to ask.
 2 Q. Okay. Hadn't you in fact filed a
 3 post-petition financing motion that specifically
 4 mentioned Mr. Spellmire as being -- going -- as
 5 going to be your counsel?
 6 A. I think I did.
 7 Q. Okay. So you expected Mr. Spellmire to
 8 be your counsel?
 9 A. I did.
 10 Q. And does that refresh your recollection
 11 that Mr. Spellmire told you that he was interested
 12 in pursuing the matter --
 13 A. Well, I --
 14 Q. -- at least at some point?
 15 A. I -- I guess, yeah, because if -- I had
 16 not heard one way or another, to the best of my
 17 knowledge, but I was relying on the fact that
 18 Mr. Spellmire was going forward. He had not told
 19 me up to that point in time that he had not --
 20 Q. Um-hum.
 21 A. -- so...
 22 Q. Okay. So Mr. -- did you ever ask
 23 Mr. Spellmire any questions about why it is he had
 24 decided not to take the case?

1 A. I don't recall a conversation offhand.
2 I think I just simply accepted his letter at face
3 value.

4 And I don't usually ask lawyers if
5 they've decided to not take the case they -- why.
6 I assume that they have good reasons. I -- I just
7 don't remember.

8 Q. Okay. This made it necessary for you to
9 find a new attorney to represent you, correct?

10 A. Yes.

11 Q. And that attorney, of course, turned out
12 to be Mr. Joyce?

13 A. Yes.

14 Q. Mr. Spehar found Mr. Joyce and
15 recommended him, correct?

16 A. Again, yes, because I'm not familiar
17 with counsel that do that kind of work.

18 Q. Did you know Mr. Joyce before Mr. Spehar
19 brought him to your attention?

20 A. No, I don't think so. It's possible
21 that we ran into each other from time to time in
22 State Court, but I don't -- never had a -- a
23 recollection of a matter with Mr. Joyce offhand
24 until actually I met him.

1 Q. Did you interview Mr. Joyce prior to
2 presenting a motion that resulted in -- in his
3 being --

4 A. I think we --

5 Q. -- approved?

6 A. -- spoke on the phone.

7 Q. How long did that take?

8 A. I don't know. I don't recall.

9 Q. When was that?

10 A. Again, I don't recall. Sometime after
11 Mr. Spellmire bowed out.

12 Q. Did you -- did you interview Mr. --
13 Mr. Joyce in person, Mr. Todhunter, or anyone
14 else?

15 A. I'm trying to think. I don't recall --
16 I don't recall a meeting offhand.

17 Q. Okay. As of the time that you first
18 contacted Mr. Joyce, had you done any investigation
19 into the malpractice claims yourself?

20 A. Other than the information that I had
21 originally from Mr. Franco, no, not really.

22 Q. And you say other than the information
23 you had from Mr. Franco. Had you spoken to
24 Mr. Franco about the malpractice claims at that

1 point?

2 A. Well, I think he testified about the
3 circumstances relative to the nonrepresentation.
4 Either that, or it was in a letter to me from
5 Mr. Franco.

6 But I did get -- I do recall some
7 information from Mr. Franco to indicate that -- as
8 I indicated before, what was the substance -- what
9 I believed to be the substance at that time of
10 the -- of the cause of action, and -- but I haven't
11 had to do anything further with that at that
12 point --

13 Q. Well, let me --

14 A. -- in time.

15 Q. -- be a little more clear about this.

16 Certainly by -- you've already testified
17 that you received information from Mr. Spehar and
18 from Mr. Todhunter --

19 A. Yeah.

20 Q. -- Mr. Spehar's counsel, about the
21 alleged malpractice, correct?

22 A. Correct.

23 Q. You had not spoken to Mr. -- Mr. Franco
24 as of this point in time, is that correct?

1 A. I don't recall when the first time I
2 spoke to Mr. Franco.

3 Q. You had not spoken to Mr. Franco about
4 the malpractice claims as of this time?

5 A. Again, I don't -- I don't remember
6 specifically talking to him about the malpractice
7 claims directly.

8 Q. All right. Now, also you say that
9 you -- you saw something in a letter from him or in
10 testimony. Can you identify more specifically what
11 letter or what testimony?

12 A. Not offhand. I just recall seeing some
13 documentation somewhere where he indicated -- it --
14 it could have been in pleadings, for all I know.
15 I'm not really sure, but where he indicated that
16 service of process had been had, a discussion had
17 been made with Mr. Given, and a decision was made
18 not to defend.

19 Q. And do you know why that decision was
20 made?

21 A. I think, if I'm not mistaken, Mr. Given
22 told him that there were some problems with respect
23 to jurisdiction in California, and that he didn't
24 think that -- he, being Mr. Given, didn't think

1 that the California Court would enter an
 2 injunction.
 3 Q. And you say that this information came
 4 to you from something that was in a pleading by
 5 Mr. Franco or in a letter?
 6 A. Again, I --
 7 Q. Is that what you recall?
 8 A. I -- yes. I believe that's the case,
 9 but I can't remember offhand.
 10 Q. Is it possible --
 11 A. It's just so many documents in this
 12 case, I can't -- it's hard to remember which --
 13 where I received that information from.
 14 Q. Is it possible that this is information
 15 that you received from Mr. Spehar and not from
 16 Mr. Franco?
 17 A. It's conceivable.
 18 Q. All right. Well, we'll -- later on,
 19 I'll -- I'll show you some of the letters from
 20 Mr. Franco and give you an opportunity to -- to
 21 look at those letters and see if they refresh your
 22 recollection.
 23 A. That's fine.
 24 Q. See if he ever said anything that

1 you're -- you're saying he said.
 2 Now -- now, shortly after Mr. Spehar
 3 first approached you about the alleged malpractice
 4 claim and his default judgment, you and he began to
 5 negotiate an arrangement by which you and -- and
 6 Spehar would share in a recovery in the legal
 7 malpractice claim?
 8 A. Well, it's not me. It's the estate of
 9 CMGT.
 10 Q. Right.
 11 A. The -- actually, the unsecured creditors
 12 of CMGT --
 13 Q. Right.
 14 A. -- provided that Mr. Spehar's claim was
 15 eventually determined to be secured.
 16 Q. Um-hum. So Mr. Spehar approached you
 17 about how you're going to share any proceeds from
 18 the legal malpractice claim, correct?
 19 A. How the estate would share.
 20 Q. Yes.
 21 A. The unsecured creditors would share
 22 if --
 23 Q. I'm not suggesting that you personally
 24 were going to share, Mr. Grochocinski.

1 A. Okay. If you're saying that's you, then
 2 you're -- acting as me as trustee for the estate,
 3 that's fine. I'm not sharing --
 4 Q. Yeah.
 5 A. -- anything.
 6 Q. That's -- that's what I mean.
 7 A. Okay.
 8 Q. Because you are the trustee, right?
 9 A. Right, right, right.
 10 Q. Okay. So when I say "you," that's what
 11 I mean --
 12 A. Okay.
 13 Q. -- in your official capacity.
 14 A. Fine, fine.
 15 Q. But it's -- it is true, isn't it, that
 16 Mr. Spehar approached you and wanted to negotiate
 17 how the moneys would be shared if they were --
 18 A. He --
 19 Q. -- awarded?
 20 A. He believed that his citation to
 21 discover assets made him a secured creditor, and
 22 that was undetermined by me at the time.
 23 But in order for us to -- to go forward,
 24 I would need to make sure that there was going to

1 be a benefit, if at all, to unsecured creditors.
 2 So in order to have a benefit for unsecured
 3 creditors, presuming that Mr. Spehar was eventually
 4 declared to be a secured creditor, then we would
 5 need to make sure there was some sort of a
 6 carve-out, some sort of an amount that would
 7 eventually be distributed to unsecured creditors,
 8 otherwise it would make no sense for me as trustee
 9 to simply pursue a case on behalf of an otherwise
 10 fully secured creditor if he thought he could do it
 11 on his own.
 12 Q. Your negotiations with Mr. Spehar about
 13 how to work this carve-out that you mentioned took
 14 a very long time, correct?
 15 A. It took unusually long.
 16 Q. How long?
 17 A. Months.
 18 Q. And why do you say it was unusual?
 19 A. Simply because the -- I don't even know
 20 if it's just Mr. Spehar or his counsel. I think
 21 there is an -- an assumption that he may have had a
 22 claim that I'm not sure that he had, and I won't
 23 know until Judge Squires rules one way or another.
 24 But he was -- I think he believed that

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1 he -- that -- that -- that Spehar Capital was the
 2 most damaged creditor in the CMGT creditor body,
 3 and as such, he believed that -- that if there was
 4 a chance of a recovery, he wanted to make sure that
 5 there was going to be a recovery for Spehar
 6 Capital.
 7 I don't know if that answered your
 8 question exactly or not, but --
 9 Q. Well, why --
 10 A. -- that's to the best of my guess.
 11 Q. How does that explain why the
 12 negotiations were unusually long?
 13 A. Well, I think his view was that the
 14 estate would be entitled to nothing, and from his
 15 perspective, if there was a recovery and he was a
 16 validly secured creditor, then all of the funds
 17 would flow to -- for payment of his claim.
 18 Obviously, secured creditors -- I
 19 shouldn't say obviously, but in -- in terms of
 20 distribution, secured creditors receive money prior
 21 to unsecured creditors, and it would make little or
 22 no sense for a -- a -- for me to proceed unless
 23 there was going to be some type of a distribution
 24 to unsecured creditors.

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1 And I think it was just a -- a -- a
 2 disagreement between what unsecured creditors
 3 should receive and what a -- a, quote, secured
 4 creditor should receive.
 5 Q. Did you find Mr. Spehar a difficult
 6 person to reach an agreement with?
 7 A. I think he is a -- a strong -- he has
 8 a -- strong beliefs in his positions, and I can't
 9 fault anybody for doing that.
 10 Q. The question was, did you find him a
 11 difficult person to reach an agreement with?
 12 A. As difficult as some and not as
 13 difficult as others. How's that?
 14 Q. More difficult than the typical one?
 15 A. I -- I don't know if there is a typical
 16 one. Sorry. Each --
 17 Q. All right.
 18 A. Each -- each case has its own unique set
 19 of circumstances.
 20 Q. All right. You mentioned that you spent
 21 months negotiating a sharing agreement with
 22 Mr. Spehar and his attorneys. Did you keep a
 23 record of the time you spent on that?
 24 A. I assume that I did.

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1 Q. All right. And you did eventually reach
 2 an agreement with Mr. Spehar?
 3 A. I -- yes, because the Court entered an
 4 order.
 5 MR. MARINELLO: All right. Would you mark
 6 this, please, as the next exhibit.
 7 MR. JOYCE: That will be 107
 8 THE COURT REPORTER: Yes.
 9 MR. MARINELLO: Okay. Thank you.
 10 (WHEREUPON, a certain document was
 11 marked Defendant's Exhibit No. 10,
 12 for identification, as of
 13 01/19/2009.)
 14 BY MR. MARINELLO:
 15 Q. I've marked as Exhibit 10 -- is -- is
 16 this the application you filed with -- with the
 17 Court to approve your agreement with -- with
 18 Mr. Spehar?
 19 A. Looks like it.
 20 Q. And the actual agreement between you and
 21 Spehar is attached, is it not?
 22 A. There's a letter agreement and then
 23 there is the order, yes. It appears to be.
 24 Q. Okay. And that agreement provides for,

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1 among other things, a schedule for how Spehar
 2 Capital and the trust -- and -- and the bankruptcy
 3 estate will share in any recovery from the
 4 malpractice claims?
 5 A. Presuming that he's a -- a secured
 6 creditor, that's correct.
 7 Q. All right.
 8 A. If he's an unsecured creditor, just so
 9 you know, then he gets -- he gets pro rata
 10 distribution like everybody else, again, presuming
 11 there's a recovery.
 12 MR. MARINELLO: Would you mark this as the
 13 next exhibit, please.
 14 (WHEREUPON, a certain document was
 15 marked Defendant's Exhibit No. 11,
 16 for identification, as of
 17 01/19/2009.)
 18 (WHEREUPON, discussion was had off
 19 the record.)
 20 BY MR. MARINELLO:
 21 Q. All right. And I just want to show you
 22 what I've marked as Exhibit 11. That is a copy of
 23 the order entered by Judge Squires approving your
 24 agreement with Mr. -- I'm sorry, with Spehar

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1 Capital, correct?
 2 A. Um-hum, yes.
 3 Q. All right. And that document refers to
 4 Mr. Joyce being your counsel? It says you will --
 5 have moved or will move to employ Mr. Joyce?
 6 A. Yes, I believe by at that time, we have
 7 already had conversations with Mr. Joyce or his
 8 counsel.
 9 Q. Mr. Joyce had counsel?
 10 A. I believe he did.
 11 Q. Who was that?
 12 A. I think Mr. Fishman.
 13 Q. Okay. As of that point in time, had you
 14 actually interviewed Mr. Joyce?
 15 A. I don't recall. I'm sure I must have
 16 talked to him on the phone.
 17 Q. Okay. I want to go back now to that
 18 default judgment that Spehar Capital obtained
 19 against CMGT.
 20 A. Where are we? Oh, I'm sorry. I -- I
 21 thought it was something else.
 22 MR. MARINELLO: Would you mark that as the
 23 next exhibit, please.
 24 MR. JOYCE: 12.

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1 (WHEREUPON, a certain document was
 2 marked Defendant's Exhibit No. 12,
 3 for identification, as of
 4 01/19/2009.)
 5 BY MR. MARINELLO:
 6 Q. Is that a true and correct copy of the
 7 default judgment for 17 million, approximately,
 8 that Spehar Capital obtained against CMGT in -- on
 9 March 18th, 2004?
 10 A. I presume it is. I haven't seen this in
 11 a long time, but it looks familiar.
 12 Q. Okay. To the best of your knowledge,
 13 has CMGT ever paid any -- any part of that default
 14 judgment prior to the bankruptcy?
 15 A. Not to the best of my knowledge.
 16 Q. Does CMGT presently have the ability to
 17 pay any part of that judgment?
 18 A. No.
 19 Q. And didn't Mr. Spehar tell you that --
 20 in his conversations with you, either he or his
 21 attorneys, that Mr. Spehar thought that he had a
 22 direct claim for malpractice against Mayer Brown?
 23 A. I don't recall that conversation
 24 occurring.

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1 Q. Do you recall seeing that in -- in
 2 papers that Mr. Spehar provided to you?
 3 A. I'm not going to say that it -- that it
 4 didn't exist, but I sure don't remember it.
 5 I was surprised at our recent trial when
 6 I -- it was reported to me that he said those
 7 things, and I don't recall that conversation or
 8 seeing it, not to say that I might not have seen
 9 something like that, but I sure don't remember it.
 10 Q. Um-hum, all right. Let me show you
 11 another exhibit now.
 12 MR. MARINELLO: This is No. 13, correct?
 13 THE COURT REPORTER: Um-hum.
 14 (WHEREUPON, a certain document was
 15 marked Defendant's Exhibit No. 13,
 16 for identification, as of
 17 01/19/2009.)
 18 BY MR. MARINELLO:
 19 Q. Exhibit 13 has a cover page that is a
 20 letter dated 6/29/2006 to Rob, who I presume is Rob
 21 Carroll, one-of your counsel, signed by Gerry, who
 22 I assume is Gerry Spehar.
 23 MR. JOYCE: I'm sorry. Where are you at?
 24 MR. MARINELLO: No. 13.

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1 MR. JOYCE: But where are you at on 137
 2 Page 1?
 3 MR. MARINELLO: Page 1, yes.
 4 MR. JOYCE: Okay.
 5 MR. MARINELLO: Okay.
 6 BY MR. MARINELLO:
 7 Q. And attached to this cover page is a
 8 memo entitled, Spehar Capital LLC versus
 9 Mayer Brown, et al.
 10 Is this a true and correct copy of the
 11 letter with the attached memo that Mr. Spehar sent
 12 to Robert Carroll?
 13 A. I -- I don't know.
 14 Q. Did you ever get a copy of this?
 15 A. I -- I'm going to assume that we did,
 16 but I've not seen this in a very, very long time,
 17 so...
 18 Q. Well, did you review it after you did
 19 receive it?
 20 A. Probably scanned it.
 21 Q. Did you make any investigation into any
 22 of the -- into the validity of any of the
 23 statements in here?
 24 A. Well, I think, if I'm not mistaken,

1 by -- you know what? I don't remember.
 2 Q. Okay. Doesn't this memo accuse
 3 Mayer Brown and Mr. Given of conspiring with
 4 Spehar's partners against Spehar, committing fraud
 5 against Spehar, breaching fiduciary duties to
 6 Spehar, in connection with an insurance partnership
 7 that he claims to have been involved in?
 8 A. I -- I don't know. If it does, then it
 9 does, but I don't recall. I haven't seen this in a
 10 long time. I'd be happy -- if you want to point it
 11 out to me, I'd be happy to take a look at it,
 12 but --
 13 Q. Do you remember that this --
 14 A. -- I don't recall.
 15 Q. Did you remember knowing those facts
 16 prior to filing the malpractice claim -- those
 17 allegations by Mr. Spehar prior to the filing of
 18 the malpractice claim?
 19 A. I don't remember.
 20 Q. Well, let me ask you this -- and I'm not
 21 going to have any specific questions about that
 22 now.
 23 Was it -- wasn't it clear to you before
 24 you filed your malpractice claims against Mr. Given

1 insistent?
 2 A. I don't know, insistent. I think he
 3 believes strongly in what he believes. My position
 4 as a trustee is to try to sort through those things
 5 and --
 6 Q. If -- if you could just answer my
 7 questions a little more directly, we could move
 8 this --
 9 A. I don't --
 10 Q. -- along. Yeah.
 11 A. I don't know what you're -- you're
 12 asking me to -- ask it again.
 13 Q. Okay. I think you answered my question
 14 with the first sentence of or two of your answer,
 15 and then you started talking about yourself as a
 16 trustee. I -- I just -- I don't mean to interrupt
 17 you, please, understand.
 18 A. No, no, no. Go ahead. I'm --
 19 Q. I just don't want to --
 20 A. -- sorry.
 21 Q. There's a lot of material to cover, and
 22 I kind of want to move along.
 23 A. I apologize.
 24 Q. Okay? So Mr. Spehar communicated with

1 and Mayer Brown that Mr. Spehar had personal
 2 animosity against Mr. Given?
 3 A. I don't -- I don't know. I'm sure that
 4 he must have had a -- a difficult relationship.
 5 Obviously, somebody doesn't sue somebody else if
 6 they don't, but I don't know.
 7 And you're using the words -- and I
 8 can't remember what your -- your qualifying
 9 adjective was, but I'm not sure that that's
 10 necessarily the case.
 11 I do know that Mr. Spehar is a very
 12 passionate person about -- about issues, and he's
 13 very -- he believes strongly in his positions.
 14 And so sometimes I think those types of
 15 people sometimes show themselves to be or may
 16 appear to be angry or -- or insistent when, in
 17 fact, they're just very passionate about what they
 18 believe. And -- and I've --
 19 Q. Is --
 20 A. -- met those people throughout my
 21 career, and I don't know if Mr. Spehar is any
 22 different than other people that believe strongly
 23 about their positions.
 24 Q. Um-hum. Did you find Mr. Spehar

1 you frequently, did he not?
 2 A. Through his counsel or together, yeah.
 3 Q. Um-hum. All right. Now, shortly after
 4 you were appointed trustee, you knew that the
 5 7 million -- \$17 million default judgment was the
 6 largest claim against CMGT?
 7 A. At that time, yes.
 8 Q. And it was in the best interests of the
 9 estate to vacate that default judgment if it was
 10 possible?
 11 A. I -- I don't know.
 12 Q. Well, if -- if the default judgment was
 13 vacated, then the -- the estate wouldn't have a
 14 claim against it for \$17 million, correct?
 15 A. I suppose that's true.
 16 Q. So it would be in the interest of the
 17 estate to get rid of that claim so that other
 18 creditors could share in the -- whatever assets
 19 CMGT had, correct?
 20 A. I suppose.
 21 Q. Okay. Did you ever investigate whether
 22 the default judgment could be vacated?
 23 A. Yes.
 24 Q. When?

1 A. I think shortly after I received the
 2 information from Mr. Todhunter.
 3 Q. What did you do?
 4 A. I either looked or I had my associate
 5 look at the California statute relative to vacation
 6 of judgments. I don't recall offhand the -- the
 7 number of the statute or whatever.
 8 Q. Okay.
 9 A. Their statute --
 10 Q. Well, that's your -- that's your answer,
 11 right? I mean, I asked you what you did -- what
 12 you did. You said you or your associate looked at
 13 the --
 14 A. Right.
 15 Q. -- statute. That's kind of the end of
 16 the answer for that question.
 17 You said that you did this after you
 18 received the materials from Mr. Todhunter?
 19 A. Sometime afterward, right.
 20 Q. Shortly after that?
 21 A. I -- yeah, I mean, I don't remember
 22 exactly, but somewhere within that time period. I
 23 wouldn't have done anything until I received the
 24 information from Mr. Todhunter about the citation.

1 Q. Okay. Well, we -- we've already
 2 established that you were appointed trustee on or
 3 about September 21st of 2004 --
 4 A. Okay.
 5 Q. -- correct?
 6 A. Right.
 7 Q. And you've testified that Mr. Todhunter
 8 contacted you pretty quickly and sent you materials
 9 about ten days later, correct?
 10 A. Right.
 11 Q. Okay. So the time frame, I guess, would
 12 be sometime around the beginning of October, 2004,
 13 correct?
 14 A. I -- I guess, but I'm not positive, but,
 15 yes, I suppose that's about right.
 16 Q. All right. Now, you say you had your
 17 associate look at the California statute?
 18 A. And I can't remember if I did it or I
 19 was looking over his shoulder doing it or whatever.
 20 Q. What's the name of your associate?
 21 A. He's not there anymore. His name was
 22 Arthur Rummier.
 23 Q. Arthur?
 24 A. Rummier.

1 Q. How do you spell his last name?
 2 A. R-U-M-M-L-E-R.
 3 Q. And where is he now?
 4 A. He's with Springer Brown.
 5 Q. What city --
 6 A. Probably get --
 7 Q. -- is that?
 8 A. In Wheaton.
 9 Q. Okay. And you looked at the statute
 10 and -- with Mr. Rummier, and what -- what -- is
 11 there anything else you did besides that?
 12 A. I just looked at the statute. I
 13 believed there -- the California statute was in
 14 some ways similar to our Illinois statute for --
 15 Q. But --
 16 A. -- vacating judgments.
 17 Q. But I'm just asking you what you did at
 18 this point, not what the statute says.
 19 A. Oh.
 20 Q. Did you do anything besides look at the
 21 statute?
 22 A. Well, I -- no.
 23 Q. Okay.
 24 A. I mean, I don't know what I'm supposed

1 to do after I look at the statute.
 2 Q. Well, did you look up -- for example,
 3 did you look at any case law?
 4 A. No.
 5 Q. Okay. Did you look at any Hornbooks or
 6 treatises on California procedure?
 7 A. No.
 8 Q. Did you obtain an opinion from
 9 California counsel about how to vacate a judgment?
 10 A. No.
 11 Q. Did you -- did you talk to anybody who
 12 was admitted to practice law in California about
 13 what -- how the statute worked?
 14 A. No.
 15 Q. Did you talk to anybody from
 16 Mayer Brown?
 17 A. No.
 18 Q. Did you talk to any of the officers or
 19 shareholders or -- of CMGT about whether there were
 20 grounds for vacating the default judgment?
 21 A. Well, over the time I had received
 22 letters --
 23 MR. JOYCE: I'm sorry. Can I have that
 24 question read back.

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1 (WHEREUPON, the record was read by
 2 the reporter.)
 3 MR. JOYCE: Thank you.
 4 BY THE WITNESS:
 5 A. Again, I had received some letters from
 6 shareholders indicating that they had certain
 7 complaints relative to CMGT's relationships with --
 8 with Spehar Capital.
 9 There were allegations of what they
 10 believed to be misconduct, but it was my opinion
 11 that the -- after having scanned the -- the
 12 California statute, that the time to vacate the
 13 judgment had come and gone and whatever complaints
 14 they may have had were too late. They should have
 15 been brought at the time.
 16 BY MR. MARINELLO:
 17 Q. Sir, you're -- you're talking about
 18 correspondence now --
 19 A. I don't --
 20 Q. -- and my -- let me -- let me finish my
 21 question, okay?
 22 A. Sure.
 23 Q. You're talking about correspondence with
 24 shareholders, and that, with all due respect,

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1 wasn't my question.
 2 My question was what you had -- had done
 3 as part of your investigation, and you just told me
 4 that you looked at the statute, and I was asking
 5 you if you talked to anybody -- if you talked to
 6 anybody from -- from CMGT, whether they are an
 7 officer or shareholder, to see if there were -- if
 8 they thought there were factual grounds for
 9 vacating the judgment.
 10 A. No.
 11 Q. All right. Now, you say that at some
 12 point, you concluded that it was too late to vacate
 13 the judgment. What is your understanding of when
 14 the judgment could be vacated?
 15 A. I haven't seen the statute in a long
 16 time.
 17 Q. Um-hum. All right. Let me -- did --
 18 did you -- in -- in looking at the question of --
 19 did you look at any other statutes besides the
 20 California statute when you thought about whether
 21 or not the default judgment could be vacated?
 22 A. I don't know if I knew -- I don't think
 23 so.
 24 Q. So, for example, you didn't look and see

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1 if there were any bankruptcy law statutes that
 2 applied to it?
 3 A. Oh, well, there's a -- I mean, I didn't
 4 look at statutes, per se. There's a -- a doctrine
 5 called Rooker-Feldman that basically says that you
 6 can't collaterally attack a judgment in the
 7 Bankruptcy Court.
 8 Q. Okay. Aside --
 9 A. And -- and --
 10 Q. -- from -- you knew -- you knew that?
 11 A. And --
 12 Q. You were familiar with that doctrine?
 13 A. Yeah, for the most part, sure.
 14 Q. Okay. But apart from that, did you look
 15 at any statutes, bankruptcy law statutes or
 16 anything like that in connection with a possible
 17 effort to vacate the judgment?
 18 A. Not that I'm aware of offhand. I
 19 don't -- if you would make a reference to
 20 something, then perhaps I would -- refresh my
 21 recollection, but I don't know if I -- you know,
 22 some of the bankruptcy issues and some of the
 23 bankruptcy laws I -- I don't need to look at. I
 24 already know what they are. If you ask me what

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1 they are, then that's fine. I don't need to relook
 2 at something.
 3 Q. Okay.
 4 A. So I'm -- you're asking me if I
 5 specifically looked at something, and I did not.
 6 MR. MARINELLO: All right. Let me -- let me
 7 have this marked as the -- as the next exhibit.
 8 I think we're on No. 14, is that --
 9 MR. JOYCE: Right.
 10 MR. MARINELLO: -- correct?
 11 MR. JOYCE: 14 is right.
 12 (WHEREUPON, a certain document was
 13 marked Defendant's Exhibit No. 14,
 14 for identification, as of
 15 01/19/2009.)
 16 BY MR. MARINELLO:
 17 Q. All right. As -- as Exhibit 14 I have
 18 marked the letter dated December 15, 2004, from Kim
 19 Quarles and Robert Quarles to you. Did you receive
 20 a copy of that letter on or about the date that it
 21 bears?
 22 A. Yes.
 23 Q. All right. And who is -- what is Kim
 24 Quarles' relationship to CMGT?

1 A. I assume that she was a -- either a
 2 shareholder or an investor in CMGT, along with her
 3 husband.
 4 Q. Okay. Do you know what she does for a
 5 living?
 6 A. No.
 7 Q. You're not aware that she's an attorney?
 8 A. No.
 9 Q. Now, her letter suggests that Spehar
 10 brought a baseless suit against CMGT in California.
 11 A. Okay.
 12 Q. And -- right?
 13 A. That's what it says.
 14 Q. And that he filed false affidavits and
 15 committed a fraud on the California Court, correct?
 16 A. Um-hum, that's what it says.
 17 Q. Okay. And she talks about how that
 18 litigation was without merit, correct?
 19 A. That's her allegation in the -- in the
 20 letter, that's correct.
 21 Q. Yes, and she says that, as a result of
 22 it, CMGT was left unfunded and without financial
 23 means to battle the spurious allegations of the
 24 lawsuit, correct?

1 A. That's what the letter says.
 2 Q. Right. She asked you at the end of the
 3 letter to investigate the situation, correct?
 4 A. Yes.
 5 Q. Did you ever pick up the telephone and
 6 call Ms. Quarles or Mr. Quarles to talk about
 7 this -- the things that they had said in their
 8 letter?
 9 A. No. I don't even know if I had her
 10 phone number.
 11 Q. Did you ever ask your attorney or anyone
 12 else to contact her?
 13 A. No.
 14 Q. Okay. Did you ever investigate any of
 15 Ms. Quarles' accusations against Spehar Capital and
 16 Mr. Spehar?
 17 A. I sent her a responsive letter.
 18 Q. I'm aware of that, sir, but my question
 19 was, did you ever investigate any of her
 20 allegations against Mr. Spehar or Spehar Capital?
 21 A. I didn't think it was necessary.
 22 Q. So the answer is no?
 23 A. No.
 24 Q. Okay. Did you ever investigate, for

1 example, whether her allegation that the reason
 2 CMGT did not defend itself in the Spehar suit was
 3 because it didn't have the financial resources to
 4 do so?
 5 A. Could you repeat that, please.
 6 Q. Did you ever investigate Ms. Quarles'
 7 assertion that the reason that CMGT did not defend
 8 itself in the Spehar lawsuit was because it did not
 9 have the financial resources to do so?
 10 A. No.
 11 Q. Why not?
 12 A. I didn't think it was relevant.
 13 Q. Okay. And would that same -- would that
 14 be your answer with respect to all of the
 15 allegations that she makes in this letter about
 16 Mr. Spehar and Spehar Capital, that you didn't
 17 think it was relevant to investigate those?
 18 A. Again, my -- my view was that I was not
 19 in a position to be able to vacate the judgment
 20 because of the lapse of time and, essentially, the
 21 due diligence or diligence that was required as
 22 part of the motion to vacate.
 23 And without that, these actions or these
 24 items would only go to a -- a defense, not the

1 diligence, and it had been clear to me that the
 2 debtor was properly served with summons and failed
 3 to appear.
 4 (WHEREUPON, a certain document was
 5 marked Defendant's Exhibit No. 15,
 6 for identification, as of
 7 01/19/2009.)
 8 BY MR. MARINELLO:
 9 Q. All right. As Exhibit 15, I have marked
 10 a letter that you wrote to Ms. Quarles dated
 11 December 16, 2004. Is that a true and correct copy
 12 of the letter you sent to her --
 13 A. Yes.
 14 Q. -- on that date?
 15 A. Yes.
 16 Q. Your letter states in Paragraph 2 --
 17 well, I'm sorry. Is that -- is that the
 18 signature -- your signature the end -- at the end
 19 of the letter also, by the way?
 20 A. Yeah, sometimes I sign with my initials.
 21 Q. All right. In the second paragraph of
 22 your letter, you state, "No motion to vacate the
 23 judgment was filed on behalf of CMGT, and, in fact,
 24 the judgment has been executed upon by virtue of a

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1 citation to discover assets." I'm going to stop
 2 there for a moment.
 3 A. Um-hum.
 4 Q. The information you had about whether
 5 there had been a citation to discover assets that
 6 had been executed upon --
 7 A. Um-hum.
 8 Q. -- that information came to you from
 9 Mr. Spehar, correct?
 10 A. Or Mr. Todhunter, right.
 11 Q. Yes, Mr. Spehar or his counsel --
 12 A. Right.
 13 Q. -- correct?
 14 A. Yeah.
 15 Q. Yes. And, in fact, isn't it the case
 16 that in your recent litigation with Mr. Spehar and
 17 Spehar Capital you are taking the position that
 18 that citation was never properly served?
 19 A. That's exactly right.
 20 Q. Right, so if that citation were not
 21 properly served, then the judgment would not have
 22 been properly executed upon, isn't that true?
 23 A. Maybe, maybe not. I don't know.
 24 Q. Well, if a judgment is executed on by

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1 serving a citation to discover assets --
 2 A. Um-hum.
 3 Q. -- and the citation is not properly
 4 served, then the judgment has not been executed on,
 5 correct?
 6 A. Yes.
 7 MR. JOYCE: He's already answered the
 8 question.
 9 BY MR. MARINELLO:
 10 Q. May I have an answer.
 11 A. I thought I did. Didn't I --
 12 Q. Well --
 13 A. -- answer the question?
 14 Q. May I have another answer.
 15 MR. JOYCE: Well, no. You don't get a choice.
 16 He answered the question.
 17 BY MR. MARINELLO:
 18 Q. Is the answer to the question yes?
 19 MR. JOYCE: The answer to the question is on
 20 the record. You want it read back, we'll read it
 21 back to you.
 22 BY MR. MARINELLO:
 23 Q. Is it your understanding, sir, that a
 24 judgment has to be properly executed on in order

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1 for it to be executed on?
 2 MR. JOYCE: Can I have that question read
 3 back?
 4 MR. MARINELLO: I'll -- I'll rephrase.
 5 BY MR. MARINELLO:
 6 Q. Is it -- is it your position -- is it
 7 your understanding that in order for a citation to
 8 be effective as an execution upon a judgment, the
 9 citation has to be properly served?
 10 A. Sure.
 11 Q. Okay. All right. Let me continue with
 12 what you've written here. It's -- you also say in
 13 Paragraph 2, "It is likely that the time period to
 14 vacate the judgment has now expired." Is that
 15 correct?
 16 A. Yes.
 17 Q. At the time you wrote this letter, you
 18 had already -- you claim you had already researched
 19 when the times expire?
 20 A. Yeah, in -- in brief, yeah.
 21 Q. All right. And you had -- you had
 22 concluded that the time had already expired as of
 23 the time that you researched that issue?
 24 A. I believe that that's the case.

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1 Q. Isn't it true that at the time you wrote
 2 this letter, you didn't know whether the time had
 3 expired and that's why you used the word "likely"
 4 instead of saying that the time, in fact, had
 5 expired?
 6 A. No. It's just the way I wrote my
 7 letters. I mean, I -- just my way of writing.
 8 Q. All right.
 9 A. Sorry. I'm surprised that --
 10 Q. Up to that point --
 11 A. -- Ms. Quarles, though, is an attorney.
 12 Q. Up to that --
 13 A. She never -- she never responded to
 14 that. It's interesting.
 15 Q. Up to that point in time, had you
 16 considered moving to -- to vacate the default
 17 judgment?
 18 A. Up to this time?
 19 Q. Yes.
 20 A. Well, I think I had already come to the
 21 conclusion that it wasn't -- that a -- that a
 22 motion to vacate was likely not well taken.
 23 Q. And the reason for that was what?
 24 A. I believe the -- the due diligence

1 aspect -- and I think California may call it
2 something a little bit different, but the due
3 diligence aspect of the motion to vacate was not
4 going to be able to be overcome, no matter what
5 kind of defense there might have been.

6 Clearly, the debtor was served, and --
7 and made a choice not to appear. I don't know how
8 I'm going to vacate a judgment like that under
9 those circumstances. I -- I just don't -- I -- I
10 just don't see how that was going to be done.

11 Q. When you say the debtor made a choice
12 not to appear, what do you mean by that?

13 A. Well, CMGT never took any action to
14 vacate the judgment. That's who the judgment was
15 against, CMGT, who was being represented by
16 counsel, but, again, CMGT was the one that needed
17 to -- as the entity needed to go forward and -- and
18 vacate the judgment.

19 Q. Um-hum. Well, let's assume you are
20 correct that CMGT never made a motion to vacate the
21 judgment.

22 A. Um-hum.

23 Q. Was it your understanding that, in that
24 instance, no one else could move to vacate the

1 THE VIDEOGRAPHER: Going back on the video
2 record at 10:46 a.m., the beginning of Tape No. 2.

3 BY MR. MARINELLO:

4 Q. Who at the debtor chose not to vacate
5 the default judgment?

6 A. I don't know. Specifically I don't
7 know.

8 Q. What was their reason for not trying to
9 vacate the default judgment?

10 A. To the best of my recollection, there
11 was an allegation that there was -- that the
12 lawsuit that was filed by Spehar Capital was not --
13 there was no jurisdiction in California, and there
14 was no apparent basis for injunctive relief, and,
15 therefore, the Court would not likely enter any
16 type of adverse judgment against CMGT.

17 Q. Well, that explains -- arguably, that
18 explains why CMGT may have decided not to defend
19 the lawsuit, but once the default judgment was
20 entered, do you have any idea why a motion was not
21 made by CMGT to vacate that default judgment?

22 A. No.

23 Q. You have no information about that?

24 A. Not that I recall. Nobody ever

1 judgment, including you as trustee?

2 A. No, but the time period, in my
3 estimation, had come and gone.

4 Q. When did that time period in your
5 estimation come and go?

6 A. I don't remember. I'd have to go back
7 to the statute and look at numbers if you've got
8 time periods, and I don't remember the -- the
9 statute. All I know is I came to that conclusion
10 after having looked at the -- the statute in
11 California.

12 MR. MARINELLO: Yeah, the court reporter has
13 just told me that the tape is going to run out, so
14 I'm going to let him change that and maybe take a
15 short break.

16 THE WITNESS: Okay.

17 MR. MARINELLO: Is that --

18 MR. JOYCE: Sure.

19 MR. MARINELLO: -- okay?

20 THE VIDEOGRAPHER: Going off the video record
21 at 10:40 a.m.

22 (WHEREUPON, the deposition was
23 recessed from 10:40 a.m. until

24 10:46 a.m.)

1 mentioned it to me.

2 Q. Did you ever ask anybody at CMGT a
3 question about that?

4 A. No, not specifically, although it was
5 mentioned in some of my correspondence, but nobody
6 ever really responded to that, to the best of my
7 knowledge.

8 I mean, it's possible. Like I said,
9 there's thousands of pages of documentation here,
10 so it's conceivable that somebody may have said
11 something, but off the top of my head, I don't -- I
12 just don't recall it.

13 Q. Well, did you ever either telephone
14 anyone or interview anyone and ask them that
15 question?

16 A. No. You know what? I really didn't
17 have many phone numbers for -- for shareholders or
18 other people, to the best of my knowledge, and I
19 would not necessarily have contacted them directly
20 because I thought, in my estimation, that
21 Mr. Franco was the only one who was essentially
22 running the operation and had the most knowledge
23 about what was going on on a day-to-day basis.

24 Q. Did you ever call Mr. Franco and ask him

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1 that question?
 2 A. I -- I don't recall ever asking him that
 3 question directly. He may have said something to
 4 me in -- either when he dropped off the documents
 5 or when he -- or in his correspondence, but I don't
 6 recall.
 7 Q. Okay.
 8 MR. MARINELLO: Next exhibit, please.
 9 MR. JOYCE: 16.
 10 (WHEREUPON, a certain document was
 11 marked Defendant's Exhibit No. 16,
 12 for identification, as of
 13 01/19/2009.)
 14 BY MR. MARINELLO:
 15 Q. Okay. As Exhibit 16, I've marked an
 16 affidavit that you filed in the litigation that you
 17 had with Spehar Capital, and I'd just ask you,
 18 first of all, can you identify that as an affidavit
 19 you filed in that litigation with Mr. Spehar?
 20 A. Yes.
 21 Q. And is that your signature --
 22 A. Yes.
 23 Q. -- at the end of the affidavit?
 24 A. Yes.

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1 Q. And you swore to the truth of the -- of
 2 the statements in this affidavit, right?
 3 A. Yes.
 4 Q. All right. I'd like you to look at
 5 Paragraph 11, if you would, and would you read that
 6 out loud, please.
 7 A. "When Spehar first suggested that I
 8 bring an action for professional malpractice on
 9 behalf of the debtor's estate, I pointed out that
 10 the estate had no assets. Spehar was aware of that
 11 situation and offered to provide some initial
 12 funding to pursue the malpractice claim."
 13 Q. Okay. Now, would you please read
 14 Paragraph 12 aloud.
 15 A. "I did not immediately respond to
 16 Spehar's proposal. It appeared to me that if
 17 Spehar's judgment could be vacated, the estate
 18 could not claim to have suffered an injury in the
 19 entry of a default judgment. On investigation,
 20 several factors persuaded me that, even if the time
 21 for bringing such a motion had not run, I would not
 22 be able to vacate the default judgment. First, it
 23 wasn't economically feasible to retain an attorney
 24 in California since the estate had no assets. Even

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1 assuming that the estate could provide funds to
 2 bring a motion in California, I concluded that such
 3 a motion would be futile. Under California law,
 4 default judgment would be vacated upon an
 5 application supported by an attorney's sworn
 6 affidavit attesting that judgment was entered as a
 7 result of attorney's 'mistake, inadvertence,
 8 surprise or neglect.' See California Civil Proc.,
 9 practice, I guess, "Code Section 473(b). In my
 10 estimation, that issue would be to be resolved as
 11 part of the proposed malpractice litigation since
 12 MBRM," which is -- "likely would not admit to" --
 13 "admit neglect on its own part," period.
 14 Q. Okay. Thank you. Now, this is
 15 referring to the investigation that you did just
 16 after receiving the documents from Mr. Tedhunter,
 17 correct?
 18 A. Yeah.
 19 Q. And that's when you -- as you testified
 20 previously, you looked at the California Code
 21 statute, correct?
 22 A. Yes.
 23 Q. And at that point, the time for bringing
 24 such a motion to vacate the default, as you say

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1 here, had not run, correct?
 2 A. I said --
 3 MR. JOYCE: Read back -- I'm sorry. Read back
 4 the question. Read back the last two questions.
 5 BY THE WITNESS:
 6 A. It said, "Even if the time period --"
 7 MR. JOYCE: Hold on. Hold on.
 8 BY THE WITNESS:
 9 A. "-- for bringing --"
 10 MR. JOYCE: Hold on.
 11 BY THE WITNESS:
 12 A. I didn't say that.
 13 (WHEREUPON, the record was read by
 14 the reporter.)
 15 MR. JOYCE: Did you say "had not run"?
 16 MR. MARINELLO: Yes.
 17 MR. JOYCE: I thought you said it had run.
 18 BY MR. MARINELLO:
 19 Q. Excuse me, Mr. -- can I have an answer
 20 to my question?
 21 A. I don't think I said that. I said even
 22 if it had -- even if -- if you could say that
 23 default judgment -- even if the time period had not
 24 run, there was still a problem.

1 Q. Um-hum. Okay.
 2 A. That's what I said in the -- in the
 3 affidavit.
 4 Q. All right. Now, Paragraph -- in
 5 Paragraph 14 of your affidavit, you say that in
 6 November of 2004, you contacted Mayer Brown and
 7 requested copies of the debtor's legal files,
 8 correct?
 9 A. Yes.
 10 Q. And did the investigation -- I'm sorry.
 11 That was after you had looked at the statute with
 12 Mr. Rummier? Is that his name?
 13 A. Yeah, it might have been at or around
 14 the same time. I might have done it -- I don't
 15 know. It's hard to tell exactly, but --
 16 Q. Um-hum.
 17 A. -- about then.
 18 Q. Okay. All right. Now, when you wrote
 19 Mr. Given --
 20 A. Um-hum.
 21 Q. -- to ask him for copies of
 22 Mayer Brown's files, prior to that time, had you
 23 ever called him to ask him whether there was any
 24 grounds for setting aside the default judgment?

1 A. No.
 2 Q. Had you ever called him about any
 3 questions at all concerning CMGT?
 4 A. No.
 5 Q. When you wrote Mr. Given and asked him
 6 for documents, why didn't you also ask him for
 7 information about the default judgment, just in
 8 case he knew something that might help you?
 9 A. I asked him for the legal files. I
 10 assumed it would be -- everything that he had would
 11 be contained in there. I waived the debtor's
 12 attorney-client privilege. I assumed he was giving
 13 me everything that he had.
 14 Q. Well, he -- in fact, he did give you
 15 every document that he had, didn't he?
 16 A. I -- I assume so. I mean, I've not
 17 asked him otherwise, but I -- I presume when I
 18 asked that he turned it over. I don't know.
 19 Q. Okay. Well, my question was, when
 20 you -- when you asked him for documents, before you
 21 did that, why didn't you pick up the phone and call
 22 him and ask him if he knew anything about the
 23 default judgment that might help you get it
 24 vacated?

1 A. I didn't think it was necessary, I
 2 guess.
 3 Q. Do you remember why you didn't do that?
 4 A. I asked him for the legal files. That's
 5 what I thought I was -- that's what I chose to do.
 6 Q. I understand what you chose to do.
 7 My -- my question is just, how come you didn't pick
 8 up the phone and ask him if he had any facts that
 9 would help you get that default judgment vacated?
 10 A. I just didn't.
 11 Q. Okay. When you were appointed the
 12 trustee of CMGT, did you ever order the Court
 13 transcript of the hearing at which the default
 14 judgment had been entered --
 15 A. No.
 16 Q. -- in California?
 17 A. No.
 18 Q. Do you think it might have made a
 19 difference to you in deciding whether to move to
 20 vacate the judgment if you knew that the Trial --
 21 Trial Judge in California had indicated that he
 22 expected such a motion to be filed?
 23 A. No.
 24 Q. Why not?

1 A. Obviously, the Judge entered the
 2 judgment. Whether he thought -- whether the Judge
 3 in an offhanded way thought it was going to be
 4 vacated or not, that's just his view. He in fact
 5 entered the judgment. That's all I was concerned
 6 about.
 7 Q. You don't think that if the Judge
 8 indicated that he thought there'd be a motion to
 9 vacate the judgment that would be made and that
 10 would render this whole -- the whole proceeding
 11 that he was sitting through a nullity, you don't
 12 think that knowing that would have helped you?
 13 MR. JOYCE: I'll object. There's about four
 14 or five assumptions in there that are not supported
 15 by the record.
 16 You can answer.
 17 BY THE WITNESS:
 18 A. I don't even know the answer to the
 19 question anymore.
 20 BY MR. MARINELLO:
 21 Q. Let me see if I can --
 22 MR. JOYCE: Hold on. Hold on.
 23 BY MR. MARINELLO:
 24 Q. Let me rephrase that.

1 MR. MARINELLO: All right.
 2 BY MR. MARINELLO:
 3 Q. Okay? I'll try and help you out.
 4 The fact is you didn't look at the
 5 transcript of the hearing in California, correct?
 6 A. I did not.
 7 Q. Have you ever looked at it?
 8 A. No.
 9 Q. Okay.
 10 MR. MARINELLO: All right. Let me ask the
 11 court reporter to mark another exhibit for a
 12 moment. 17?
 13 THE COURT REPORTER: Yes.
 14 BY MR. MARINELLO:
 15 Q. Is that a letter that you -- is
 16 Exhibit 17 a letter that you wrote to Ms. Quarles
 17 on December 16, 2004?
 18 A. Looks like it.
 19 Q. Okay. Is that your signature at the
 20 end?
 21 A. Yes, I think I saw this before, didn't
 22 we?
 23 Q. Oh, you know? Somehow I've gotten that
 24 mixed up. Excuse me. May have I have that back,

1 please --
 2 A. Sure.
 3 Q. --- that exhibit?
 4 (WHEREUPON, discussion was had off
 5 the record.)
 6 MR. JOYCE: You know what? I don't -- I don't
 7 think you showed him that before. The date is
 8 different. You showed him one that was dated the
 9 15th. I'm sorry. Pardon --
 10 MR. MARINELLO: Let's take --
 11 MR. JOYCE: I'm sorry. You're right. This is
 12 16 --
 13 MR. MARINELLO: Am I right? That was -- that
 14 was 15.
 15 MR. JOYCE: Yeah, you're right.
 16 MR. MARINELLO: Yeah, I thought so.
 17 MR. JOYCE: So --
 18 MR. MARINELLO: I just -- I just grabbed the
 19 wrong --
 20 MR. JOYCE: So you'll withdraw --
 21 MR. MARINELLO: -- the wrong letter.
 22 MR. JOYCE: -- 17?
 23 MR. MARINELLO: Yeah, 17 is withdrawn, please.
 24 Thank you.

1 Okay. Would you mark this as the next
 2 exhibit, please. This will be 17.
 3 (WHEREUPON, a certain document was
 4 marked Defendant's Exhibit No. 17,
 5 for identification, as of
 6 01/19/2009.)
 7 BY MR. MARINELLO:
 8 Q. Mr. Grochocinski, I've -- I've placed in
 9 front of you a copy of 11 USC Section 108.
 10 A. Um-hum.
 11 Q. Extension of Time is the title of this
 12 statute. Do you see that?
 13 A. Yes.
 14 Q. You testified -- did you review this
 15 statute when you first became trustee of the
 16 estate?
 17 A. No, I don't think I went back to review
 18 it.
 19 Q. Did you review the statute prior to
 20 deciding that the time period for vacating the
 21 judgment had expired?
 22 A. I think I probably took it into
 23 consideration.
 24 Q. And what is the -- what did you -- you

1 think you did or you know you did?
 2 A. I don't know. I -- I'm just going to
 3 say I think I did.
 4 Q. You don't remember one way or the other?
 5 A. It's a long time ago.
 6 Q. Um-hum. This statute extends the time
 7 to move to vacate a default judgment, correct?
 8 A. It says what it says.
 9 Q. Is that your understanding of it?
 10 A. I don't know. Maybe, maybe not.
 11 Q. Um-hum. Do you know whether this
 12 statute -- is it your understanding that this
 13 statute had any application to the default judgment
 14 that was entered against CMGT?
 15 A. I'm not really sure.
 16 Q. Why aren't you sure?
 17 A. Because I'm not sure.
 18 Q. Did you ever reach a conclusion as to
 19 whether this statute did or did not apply to the
 20 default judgment that had been entered against
 21 CMGT?
 22 A. My conclusion is is that the judgment in
 23 California was valid.
 24 Q. And why?

1 A. I told you. It was my belief that it
 2 was not possible to vacate the judgment based on
 3 the lack of due diligence.
 4 Q. What do you mean by "lack of due
 5 diligence"?
 6 A. Service of process, knowledge that the
 7 judgment was to be entered and an intentional
 8 decision not to appear. I don't know how I get
 9 around that.
 10 Q. Okay. Who made the intentional decision
 11 not to appear?
 12 A. I assume CMGT did.
 13 Q. And why did they make that decision?
 14 A. I have no idea. I think, personally,
 15 that they believed that the Judge in California,
 16 and erroneously on their behalf, would never enter
 17 the judgment.
 18 Q. And what is the basis for your belief?
 19 A. I think I've already said this before.
 20 I believe that Mr. Franco said that he had
 21 conversations with Mr. Given and that Mr. Given
 22 indicated that the decision to vacate the
 23 judgment -- or not to vacate the judgment, but to
 24 not appear was based on the fact that, one, the

1 amended its complaint to seek money damages?
 2 A. I recall.
 3 Q. And then, after that happened, the Court
 4 set a hearing for a prove-up on the amount of a
 5 default judgment. Do you remember that?
 6 A. Vaguely.
 7 Q. Okay. So we're talking about a Court
 8 hearing that took place several months after the
 9 initial failure to appear, correct?
 10 A. Again, the time period you're saying,
 11 that's it, I don't know that to be the case, but
 12 assuming that you're correct, then that would be
 13 correct.
 14 Q. Well, okay. But I'm not --
 15 A. I don't have a docket in front of my
 16 face, so I don't want --
 17 Q. I --
 18 A. -- to respond --
 19 Q. I understand.
 20 A. -- erroneously.
 21 Q. And that's why I'm not holding you to
 22 any specific dates.
 23 A. Okay.
 24 Q. But you understand there was a time -- a

1 Judge -- there was little or -- there was no
 2 adequate grounds for jurisdiction in California,
 3 and, two, that there was no grounds for an entry of
 4 a -- an injunction, and therefore, they didn't
 5 appear.
 6 Q. Okay. You're talking about the
 7 appearance that they didn't make, right?
 8 A. Yes.
 9 Q. Okay. That was back in -- at the time
 10 that the TRO was entered, correct?
 11 A. Yes.
 12 Q. And that was in September of 2004,
 13 correct?
 14 A. I don't remember the dates.
 15 Q. Approximately, you remember that was --
 16 A. Okay. I don't -- again, I don't
 17 remember the dates.
 18 Q. But -- but that was the first thing that
 19 happened, the TRO was entered in September of 2004,
 20 correct?
 21 A. A -- a TRO was entered. I don't
 22 remember the date.
 23 Q. Okay. Do you remember that after the
 24 TRO was entered, a couple months later, CMGT

1 significant period of time between when CMGT did
 2 not appear for the TRO hearing and the time when
 3 the -- the complaint was amended after that, and
 4 then there was a default hearing on the amended
 5 complaint, correct?
 6 MR. JOYCE: I'll object to the use of the word
 7 "significant" as vague.
 8 BY THE WITNESS:
 9 A. There was a time period.
 10 BY MR. MARJNELLO:
 11 Q. Considerable time period, correct?
 12 A. I don't know that to be the case, but
 13 there was a time period, obviously.
 14 Q. Okay. So when you say that there was a
 15 decision not to appear, are you talking about the
 16 decision not to appear in September when the TRO
 17 was entered, or are you talking about the
 18 decision -- a decision not to appear for the -- for
 19 the default hearing?
 20 A. Maybe both. They were defaulted. I
 21 don't know the answer to the question. I don't
 22 recall what the docket said, but it was my
 23 impression that they had been defaulted.
 24 Q. My -- my question is do you --

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1 A. So the question is --
 2 Q. Do you know if -- do you know if CMGT
 3 made a deliberate decision not to appear for the
 4 prove-up hearing in California?
 5 A. I don't know the answer to that.
 6 Q. Do you know -- if they did make a
 7 decision not to appear at that prove-up hearing, do
 8 you know why they made that decision?
 9 A. I don't even know if they knew. They
 10 didn't appear, so they wouldn't have gotten notice
 11 they were defaulted, to the best of my knowledge,
 12 so I'm not really sure.
 13 Q. Do you know if they got notice of
 14 amended complaint?
 15 A. I don't know the answer to that.
 16 MR. MARINELLO: We are on Exhibit 18, are we?
 17 Would you please mark that as Exhibit 18.
 18 (WHEREUPON, a certain document was
 19 marked Defendant's Exhibit No. 18,
 20 for identification, as of
 21 01/19/2009.)
 22 BY MR. MARINELLO:
 23 Q. Okay. As Exhibit 18 I have marked a
 24 letter dated August 10, 2005, from you to Mr. Ira

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1 Bodenstein. Is that a copy of the letter that you
 2 wrote to him on or about that date?
 3 A. Yes.
 4 Q. Okay. Thank you. I have no -- no
 5 questions, just wanted to authenticate it.
 6 MR. MARINELLO: Would you mark this as the
 7 next exhibit, please.
 8 MR. JOYCE: Can I have one?
 9 MR. MARINELLO: 19?
 10 MR. JOYCE: Yeah.
 11 MR. MARINELLO: There you go.
 12 MR. JOYCE: Thanks.
 13 (WHEREUPON, a certain document was
 14 marked Defendant's Exhibit No. 19,
 15 for identification, as of
 16 01/19/2009.)
 17 BY MR. MARINELLO:
 18 Q. As Exhibit 19 I've marked a letter dated
 19 November 29, 2004, from Ronald Given to you. Is
 20 that a letter that you received from him on or
 21 about that date?
 22 A. I think so.
 23 Q. And he enclosed CD-ROMs with his letter,
 24 correct?

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1 A. Yes.
 2 Q. Okay. Did you when you received this
 3 letter call Mr. Given or talk to him about any of
 4 the issues concerning CMGT?
 5 A. Not that I recall.
 6 Q. Okay. All right. I'd like to go back
 7 to your affidavit for a minute, the one that I
 8 marked as an exhibit. You should still have it in
 9 front of you. It's Exhibit 16.
 10 A. Okay.
 11 Q. Now, in -- in Paragraph 12 of your
 12 affidavit, you talk about several factors that
 13 persuaded you that you would not be able to vacate
 14 the default judgment?
 15 A. I'm sorry. Which --
 16 Q. Paragraph 12.
 17 A. Oh, I apologize. Okay.
 18 Q. In Paragraph 12, you say there are
 19 several factors that persuaded you that, even if
 20 the time for bringing a motion had not run, you
 21 would not be able to vacate the default judgment,
 22 correct?
 23 MR. JOYCE: It says what it says. I mean --
 24

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1 BY THE WITNESS:
 2 A. Yes, I mean, I -- I --
 3 BY MR. MARINELLO:
 4 Q. Just by way of introduction.
 5 Now, your first -- the first reason you
 6 give there, you say, first, the CMGT bankruptcy
 7 estate did not have the money to hire an attorney
 8 to go out to California and to move to vacate the
 9 default judgment.
 10 A. That's true.
 11 Q. Okay. Did you make any effort at that
 12 time to see if any of the shareholders of CMGT
 13 would contribute money for an effort to vacate the
 14 default judgment?
 15 A. No. They had not given money before
 16 when it was served. I don't know why I would have
 17 asked them to do it now after the bankruptcy was
 18 filed.
 19 Q. The answer is that you did not make that
 20 effort, correct?
 21 A. No.
 22 MR. JOYCE: He answered the question.
 23 BY MR. MARINELLO:
 24 Q. Okay. Now, you're an attorney also,

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1 aren't you?
 2 A. I am.
 3 Q. And you're also the trustee of the
 4 estate, correct?
 5 A. I am.
 6 Q. Do you think that it was malpractice for
 7 you not to go out to California to -- to vacate
 8 that default judgment?
 9 A. No.
 10 Q. Why?
 11 A. I'm not a California attorney.
 12 Q. Any other reason besides that?
 13 A. There was no reason for me to -- to
 14 proceed on a -- a motion to vacate that I didn't
 15 think was well taken.
 16 Q. And the reason you didn't think it was
 17 well taken was?
 18 A. Haven't I answered this question before?
 19 MR. JOYCE: About five times.
 20 BY THE WITNESS:
 21 A. How many more times --
 22 BY MR. MARINELLO:
 23 Q. Is it the -- because of the lack of due
 24 diligence that you've described earlier?

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1 A. Well, amongst other things, yeah. I
 2 mean, I -- I just do not believe that there was
 3 a -- a basis in which to vacate this judgment.
 4 Q. Um-hum. Okay. Did you --
 5 A. And I'm not required to -- to advance
 6 moneys on the estate as a trustee, to do so.
 7 Q. Um-hum. Did you consider filing a
 8 motion to vacate the default judgment and then
 9 calling the Court to see if the hearing could be
 10 held by telephone so you wouldn't have to incur the
 11 expense of going out there?
 12 A. No.
 13 Q. Did you consider having yourself
 14 admitted pro hac vice so that you could -- just for
 15 the purpose of having the default judgment heard?
 16 A. No. How come Ron Given didn't do it?
 17 Q. My -- sir, my questions -- I'm not
 18 arguing with you.
 19 A. I -- I'm just --
 20 Q. I'm just asking you questions.
 21 A. -- asking, you know -- I mean, to a
 22 certain --
 23 Q. Let me ask you a question.
 24 A. If it's you're asking me questions, then

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1 I'm going to ask you the questions. Why -- why
 2 didn't your firm, your client, do this stuff? It
 3 was counsel. Help me out here.
 4 Q. Well, my -- this is -- this is your
 5 deposition, sir.
 6 A. Of course, but I'd like to know, too. I
 7 mean, you're --
 8 Q. We can have --
 9 A. -- asking me those questions.
 10 Q. If your counsel wants to have a
 11 discussion after the hearing, we can -- we can
 12 possibly do that.
 13 A. Just so you know. I mean --
 14 Q. Just right now, but -- let's just keep
 15 it calm.
 16 A. No, no.
 17 Q. I'm just going to ask you questions.
 18 A. I'm calm.
 19 Q. Okay?
 20 A. It's just -- I -- you're asking me, and
 21 I'm telling you --
 22 Q. The only --
 23 A. -- you should be asking your client the
 24 same question.

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1 Q. My question is, did you do those things?
 2 MR. JOYCE: He's already --
 3 BY THE WITNESS:
 4 A. Did I do --
 5 MR. JOYCE: He already --
 6 BY THE WITNESS:
 7 A. -- what things?
 8 MR. JOYCE: He's already answered those
 9 questions.
 10 MR. MARINELLO: Well, I'd like an answer
 11 without all -- I'd move to strike all the comments
 12 about -- about other people and all the questions
 13 that were asked by Mr. Grochocinski, because I
 14 don't think those are appropriate.
 15 BY MR. MARINELLO:
 16 Q. Let me ask you this: Did you ever
 17 consider calling the Judge's clerk in California
 18 and asking if the Court would entertain a motion by
 19 you with a hearing by telephone so that it would
 20 reduce your expenses?
 21 A. No.
 22 Q. Okay. Now, you say you had a -- in your
 23 affidavit, you say you had a second reason for not
 24 trying to vacate the default judgment futility.

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1 And you explained -- and I'm going to
 2 quote you, "Under California law, a judgment may be
 3 vacated upon an application supported by an
 4 attorney's sworn affidavit attesting the judgment
 5 was entered as a result of the attorney's mistake,
 6 inadvertence, surprise, or neglect," and then you
 7 quote the California code, 473(b), correct?
 8 A. Yes.
 9 Q. And then you say after that, "In my
 10 estimation, that issue would have to be resolved as
 11 part of the proposed malpractice litigation since
 12 Mayer Brown likely would not admit neglect on its
 13 own part," correct?
 14 A. That's what it says.
 15 Q. Okay. Did you ever call Mayer Brown to
 16 ask them if -- if -- if they would assist you in
 17 any way with the effort to vacate the default
 18 judgment?
 19 A. No.
 20 MR. MARINELLO: Okay. All right. Are we on
 21 Exhibit 18 now?
 22 THE COURT REPORTER: 20.
 23 MR. MARINELLO: 20. Would you please mark
 24 this as Exhibit 20.

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1 (WHEREUPON, a certain document was
 2 marked Defendant's Exhibit No. 20,
 3 for identification, as of
 4 01/19/2009.)
 5 BY MR. MARINELLO:
 6 Q. Okay. As Exhibit 20, I have placed
 7 before you a copy of California Civil -- Code of
 8 Civil Procedure Section 473, and there's an (a) and
 9 a (b).
 10 Is this the statute that you and
 11 Mr. Rummier looked over when you were discussing
 12 whether or not there was a -- a basis for vacating
 13 the default judgment?
 14 A. Well, I don't know if I discussed it
 15 with Mr. Rummier, but this is the statute that I
 16 looked at.
 17 Q. All right. And if you -- and this is
 18 the statute that you refer to in your affidavit as
 19 well, correct?
 20 A. Yes.
 21 Q. All right. Would you look at
 22 Section (b), please.
 23 A. Okay.
 24 Q. And would you read out loud the first

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1 two sentences of that section.
 2 A. "The Court may, upon any terms as may be
 3 just, relieve a party or his or her legal
 4 representative from a judgment, dismissal, order or
 5 other proceeding taken against him or her through
 6 his or her mistake, inadvertence, surprise or
 7 excusable neglect. Application for this relief
 8 shall be accompanied by copy of the answer or the
 9 pleading proposed to be filed therein, otherwise
 10 the application shall not be granted and shall be
 11 made within a reasonable time in no case exceeding
 12 six months after the judgment, dismissal, order or
 13 proceeding was taken."
 14 Q. All right. Now, doesn't -- don't you
 15 understand that section to say that the Court may
 16 grant relief from the judgment within the
 17 appropriate time frame if the judgment is entered
 18 against a person through that person's mistake,
 19 inadvertence, surprise, or excusable neglect?
 20 A. Which person are you referring to?
 21 Q. The person against whom the judgment was
 22 entered.
 23 A. Okay. I guess. I'm not sure that I
 24 understand the -- the question, but --

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1 Q. Well, I don't want you to answer the
 2 question if you don't understand --
 3 A. I --
 4 Q. -- it.
 5 A. I'm not really sure I quite understand
 6 the question. I'm trying to --
 7 Q. Okay. My -- my --
 8 A. -- answer what you want, but I -- it was
 9 unclear to me what you're --
 10 Q. Let me rephrase it then, okay?
 11 A. Okay.
 12 Q. Don't you understand that section that
 13 you just read to say that if a judgment is entered
 14 against a person and that person makes a motion
 15 that shows -- that meets the appropriate
 16 standards --
 17 A. Um-hum.
 18 Q. -- the judgment -- the Court has the
 19 discretion to relieve that person of the judgment
 20 entered against him?
 21 A. I guess that's what it says, right.
 22 Q. Okay. It doesn't say anything about the
 23 judgment having to be entered as a result of a
 24 mistake by the attorney, does it?

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1 MR. JOYCE: Wrong. And you're arguing with
 2 him. It -- the statute says exactly what it says.
 3 He's not here to be a reader, and you're arguing
 4 with him. I object.
 5 BY MR. MARINELLO:
 6 Q. Would you answer my question, please.
 7 A. Again, I'm not sure what you're
 8 referring to.
 9 Q. Well --
 10 A. I mean, I --
 11 Q. I'm -- okay. Let me --
 12 A. I mean, a person -- the judgment -- a
 13 judgment is always entered against an entity.
 14 Counsel represents an entity, so I'm not sure that
 15 it would have made a difference.
 16 Somebody would have to say they there
 17 was surprise, neglect, inadvertence or the like,
 18 and to the best of my knowledge, there was no such
 19 surprise, inadvertence, mistake, or neglect.
 20 Nothing that I know of that indicates that, to the
 21 best of my recollection.
 22 Q. Okay. But --
 23 A. In fact of the matter is, they knew that
 24 they were served with process and made a decision

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1 not to appear, so how could it be mistake,
 2 inadvertence, surprise, or excusable neglect?
 3 Q. Did you ever call anyone from CMGT or
 4 anyone at Mayer Brown to see if there was an
 5 argument for that?
 6 A. No.
 7 Q. Okay. Now, also -- and -- and this is
 8 the question that I asked you earlier -- you read
 9 the first two sentences of that section.
 10 Is it your understanding that in order
 11 for the Court to relieve a party from a judgment
 12 under -- under the part of that statute that you
 13 just read that there has to be an admission on the
 14 part of the attorney that he has made a mistake or
 15 she has made -- made a mistake?
 16 A. I assume that if the attorney is
 17 representing the party, then his mistake, his
 18 inadvertence or surprise, would be part and parcel
 19 of any motion to vacate.
 20 Q. My question to you is different. My
 21 question is, under the section you just read, do
 22 you understand it to require the attorney to admit
 23 that he or she made a mistake in order for relief
 24 to be granted?

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1 A. Not necessarily, but if he's --
 2 Q. Okay.
 3 A. -- they're being represented by counsel,
 4 I don't know how you would do it otherwise. And
 5 that's --
 6 Q. Well, couldn't the --
 7 A. -- what I understood the --
 8 Q. Well, isn't there --
 9 A. -- situation to be.
 10 Q. Do you recognize the distinction between
 11 an attorney filing a pleading that says, "Your
 12 Honor, we'd like to have this default judgment
 13 vacated because my client had it entered through
 14 its excusable negligence," as compared to, "Your
 15 Honor, I'd like this default judgment to be vacated
 16 because of my excusable negligence?"
 17 Do you recognize a difference between
 18 those two statements?
 19 A. Of course.
 20 Q. Okay. So the section that I just had
 21 you read doesn't say anything about requiring the
 22 attorney to make an admission that he or she was
 23 negligent, does it?
 24 MR. JOYCE: You've asked that about three

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1 times. He's answered the question. Why don't you
 2 ask a new one?
 3 BY MR. MARINELLO:
 4 Q. Would you answer my question, sir?
 5 A. Again, those two sentences that I read
 6 does not say it has to be relative to an attorney.
 7 Q. Okay. Thank you.
 8 Now, would you look at the second part
 9 of the statute, which -- with -- beginning with the
 10 word -- I'm sorry. If you'd go to the second page,
 11 Page 2, do you see the word "Notwithstanding" at
 12 the left margin?
 13 A. Okay.
 14 Q. Would you read that sentence out loud,
 15 please.
 16 A. "Notwithstanding any other requirements
 17 of this section, the Court shall whenever an
 18 application for relief is made no more than six
 19 months after entry of judgment, is in proper form
 20 and is accompanied by an attorney's sworn affidavit
 21 attesting to his or her mistake, inadvertence,
 22 surprise or neglect, vacate any
 23 1) resulting default entered by the clerk against
 24 his or her client and which will result in entry of

1 a default judgment or 2) resulting default judgment
 2 or dismissal entered against his or her client.
 3 unless the Court finds that the default or
 4 dismissal was not in fact caused by the attorney's
 5 mistake, inadvertence, surprise or neglect."
 6 Q. Thank you. That's -- that's enough.
 7 A. Okay.
 8 Q. Now, doesn't that section that you just
 9 read speak to the point that's made in Paragraph 12
 10 of your -- of your affidavit where you say that a
 11 default judgment may be vacated upon application
 12 supported by an attorney's sworn affidavit?
 13 A. I believe so.
 14 Q. Okay. So that's entirely different from
 15 the section that you read a moment earlier,
 16 correct?
 17 MR. JOYCE: I object. You're arguing with
 18 him.
 19 BY THE WITNESS:
 20 A. It's all part of the same section of the
 21 code.
 22 BY MR. MARINELLO:
 23 Q. Yes, it is. And there's grounds for
 24 vacating a default judgment where the client's made

1 a mistake, and there's also a section for vacating
 2 a default judgment where the attorney's made a
 3 mistake, and the two are different, aren't they?
 4 A. I suppose there's a difference between
 5 the client and the attorney.
 6 Q. And there's a difference in the statute
 7 also?
 8 A. Sir, the statute says what the statute
 9 says.
 10 Q. I'm asking you for your understanding,
 11 sir. Isn't it true that it's your understanding of
 12 this statute that it provides for two different
 13 ways of getting a default judgment vacated; one is
 14 if the client makes a motion and says, "It was my
 15 mistake," and another is if the lawyer files a
 16 motion and says, "It was my mistake"?
 17 MR. JOYCE: You've asked that about three
 18 times. He's answered it three times.
 19 BY THE WITNESS:
 20 A. Yes.
 21 BY MR. MARINELLO:
 22 Q. Okay. How do you explain the fact that
 23 in your sworn affidavit you told the Court about
 24 the second part of Section 473(b) but you did not

1 inform the Court about the first part of the
 2 statute?
 3 A. I didn't think it was relevant.
 4 Q. Anything else?
 5 A. Well, if you want me to answer more, I'd
 6 be happy to answer more.
 7 Q. Well, are there any -- any other reasons
 8 why you didn't include it?
 9 A. Again, my humble understanding of the
 10 circumstances is that Mr. Franco and Mr. Given
 11 together on behalf of the -- the -- CMGT made a --
 12 a concerted decision not to appear and not to
 13 defend.
 14 So, frankly, I'm not sure how I would do
 15 anything with mistake, inadvertence, surprise or
 16 excusable neglect when the debtor has been duly
 17 served with summons and fails to appear because
 18 counsel told him not to.
 19 Q. Now, do you --
 20 A. To the best of my understanding, I mean,
 21 I --
 22 Q. Let me ask --
 23 A. You know --
 24 Q. -- you a question.

1 A. -- that's my basis.
 2 Q. Okay.
 3 A. I'm sorry.
 4 Q. Did you know from your own personal
 5 knowledge that Mr. Given had told people not
 6 appear?
 7 A. I didn't ask Mr. Given.
 8 Q. You didn't know, did you?
 9 A. I didn't ask Mr. Given. I had no
 10 conversation with him.
 11 Q. And you didn't ask Mr. Franco that
 12 question either?
 13 A. All I know is the information that I
 14 have.
 15 Q. And the information that you had came
 16 from Mr. Spehar?
 17 A. I don't know if that's the case or not.
 18 I told you --
 19 Q. Can you identify any other source?
 20 A. Mr. Franco.
 21 Q. Can you -- okay. Mr. -- you say you may
 22 have -- but you never spoke to Mr. Franco about it.
 23 If it came from Mr. Franco, it came in the way
 24 of -- of some document or letter, is that correct?

1 MR. JOYCE: You're arguing with him. He's --
 2 he's not said that at all.
 3 BY THE WITNESS:
 4 A. You know --
 5 MR. JOYCE: Hold on. Hold on.
 6 You know, this -- the way you're doing
 7 this deposition is really, I think, inappropriate.
 8 You're arguing with the witness. You're asking him
 9 to identify and talk about statutes. He's told you
 10 what he did.
 11 MR. MARINELLO: Um-hum.
 12 MR. JOYCE: Okay.
 13 BY MR. MARINELLO:
 14 Q. Can you identify any time when you spoke
 15 to Mr. Franco and he said to you, "I and Mr. Given
 16 made a concerted decision not to appear to defend"?
 17 A. Concerted decision is my -- is my
 18 description.
 19 Q. Okay. Let me -- let me --
 20 A. I do not believe -- I believe that they
 21 were adequately served with summons and they made a
 22 decision not to appear.
 23 Q. You believe that, I understand. My
 24 question is can you identify -- can you state that

1 for identification, as of
 2 01/19/2009.)
 3 BY MR. MARINELLO:
 4 Q. Okay. As Exhibit 21, I have marked a
 5 e-mail chain. The top e-mail is an e-mail from you
 6 to Steve Klenda dated February 25th, 2005.
 7 That's -- that's an e-mail that you sent to him on
 8 that date, isn't it?
 9 A. Yep -- yes.
 10 Q. And these other e-mails that are
 11 referred to in here are e-mails that you and he
 12 exchanged on the dates that they show?
 13 A. Yes.
 14 Q. All right.
 15 A. I believe so.
 16 Q. All right. Now -- I have no questions,
 17 sir, about that right now. I just wanted you to
 18 identify it.
 19 Now, if you closed the CM -- if -- CMGT
 20 bankruptcy estate as a no-asset case, what would --
 21 what's your understanding as -- as to what would
 22 happen to the default judgment?
 23 A. It would remain.
 24 Q. It would remain against what?

1 you ever spoke to Mr. Franco and obtained that
 2 information from him?
 3 A. I've had so many conversations with so
 4 many people over a period of time that I do not
 5 have a present recollection of an exact date, an
 6 exact time that I spoke to Mr. Franco.
 7 Q. Um-hum. Did you ever speak to
 8 Mr. Franco about this topic?
 9 A. I don't recall.
 10 Q. Okay. Let's change topics.
 11 As the bankruptcy trustee, don't you --
 12 didn't -- don't you have the right and the power to
 13 recommend that a bankruptcy estate like CMGT's be
 14 closed as a no-asset bankruptcy?
 15 A. Yes.
 16 Q. And, in fact, isn't it true that at one
 17 point you told Mr. Spehar that you were thinking of
 18 doing just that?
 19 A. I did probably.
 20 Q. Okay. All right. Let me show you --
 21 MR. MARINELLO: Well, let me have the court
 22 reporter mark this as the next exhibit, please.
 23 (WHEREUPON, a certain document was
 24 marked Defendant's Exhibit No. 21,

1 A. Against the entity CMGT.
 2 Q. Um-hum. And if you closed the estate
 3 and -- and CMGT -- wouldn't CMGT cease to exist?
 4 A. Oh, I don't know. I -- CMGT is -- I'm
 5 not sure that I answer -- that I understand the
 6 question. Perhaps I can just backtrack.
 7 Corporations don't get discharges in
 8 bankruptcy, so the entity remains until it
 9 disappears either by operation of law, ceases to
 10 exist otherwise, or whatever happens to
 11 corporations that don't continue to do business,
 12 so, I mean, I -- it -- you know, that's a -- like a
 13 black hole.
 14 Q. What happens to a corporation that goes
 15 into Chapter 7 and then -- and when the estate is
 16 closed as a no-asset bankruptcy?
 17 A. It -- it continues as normal under State
 18 law and then gets dissolved, I assume, if nobody
 19 cares about it, and its assets, whatever those
 20 assets are, go back to the debtor because the --
 21 the fact of a closing of the case acts as
 22 abandonment.
 23 So whatever actions, causes of actions,
 24 assets that there might be, go back to the debtor,

1 whatever it might be. So I don't know if that
 2 answers the question or not, but -- unlike
 3 personal -- individuals that get a discharge.
 4 Q. You would only close the CMGT bankruptcy
 5 estate as a no-asset case if in fact there were no
 6 assets in it, correct?
 7 A. Yes.
 8 Q. And if there were no assets in the CMGT
 9 bankruptcy estate and you closed it, can you think
 10 of any damage that the CMGT bankruptcy estate would
 11 suffer from the default judgment from that point
 12 forward?
 13 A. I -- I guess I must have missed
 14 something. I'm not sure I understood the question.
 15 Q. Okay.
 16 A. It's kind of a speculative thing.
 17 Q. Yeah. I'm asking you if you can think
 18 of any damage that the CMGT -- that CMGT would
 19 suffer from the default judgment if you simply
 20 closed the bankruptcy estate as a no-asset
 21 bankruptcy.
 22 A. I don't know. Judgments still remain in
 23 effect. I don't know. Whatever --
 24 Q. What effect --

1 A. Whatever -- whatever rights CMGT would
 2 continue to have it would continue to have, and
 3 whatever rights it doesn't have, it doesn't have.
 4 As trustee --
 5 Q. Is the --
 6 A. -- I only --
 7 Q. Is the answer --
 8 A. I only step into --
 9 Q. -- you're not sure?
 10 A. -- the shoes of the trust -- of the
 11 debtor.
 12 Q. Is it -- is it -- is it your position
 13 that you really don't know the answer to the
 14 question?
 15 MR. JOYCE: Objection.
 16 BY THE WITNESS:
 17 A. Yeah, I --
 18 MR. JOYCE: You asked the question. He
 19 answered it.
 20 BY THE WITNESS:
 21 A. I told you it was speculative. I'm not
 22 really sure I know how to answer that question,
 23 but --
 24

1 BY MR. MARINELLO:
 2 Q. All right. Fair enough.
 3 A. -- I answered it the best I could.
 4 Q. Okay. All right. Now, did you do
 5 anything personally to investigate the legal
 6 malpractice claims before you filed your lawsuit?
 7 A. Other than I think what I've said
 8 before, that was pretty much it. I mean, I -- I'm
 9 not a malpractice attorney. I don't really do that
 10 kind of work, so I generally rely on other people
 11 to flush out whatever details there might be and --
 12 and give me a -- a recommendation one way or
 13 another.
 14 Q. Okay. So is it fair to say, then, that
 15 the only thing you did with respect to the
 16 investigation of the malpractice claims is to look
 17 at the documents that Mr. Todhunter and Mr. Given
 18 sent to you?
 19 MR. JOYCE: Can I have the question read back.
 20 (WHEREUPON, the record was read by
 21 the reporter.)
 22 MR. JOYCE: Well, he's already told you he
 23 checked with counsel, so are you including that in
 24 there, too?

1 MR. MARINELLO: We're talking about his
 2 investigation. So he can answer -- he can answer
 3 the question.
 4 BY THE WITNESS:
 5 A. You know, other than having, you know,
 6 counsel advise me one way or another, then my own
 7 personal investigation, that -- that was pretty
 8 much it.
 9 BY MR. MARINELLO:
 10 Q. Okay. Did you personally review all of
 11 the corporate records from CMGT that Mr. Given sent
 12 to you?
 13 A. I've gone through most of them, paged
 14 through most of them. I don't have a -- a, you
 15 know, photographic memory, but I -- I had couple
 16 of -- I had his -- his information, and then I had
 17 some information from Mr. Franco in several boxes
 18 or whatever that I looked at.
 19 Q. I'm sorry. Mr. Franco sent you some
 20 documents from CMGT also?
 21 A. Right.
 22 Q. And you looked at some of those
 23 documents?
 24 A. Yes.

1 Q. Okay. So what you did in connection
2 with the investigation of malpractice claims is you
3 looked at the corporate records that you -- of CMGT
4 that you received from Mr. Franco, Mr. Given, and
5 Mr. Todhunter, correct?

6 MR. JOYCE: I object. He's answered this
7 question three or four times. He told you what he
8 did.

9 BY THE WITNESS:

10 A. I --

11 MR. JOYCE: You just keep re-asking it.

12 BY THE WITNESS:

13 A. Again, I'll -- I mean, I --

14 MR. JOYCE: No, you don't have to answer it
15 again. I mean, you -- let's just get a new
16 question.

17 BY MR. MARINELLO:

18 Q. Well, did you talk to anyone or
19 interview anybody yourself?

20 MR. JOYCE: You've asked that question. He's
21 answered that question.

22 BY MR. MARINELLO:

23 Q. Is the answer no?

24 MR. JOYCE: You already answered it.

1 Move on.

2 MR. MARINELLO: I've asked it as of particular
3 points in time, so I'd like an answer to the
4 question.

5 BY MR. MARINELLO:

6 Q. Did -- is there ever a time when you --
7 when you -- when you had a conversation about the
8 malpractice claims with anybody other than your
9 counsel and Mr. Todhunter?

10 MR. JOYCE: He's already answered it. You
11 want any -- any additional testimony?

12 MR. MARINELLO: No.

13 MR. JOYCE: Well, then he's answered it. Move
14 on.

15 MR. MARINELLO: I don't believe he has.

16 MR. JOYCE: Well, that's -- the record will
17 speak for itself.

18 MR. MARINELLO: Are you going to instruct him
19 not to answer the question?

20 MR. JOYCE: I can't instruct him. I'm just
21 advising him if he's answered it, he can say, "I've
22 answered it." He's answered it three or four
23 times, but I'm not going to instruct him.

24

1 BY MR. MARINELLO:

2 Q. All right. May I have an answer to the
3 question, sir.

4 A. What time period -- what -- I don't even
5 know what the question is anymore.

6 Q. All right. Well, let me -- let me be
7 more specific. Let's take the date that the
8 malpractice claim was filed, okay?

9 A. Okay.

10 Q. Prior to that date, had you spoken to
11 any shareholders of CMGT about the malpractice
12 claims?

13 A. Not to the best of my recollection.

14 Q. Okay.

15 A. It -- again, it -- it may be Franco
16 possibly, but -- but I didn't speak to any of the
17 other shareholders.

18 Q. Okay. Did you speak to any officers of
19 CMGT prior to the filing of the claim?

20 MR. JOYCE: Other than Franco?

21 BY THE WITNESS:

22 A. Other than Franco, probably not. Some
23 of the shareholders called me from time to time,
24 but I wouldn't recall the dates or the times, and I

1 certainly wouldn't have called them.

2 It would have probably been a -- a
3 response to status of the case or something else of
4 that sort.

5 BY MR. MARINELLO:

6 Q. Well, I appreciate that information, but
7 my question was more specific than that, and if
8 we're going --

9 A. Yes, I know, and --

10 Q. -- to move through this --

11 A. I don't -- I don't recall.

12 Q. -- we're going to need to -- you to --
13 you to answer more specifically. So let me
14 rephrase it.

15 You told me you may possibly have spoken
16 to Franco.

17 A. Right.

18 Q. No other shareholder, correct?

19 MR. JOYCE: No, he didn't say that at all. He
20 just told you a minute ago he spoke to other
21 shareholders.

22 You are -- you know, you're just
23 twisting the answers, asking the same question four
24 or five times. I don't know what the purpose of

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1 this is.
 2 MR. MARINELLO: Well, we'll see.
 3 BY MR. MARINELLO:
 4 Q. Mr. Grochocinski, I think you just
 5 testified a second ago -- and understand, I'm not
 6 asking you about whether you had conversations with
 7 people about the weather or about the status of the
 8 case or about anything else.
 9 A. Um-hum.
 10 Q. I'm asking a very specific question.
 11 My question is, did you talk to any
 12 shareholders about the legal malpractice claims or
 13 the facts relating to those malpractice claims
 14 prior to the time that you filed the malpractice
 15 claim?
 16 A. I don't recall.
 17 Q. Okay. Did you talk to any -- any
 18 officers of CMGT --
 19 MR. JOYCE: Asked and answered.
 20 BY MR. MARINELLO:
 21 Q. -- about the malpractice claims before
 22 you filed them?
 23 A. I don't recall.
 24 MR. JOYCE: You've asked that three or four

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1 times.
 2 BY THE WITNESS:
 3 A. I don't recall.
 4 BY MR. MARINELLO:
 5 Q. You don't recall, okay. Did you talk to
 6 any employees of CMGT about the legal malpractice
 7 claims before you filed those claims?
 8 A. I'm not aware of any employees of CMGT
 9 other than Franco and a couple of others that were
 10 also shareholders. I don't know any other
 11 employees.
 12 Q. Okay. So you didn't speak to any
 13 employees?
 14 A. I'm not aware --
 15 MR. JOYCE: He answered the question.
 16 BY THE WITNESS:
 17 A. I'm not aware of any, so I don't know
 18 how I could speak to them.
 19 MR. JOYCE: Look, you're not -- you're not
 20 required to accept --
 21 BY MR. MARINELLO:
 22 Q. Did you --
 23 MR. JOYCE: -- his characterization.
 24 So from now, I'm going to object to all

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1 the characterizations and ask you just to move on.
 2 BY MR. MARINELLO:
 3 Q. Did you speak to any -- to anybody at
 4 Mayer Brown, including Mr. Given, about the
 5 malpractice claims before you filed them?
 6 MR. JOYCE: You've asked that question at
 7 least three times.
 8 BY THE WITNESS:
 9 A. No.
 10 BY MR. MARINELLO:
 11 Q. Okay. Now, is it fair to say that you
 12 relied on Mr. Joyce's firm to investigate the legal
 13 malpractice claims?
 14 A. I hired counsel to provide me a
 15 recommendation.
 16 Q. And who -- what counsel was that?
 17 A. Mr. Joyce and associates in his firm.
 18 Q. Okay. Who are the attorneys that you
 19 understood to be involved in Mr. Joyce's firm in
 20 investigating the legal malpractice claims for you?
 21 A. Mr. Carroll.
 22 Q. Anyone else?
 23 A. Mr. Joyce.
 24 Q. Anyone else?

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1 A. I don't recall.
 2 MR. MARINELLO: All right. Let me ask the
 3 court reporter to mark this as the next exhibit,
 4 please.
 5 Are we up to 22?
 6 (WHEREUPON, a certain document was
 7 marked Defendant's Exhibit No. 22,
 8 for identification, as of
 9 01/19/2009.)
 10 BY MR. MARINELLO:
 11 Q. Okay. As Exhibit 22, I've marked a
 12 group of exhibits. This is a group of letters that
 13 you -- I believe you received from CMGT
 14 shareholders. Is -- I would ask you to look
 15 through this --
 16 A. Um-hum.
 17 Q. -- and tell me if these are in fact
 18 letters that you received from CMGT's shareholders.
 19 A. Yes.
 20 Q. Okay. And are they -- is -- was each
 21 one received by you on or about the date that it
 22 bears?
 23 A. Approximately.
 24 Q. Okay. Now, isn't it true that many of

1 these letters say that Mr. Spehar violated his
 2 duties to CMGT?
 3 A. I don't know if all of them do. Some of
 4 them make that allegation.
 5 Q. All right. And -- and don't many of
 6 them also make the allegation that the reason that
 7 CMGT did not defend itself in the litigation
 8 brought by Mr. Spehar and Spehar -- I'm sorry,
 9 Spehar Capital, is because the company didn't have
 10 the resources to defend itself?
 11 A. Well --
 12 MR. JOYCE: Hold -- hold on. He's not here to
 13 read letters. I mean, this is ridiculous. You
 14 have the letters. He says he got them. It's not
 15 appropriate to say, "What does the letter say?"
 16 It's just a waste of time.
 17 BY THE WITNESS:
 18 A. Again, some of them say that. You know,
 19 some -- I don't -- they say what they say.
 20 BY MR. MARINELLO:
 21 Q. And isn't it true that you forwarded
 22 copies of these letters to Mr. Spehar?
 23 A. I sent some of them to Mr. Todhunter's
 24 firm. Mr. Giese is a member of that firm, but I

1 A. I'm not aware of any.
 2 Q. How about the year 2001?
 3 A. I'm not aware of any funding that Spehar
 4 Capital obtained and was received by CMGT.
 5 Q. Okay. And that would cover any period
 6 of time prior to your filing of the case?
 7 A. To the best of my knowledge.
 8 Q. Okay.
 9 A. I don't believe it was -- the funding
 10 ever completed.
 11 Q. Have you ever seen a document from the
 12 Washoe Indian Tribe offering financing to CMGT?
 13 A. I'm sure I have. I just haven't seen it
 14 in a very long time.
 15 Q. Well, you say you're sure you have. Do
 16 you know that you have?
 17 A. I -- without seeing it, I don't recall.
 18 Q. Okay. Have you ever spoken, yourself,
 19 with anybody at the Washoe Indian Tribe?
 20 A. No.
 21 Q. Has anyone done that on your behalf?
 22 A. I don't know.
 23 Q. Now, prior to filing your malpractice
 24 suit against Mr. Given and Mayer Brown, you knew

1 don't know if I sent them all.
 2 Q. But you did forward copies of the
 3 letters to Spehar or his counsel?
 4 A. To -- to counsel, right, some of them.
 5 I don't know which ones I did and which ones I
 6 didn't.
 7 Q. Okay. Now, you're aware, are you not,
 8 that CMGT hired Spehar Capital to be its financial
 9 advisor in or around January of 2000?
 10 A. I'm aware that CMGT hired Mr. Spehar's
 11 company, Spehar Capital, to find funding for CMGT.
 12 Q. Okay.
 13 A. That's what I understood his
 14 relationship to be.
 15 Q. Okay. And they actually hired him
 16 sometime in the year 2000, correct?
 17 A. I -- I don't know the answer offhand. I
 18 don't recall.
 19 Q. Okay. If that's set forth in your
 20 complaint, you won't object to date?
 21 A. Obviously not.
 22 Q. Okay. Are you aware of any funding that
 23 Spehar Capital was able to obtain for CMGT in the
 24 year 2000?

1 that Mr. Franco had been CEO and president of CMGT
 2 for a number of years prior to the bankruptcy?
 3 A. I know he had been the president. I'm
 4 not sure about CEO, and I don't know about number
 5 of years, but I know that he was at least at the
 6 time the lawsuit was filed by -- by Mr. Spehar's
 7 company.
 8 Q. Other than Mr. Franco, are you aware of
 9 anyone else who was involved in running CMGT as a
 10 business?
 11 A. I don't recall. I thought Mr. Holman
 12 had something to do with the technology portion of
 13 it, doing the software information, I think
 14 Mr. Wong was like a -- like a CFO or controller or
 15 something of that sort, but I -- other than that,
 16 I'm not -- I don't have a present recollection on
 17 that, other than those two offhand.
 18 MR. MARINELLO: Okay. Would you mark that as
 19 the next exhibit, please.
 20 (WHEREUPON, a certain document was
 21 marked Defendant's Exhibit No. 23,
 22 for identification, as of
 23 01/19/2009.)
 24 BY MR. MARINELLO:

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1 Q. As Exhibit 23 I have marked a group
 2 exhibit of documents. These are letters from
 3 Mr. Franco to you and -- or other -- letters or
 4 e-mails from Mr. Franco to you and from you to
 5 Mr. Franco.
 6 And I'm going to ask you just to
 7 identify them, if you would. Let's start with the
 8 first letter. This is a letter that Mr. Franco
 9 wrote to you on or about November 30, 2004?
 10 A. I guess.
 11 Q. Do you remember receiving --
 12 A. I don't recognize the signature, but,
 13 yes, it's directed to me. I assume that this is --
 14 I've -- I've seen this before so, yes.
 15 Q. Okay. And then the next page is a
 16 letter you wrote to him on December 3rd, 2004?
 17 A. Right.
 18 Q. And -- and all of these -- maybe we
 19 don't have to go through these one by one, but
 20 these are -- this is correspondence between you and
 21 Mr. Franco, correct?
 22 A. Right, um-hum.
 23 Q. I'm going to ask you if you see anything
 24 in these letters that leads you to believe that you

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1 spoke with Mr. Franco prior to the time that you
 2 filed your legal malpractice claims against
 3 Mayer Brown and Ron Given.
 4 MR. JOYCE: Spoke to him about anything?
 5 MR. MARINELLO: Spoke to him about the legal
 6 malpractice claims, and I hope I don't have to make
 7 that point again, Mr. Joyce.
 8 MR. JOYCE: You know what? Your questions
 9 sometimes are precise, and sometimes they're not.
 10 MR. MARINELLO: All right. Well, then I'll --
 11 let me just be clear about it.
 12 BY MR. MARINELLO:
 13 Q. Does this -- does -- do any of the
 14 documents that are in this group exhibit, 23,
 15 indicate to you that you did speak to Mr. Franco
 16 about the legal malpractice claims against Ron
 17 Given and Mayer Brown before you filed them?
 18 A. Nothing in these documents would
 19 indicate that.
 20 Q. Okay. Now, Mr. Franco in this very
 21 first letter told you that he had CMGT corporate
 22 records --
 23 A. Yes.
 24 Q. -- and offered to make them available to

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1 you, correct?
 2 A. Yes.
 3 Q. And he also said, "I look forward to
 4 hearing from you about this and related CMGT
 5 matters," correct?
 6 A. Yes.
 7 Q. Okay. And then you and he got together
 8 in -- in the sense that he did send you the -- I'm
 9 sorry. He did send you the records when you
 10 requested them, correct?
 11 A. Yes. On December 3rd, I sent him a
 12 letter, and we did speak after that, and I told him
 13 that I would pay for them -- to have them shipped
 14 and/or delivered in some fashion, whichever he
 15 thought, and I in fact received the documents and
 16 sent him a check in late February of '05.
 17 I -- you know, the rest -- I haven't
 18 read this letter in a very long time, in July. If
 19 you'd like me to read it, I'd be happy to do it.
 20 I think he was complaining about some of
 21 the notices that he received.
 22 Q. Okay. Now, if you would please turn to
 23 his letter dated July 21st, 2005, to Mr. Ira
 24 Bodenstein.

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1 A. Um-hum.
 2 Q. A copy of this letter went to you,
 3 correct?
 4 A. Apparently.
 5 Q. Okay. And if you turn to Page 2 of the
 6 letter, do you see first -- the paragraph at the
 7 very top?
 8 A. It says "Mr. Bodenstein"?
 9 Q. Yes.
 10 A. Yes.
 11 Q. And statement is made in that paragraph
 12 that CMGT was simply never funded and could not
 13 defend itself in Court. Do you know whether that
 14 statement is true?
 15 A. I don't know.
 16 Q. Do you know whether CMGT had the
 17 financial resources to defend itself in California?
 18 A. I don't know.
 19 Q. Have you ever taken any action to
 20 determine whether that's true?
 21 A. No.
 22 Q. That's all the questions I have about
 23 that exhibit right now, sir.
 24 Didn't you yourself come to the

1 conclusion that the default judgment was entered
2 against CMGT because CMGT just didn't have the
3 money to hire an attorney to defend it in
4 California?

5 A. No.

6 MR. MARINELLO: Is this 24?

7 THE COURT REPORTER: Yes.

8 (WHEREUPON, a certain document was
9 marked Defendant's Exhibit No. 24,
10 for identification, as of
11 01/19/2009.)

12 BY MR. MARINELLO:

13 Q. Is Exhibit 24 a draft letter that you
14 sent to Mr. Klenda?

15 MR. JOYCE: A draft letter that he sent?

16 BY THE WITNESS:

17 A. It's a draft letter to -- to Mr. Klenda
18 dated the 21st. It says, "Draft Only."

19 BY MR. MARINELLO:

20 Q. Um-hum. Did you send this letter to
21 Mr. Todhunter to look at?

22 A. I don't know.

23 Q. If you look at the --

24 A. Oh, I might have, yeah. Okay.

1 Mr. Klenda to Mr. Todhunter if they both
2 represented Spehar Capital?

3 A. I don't know why not. There was going
4 to be a CC to Mr. Todhunter in any event, and I can
5 send a draft to whomever I choose. I was talking
6 to Mr. Todhunter --

7 Q. Um-hum.

8 A. -- on a more daily basis. I believe
9 that Mr. Klenda had some limited bankruptcy
10 information and experience.

11 But I knew for sure Mr. Todhunter knew
12 local rules, knew our procedures here in the
13 Northern District of Illinois, and it would make
14 sense for me to contact him so that he could see
15 kind of where we were headed a little bit for
16 discussion, and then I want to get his views.

17 Q. Well, you were representing the -- the
18 estate, correct?

19 A. Yes.

20 Q. And Mr. Todhunter and Mr. Klenda were on
21 the opposite side of the table representing Mr. --
22 Spehar Capital, correct?

23 A. Of course.

24 Q. Yeah, and you were, through this letter

1 Q. Okay.

2 A. "Draft Only."

3 Q. Okay. And why would you send it to
4 Mr. Todhunter?

5 A. Well, he was bankruptcy counsel. We
6 were discussing a potential carve-out for the
7 estate relative to moneys to be advanced in the
8 event of proceeding so that there was a -- a basis
9 in which to fund the estate in the event we went
10 forward.

11 Mr. Todhunter is local bankruptcy
12 counsel or was local bankruptcy counsel, so I
13 thought it was appropriate that I send it to him so
14 that we could have a further discussion.

15 Q. When you say he was -- Mr. Todhunter was
16 local bankruptcy counsel, local bankruptcy counsel
17 to whom?

18 A. I believe to Spehar Capital.

19 Q. So -- and who was Mr. Klenda
20 representing?

21 A. Spehar Capital, I think.

22 Q. Why were you sending a letter to
23 Mr. Todhunter -- strike that.

24 Why were you sending a draft letter to

1 and some of the other letters that you were sending
2 back and forth, negotiating a carve-out for the
3 unsecured creditors of the estate?

4 A. Presuming that Mr. -- Mr. -- that --
5 that Spehar Capital was deemed to be a fully
6 secured creditor, yeah, that was the key here,
7 because --

8 Q. Right, right. So --

9 A. -- otherwise it wouldn't make sense.

10 MR. JOYCE: Hold on. Let him -- let him
11 finish.

12 BY MR. MARINELLO:

13 Q. Well, but I'm -- so, in other words, you
14 were negotiating with Mr. Klenda and
15 Mr. Todhunter --

16 A. Yes.

17 Q. -- as to what the estate would get that
18 you were representing as compared to what Mr. --
19 what Spehar Capital would get, correct?

20 A. Yes.

21 Q. So my question is, why were you sending
22 your opponent in the negotiations your letter in
23 draft form for them to comment on before you sent
24 it?

1 A. Because this is the kind of a -- a -- an
2 agreement, a carve-out agreement has to be agreed
3 by both sides. This is not a -- I can't force --
4 force a -- a post-petition financing agreement down
5 their throat unless they consent.

6 So the agreement that we -- we reach has
7 to be spelled out in some fashion or another, and
8 the best way to do that is to put together a
9 letter, explain what some of the concerns are for
10 the estate.

11 And if we couldn't have arrived at an
12 agreement, then there would have been no post
13 petition financing agreement. Can't get money from
14 a lender unless the lender agrees, whether it's
15 Mr. Spehar's firm or a bank or whomever.

16 Q. Well, you didn't send a copy of this
17 draft letter to Mr. Klenda, did you?

18 A. This says that I sent it to
19 Mr. Todhunter so that he would get a chance to talk
20 to me about what some of the issues were.

21 Q. Were there differences of opinion in how
22 to proceed between Mr. Todd and Mr. Klenda?

23 A. I don't think ultimately at all.

24 Q. Okay. Were the statements that you made

1 in this letter truthful?

2 A. I -- I don't know. I assume so. I
3 mean, I don't know -- if you've got some questions
4 about it, you can let me know. But the letter says
5 what it says. It was draft only for discussion
6 purposes.

7 Q. Okay.

8 A. That's all it is.

9 Q. If we look at the second paragraph of
10 your letter --

11 A. Um-hum.

12 Q. -- would you read that out loud, the
13 first sentence.

14 A. "Further, while you, client, expend
15 some --"

16 Q. No, no, no. I'm sorry. The second
17 paragraph, sir.

18 A. Oh, I'm sorry. "While I appreciate the
19 fact that your client has a large judgment, it was
20 entered by default largely due to lack by funds of
21 the debtor. This does not --"

22 Q. Stop.

23 A. "-- mean --"

24 Q. That's -- just the first sentence.

1 A. Okay.

2 Q. Um-hum. So in that sentence, you're
3 saying that the default was entered largely due to
4 the lack of funds by the debtor, correct?

5 MR. JOYCE: That's what it says.

6 BY THE WITNESS:

7 A. That's what it says.

8 BY MR. MARINELLO:

9 Q. Okay. And what were the facts upon
10 which you base that?

11 A. I don't know.

12 Q. Okay. Well, with respect to that
13 exhibit, sir --

14 A. Um-hum.

15 Q. -- did Mr. Todhunter make some
16 suggestions for changes?

17 A. I don't recall offhand. He may have
18 sent me something in response. I just -- again,
19 I -- as I said before, there's so many documents
20 here, and we've had so many e-mails, discussions,
21 and the like, you'd have --

22 Q. Um-hum.

23 A. -- to show me what you're referring to.

24 I just don't have an independent recollection.

1 MR. MARINELLO: Would you mark this as the
2 next exhibit, please.

3 MR. JOYCE: 25?

4 THE COURT REPORTER: 26.

5 MR. JOYCE: Where's 25?

6 THE COURT REPORTER: Oh, I'm sorry.

7 MR. MARINELLO: Is it 25?

8 THE COURT REPORTER: It's 25. Yep, sorry.

9 MR. MARINELLO: Okay. Sorry. Change that.

10 (WHEREUPON, a certain document was
11 marked Defendant's Exhibit No. 25,
12 for identification, as of
13 01/19/2009.)

14 BY MR. MARINELLO:

15 Q. Okay. As Exhibit 25, I've marked a fax
16 dated August 21, 2006, from Rob Carroll to Lou
17 Franco. Have you seen this before?

18 A. I don't recall.

19 Q. Well, you want to take a minute to look
20 through at -- the exhibit?

21 A. Yeah, I have, and I don't -- I honestly
22 don't recall.

23 Q. Okay. Is this a letter that you --

24 whether you saw the letter or not, is it something

1 that you told your attorneys to send to Mr. Franco?
 2 MR. JOYCE: I would object. That's going to
 3 be attorney-client communication. He's not going
 4 to -- he's not waiving the attorney-client
 5 privilege.
 6 BY MR. MARINELLO:
 7 Q. Okay. Do you think Mr. Franco has done
 8 something wrong that makes him a possible defendant
 9 to the litigation that you have with Mayer Brown
 10 and Ron Given?
 11 A. Do I think now, or did I think at the
 12 time?
 13 Q. Well, let's take it, first, did you --
 14 did you think at the time?
 15 A. I thought the possibility existed that
 16 Mr. Franco may have some liability as an officer,
 17 director, or shareholder. For certain he was
 18 active in the operations of the debtor.
 19 That's kind of standard for people that
 20 are there, for a trustee to make sure we
 21 investigate those situations as well.
 22 Q. Did you do any investigation into what
 23 Mr. Franco's actions were?
 24 A. No. I -- I think that I encompassed

1 with him, but I don't know.
 2 Q. Okay. Did Mr. Spehar tell you that you
 3 should try to scare Mr. Franco to get his
 4 cooperation with your action against Mayer Brown?
 5 A. I don't know. I don't think that scare
 6 is the appropriate word. Maybe he suggested that
 7 we look at Mr. Franco's involvement in the case as
 8 well, but I'm not sure -- I can't even be honest
 9 whether he said that as well.
 10 That -- that is generally something that
 11 I look at on my own. So it's -- is it conceivable
 12 that he may have --
 13 MR. JOYCE: Well, don't --
 14 BY THE WITNESS:
 15 A. -- suggested that --
 16 MR. JOYCE: He's not asking you that. He's
 17 not asking you to guess. If you don't know, you
 18 just don't know.
 19 BY THE WITNESS:
 20 A. I --
 21 BY MR. MARINELLO:
 22 Q. Is the answer you don't know?
 23 A. I guess the answer is I don't know.
 24 Q. Okay. If you -- this letter states,

1 that with respect to my counsel.
 2 Q. Okay. My question -- and I understand
 3 you're trying to probably shorten this as much as I
 4 am, but if you could answer just the question I
 5 ask, I'd appreciate it. It would make it faster,
 6 believe it or not.
 7 A. Okay.
 8 Q. So you -- you personally didn't do any
 9 investigation?
 10 A. I did not speak to Mr. Franco or do
 11 anything other than look at the documents that I
 12 received from CMGT and from --
 13 Q. Okay.
 14 A. -- Mr. Given with respect to
 15 Mr. Franco's potential liability.
 16 Q. Do you know whether your attorneys did
 17 any investigation with respect to Mr. Franco's
 18 actions on behalf of CMGT?
 19 A. I presume they did.
 20 Q. You presume, but do you know if they
 21 did?
 22 A. Again, I presume they did. We got an
 23 extension of time here for a tolling agreement, so
 24 I assume that they must have discussed something

1 "Given that you were CMGT's president and chief
 2 executive officer, we would like to speak to you
 3 about what you believe happened at CMGT." Do you
 4 see that?
 5 A. I see what it says in the letter, yeah.
 6 Q. Yes. Do you know whether your counsel
 7 ever did speak to Mr. Franco?
 8 A. I don't know.
 9 Q. Okay. Attached as Page 3 is a tolling
 10 agreement signed by Robert Carroll, correct?
 11 A. Yes.
 12 Q. And then on the next page, there's a
 13 tolling agreement signed by Robert Carroll and also
 14 Louis Franco, correct?
 15 A. Correct.
 16 Q. And that tolling agreement expires on
 17 August 24, 2007, correct?
 18 A. That's what it says.
 19 Q. Okay. Do you know, has this agreement
 20 been extended?
 21 A. I -- I'm not sure. I don't know the
 22 answer to that.
 23 MR. JOYCE: I need about a two-minute break.
 24 MR. MARINELLO: Okay. Just give me -- I'm

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1 almost done with this line, and you can have it.
 2 BY MR. MARINELLO:
 3 Q. You said that -- do you know now whether
 4 Mr. Franco did anything wrong that you intend to
 5 pursue with respect to CMGT?
 6 A. Only with respect to his claim, perhaps.
 7 Q. So you have no intention of bringing an
 8 affirmative claim against Mr. Franco?
 9 A. Not at present. I haven't seen anything
 10 that would indicate that I'm going to pursue a
 11 matter independently against Mr. Franco.
 12 Q. Have you received any report from your
 13 attorneys with respect to Mr. Franco?
 14 MR. JOYCE: Objection.
 15 MR. MARINELLO: I didn't ask what he -- what
 16 he -- what you said to him.
 17 BY MR. MARINELLO:
 18 Q. Just whether you received a report.
 19 A. Not that I can recall.
 20 Q. Okay.
 21 MR. MARINELLO: All right. We -- this is a
 22 good time to take a break now.
 23 MR. JOYCE: I just --
 24 MR. MARINELLO: If you'd like one --

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1 MR. JOYCE: -- need two minutes. That's all I
 2 need.
 3 MR. MARINELLO: I understand.
 4 THE VIDEOGRAPHER: Going off the video record
 5 at 11:59 a.m.
 6 (WHEREUPON, the deposition was
 7 recessed for lunch from 11:59 a.m.
 8 until 12:31 p.m., this date,
 9 January 19, 2009.)
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1 IN THE UNITED STATES DISTRICT COURT
 2 NORTHERN DISTRICT OF ILLINOIS
 3 EASTERN DIVISION
 4 DAVID GROCHOCINSKI, not)
 5 individually but solely in his)
 6 capacity as the Chapter 7)
 7 Trustee for the bankruptcy)
 8 estate of CMGT, INC.,)
 9 Plaintiff,) No. 06 C 5486
 10 -vs-)
 11 MAYER BROWN ROWE MAW LLP and)
 12 RONALD B. GIVEN,)
 13 Defendants.)
 14
 15 January 19, 2009
 16 12:31 p.m.
 17
 18
 19 The videotaped deposition of DAVID
 20 GROCHOCINSKI resumed pursuant to recess at the
 21 offices of Novack and Macey LLP, 100 North
 22 Riverside Plaza, Suite 1500, Chicago, Illinois.
 23
 24

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1 PRESENT:
 2
 3 EDWARD T. JOYCE & ASSOCIATES, P.C.,
 4 (11 South LaSalle Street, Suite 1600,
 5 Chicago, Illinois 60603,
 6 312-641-2600), by:
 7 MR. EDWARD T. JOYCE,
 8 appeared on behalf of the Plaintiff
 9
 10 NOVACK AND MACEY LLP,
 11 (100 North Riverside Plaza, Suite 1500,
 12 Chicago, Illinois 60606,
 13 312-419-6900), by:
 14 MITCHELL L. MARINELLO,
 15 MR. STEVEN J. CISZEWSKI,
 16 appeared on behalf of the Defendants.
 17
 18 ALSO PRESENT:
 19 MR. KEVIN DAILEY, Legal Videographer,
 20 Esquire Deposition Services.
 21
 22
 23 REPORTED BY: LINDA M. STRATTON, CSR, RPR, CRR
 24 CSR Certificate No. 84-2613

1 THE VIDEOGRAPHER: Going back on the video
 2 record at 12:31 p.m., the beginning of Tape No. 3.
 3 MR. MARINELLO: Okay. Thank you.
 4 DAVID GROCHOCINSKI,
 5 called as a witness herein, having been previously
 6 duly sworn and having testified, was examined and
 7 testified further as follows:
 8 EXAMINATION (Resumed)
 9 BY MR. MARINELLO:
 10 Q. At the time that you filed your
 11 malpractice complaint against Ron Given and
 12 Mayer Brown, what was your understanding of the
 13 role that James Wong had played in CMGT?
 14 A. My limited understanding was that he was
 15 a -- like I said before, either a CFO or a
 16 controller or accountant. That's the best of my
 17 recollection.
 18 Q. Do you know whether he was a shareholder
 19 in the company?
 20 A. I think he had the same status as some
 21 of the others, but I, in all honesty, don't recall,
 22 no.
 23 Q. Do you know whether you knew that -- did
 24 you know at that time whether he hadn't paid for

1 not sure.
 2 Q. Okay. Did -- I think you testified
 3 earlier that you never interviewed or spoke with
 4 Mr. Wong prior to filing your claims?
 5 A. No, I've not talked to Mr. Wong.
 6 Q. Did your counsel interview Mr. Wong?
 7 A. I don't know.
 8 Q. Did you ever get a report from your
 9 counsel about Mr. -- about any interview or
 10 investigation they did with respect to Mr. Wong?
 11 A. Not that I can recall.
 12 Q. Okay.
 13 MR. MARINELLO: Okay. Would you mark this as
 14 the next exhibit, please.
 15 (WHEREUPON, a certain document was
 16 marked Defendant's Exhibit No. 26,
 17 for identification, as of
 18 01/19/2009.)
 19 BY MR. MARINELLO:
 20 Q. Okay. As Exhibit -- as Exhibit 26, I've
 21 marked a letter from Robert Carroll to James Wong
 22 dated August 22, 2006. Can you identify that as a
 23 letter that your counsel sent to Mr. Wong on or
 24 about that date?

1 his services as an accountant to the company?
 2 MR. JOYCE: Can I have that --
 3 BY THE WITNESS:
 4 A. Could you say that --
 5 MR. JOYCE: Hold on.
 6 BY THE WITNESS:
 7 A. -- again. I didn't hear you.
 8 MR. JOYCE: Read it -- read it -- read it
 9 back, please.
 10 (WHEREUPON, the record was read by
 11 the reporter.)
 12 MR. JOYCE: I don't think you want --
 13 MR. MARINELLO: Let's -- let's strike that.
 14 That's a mess.
 15 MR. JOYCE: I don't think you want that --
 16 MR. MARINELLO: Yeah.
 17 MR. JOYCE: -- question. Right.
 18 BY MR. MARINELLO:
 19 Q. Did you know at the time you filed your
 20 complaint whether Mr. Wong had been paid any money
 21 for accounting services to CMGT?
 22 A. I really don't know. I'm not -- I think
 23 Mr. Wong is listed on Schedule F, so there might
 24 have been a claim due for him or whatever, but I'm

1 A. I don't know. I don't recall seeing
 2 this, so I'm not really sure.
 3 Q. Well, did you review letters like this
 4 that your counsel sent before they went out?
 5 A. Before they went out?
 6 Q. Yes.
 7 A. I don't know if I did it before.
 8 Q. Do you know whether you've ever seen
 9 this letter before?
 10 A. I assume that I did. I may not have a
 11 present recollection, but I assume that I did.
 12 Q. Okay.
 13 A. But I'm not really sure.
 14 Q. Um-hum. Did you have a -- did you --
 15 after sending this letter to Mr. -- Mr. Wong, did
 16 you do any investigation into the actions of
 17 Mr. Wong in connection with CMGT?
 18 A. Personally?
 19 Q. Yes.
 20 A. No.
 21 Q. Okay. Do you know if your attorneys did
 22 any such investigation?
 23 A. I don't know.
 24 Q. Did your --

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1 A. Or I don't recall.
 2 Q. Did your attorneys ever give you a
 3 report about whether any cause of action existed
 4 against Mr. Wong?
 5 A. Not that I recall.
 6 Q. Okay. Now, did Mr. Spehar say to you at
 7 some point in time either verbally or in writing
 8 that you should scare Mr. Wong to get his
 9 cooperation with your lawsuit against Mayer Brown?
 10 A. You're using the word "scare," and I
 11 don't recall him using that language. Might he
 12 have suggested that Mr. Wong's actions should be
 13 reviewed? Possibly, but I don't recall offhand.
 14 Q. Is it also possible that he may have
 15 used the word "scare"?
 16 A. I suppose, although I don't recall him
 17 using those words, but I suppose it's conceivable.
 18 MR. MARINELLO: All right. Would you mark
 19 that as the next exhibit, please.
 20 (WHEREUPON, a certain document was
 21 marked Defendant's Exhibit No. 27,
 22 for identification, as of
 23 01/19/2009.)
 24 BY MR. MARINELLO:

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1 Q. As 20 -- as Exhibit 27, I've marked a
 2 tolling agreement signed by Mr. Carroll, your
 3 attorney, and also by Mr. Wong dated August 22,
 4 2006. Have you seen this before?
 5 A. Yes, I believe I have.
 6 Q. Okay. Did you request this tolling
 7 agreement?
 8 A. I don't know if I requested it or it was
 9 just suggested because --
 10 MR. JOYCE: Well, I don't want you to disclose
 11 any attorney-client communication.
 12 THE WITNESS: Okay.
 13 BY MR. MARINELLO:
 14 Q. This tolling agreement has expired,
 15 correct?
 16 A. By its terms, yes.
 17 Q. Okay. Do you know if it's been
 18 extended?
 19 A. I don't know.
 20 Q. Okay. Did you -- do you have any plans
 21 to bring a lawsuit against Mr. Wong?
 22 A. As we sit here today, no.
 23 Q. Are you aware of anything Mr. Wong did
 24 that was wrong in connection with CMGT?

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1 A. Not to the best of my knowledge.
 2 Q. Now, do you know Mr. Wayne -- do you
 3 know of a Mr. Wayne Baliga?
 4 A. I know who -- I know who he is. I don't
 5 know him personally.
 6 Q. Okay. At the time you filed your
 7 malpractice claims against Mayer Brown and Ron
 8 Given, what was your understanding of Mr. Baliga's
 9 relationship to CMGT?
 10 A. I am unclear about what -- or I don't
 11 recall exactly. I know that he or -- I'm pretty
 12 sure that he had a shareholder, quote, lending
 13 interest, but I'm not sure about -- as we sit here
 14 today, about what his role was either in terms of
 15 being an officer or whatever.
 16 Q. Do you know if he was a -- do you know
 17 what role he played in the decisions that were made
 18 by the company in the last three or four months of
 19 its existence prior to the bankruptcy?
 20 MR. JOYCE: Can I have that question read
 21 back.
 22 (WHEREUPON, the record was read by
 23 the reporter.)
 24 MR. JOYCE: Thank you.

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1 BY THE WITNESS:
 2 A. As we sit here today, no.
 3 BY MR. MARINELLO:
 4 Q. Um-hum. Do you know what role he played
 5 in connection with any decisions that were made
 6 concerning the Spehar lawsuit?
 7 A. Not that I have a recollection of right
 8 now.
 9 Q. Okay. And do you know of anything
 10 that -- any role he played in connection with the
 11 Trautner Newco proposal?
 12 A. Again, not that I recall right now, no.
 13 Q. Okay. You did not interview Mr. Baliga
 14 or speak to him at any point in time?
 15 A. No.
 16 Q. Did your counsel interview him or speak
 17 to him?
 18 A. Don't know.
 19 Q. Did you ever receive a report from your
 20 counsel with respect to Mr. Baliga?
 21 A. Not that I recall.
 22 Q. Did you ask Mr. Baliga for a tolling
 23 agreement?
 24 A. I don't recall.

1 Q. Do you know whether you had -- ever had
2 a tolling agreement from Mr. Baliga?

3 A. I don't know the answer to that.

4 Q. Have you or your counsel done any
5 investigation into Mr. Baliga's actions with
6 respect to CMGT?

7 A. Not that I recall.

8 Q. Why not?

9 A. Why don't I recall?

10 Q. No, no. Well, I'm not sure of your
11 answer now. If you -- is your answer that you
12 don't -- you don't know if you did --

13 A. I don't --

14 Q. -- an investigation?

15 A. I don't recall presently if there's any
16 investigation that I did with respect to
17 Mr. Baliga.

18 Q. Okay. So you don't -- you don't
19 remember whether or not you did investigate
20 anything Mr. Baliga did?

21 MR. JOYCE: You know, he's answered the
22 question. You -- you have a habit of repeating his
23 answer and then asking him to verify that you heard
24 it right.

1 anything.

2 Q. Okay. Do you have any plans presently
3 to bring any legal action against Mr. Baliga with
4 respect to CMGT?

5 A. Not as we sit here today.

6 Q. Let's talk about Ms. Quarles. I think
7 you previously testified that she was -- you knew
8 her to be an investor in CMGT, correct?

9 A. Yes. She indicated in her letter that
10 she was an investor --

11 Q. Okay. And --

12 A. -- a lender and investor.

13 Q. And I think you also confirmed that you
14 did not personally contact her by telephone or
15 speak to her, correct?

16 A. Not personally. My only -- my only
17 contact with her was correspondence.

18 Q. And we've already marked that
19 correspondence as exhibits, correct?

20 A. I believe so.

21 Q. All right. Did your counsel ever speak
22 to her or interview her?

23 A. I don't know.

24 Q. Did you ever receive a report from your

1 MR. MARINELLO: Well, not that I recall is
2 kind of a confusing answer as demonstrated by -- by
3 the last exchange.

4 BY MR. MARINELLO:

5 Q. I take it what you mean is you don't
6 remember if you did or did not investigate
7 Mr. Baliga, correct?

8 A. That's right, not --

9 Q. You -- you didn't do --

10 A. -- without showing --

11 Q. -- it personally?

12 A. Not without showing me something else.
13 The -- yes, I did not call Mr. Baliga on the phone
14 and speak to him personally.

15 Q. Okay. And you don't know whether
16 your -- whether your counsel did an investigation
17 of him?

18 A. I'm not sure, right.

19 Q. Okay. Do you have any plans to -- are
20 you aware of anything Mr. Baliga did wrong in
21 connection with CMGT?

22 A. Not that I recall, not that I -- I
23 didn't see anything in the documents that I saw
24 that would lead me to that, but that doesn't mean

1 counsel with respect to -- to anything concerning
2 Ms. Quarles?

3 A. Not that I can recall.

4 Q. Are you aware of any wrongful action
5 that Ms. Quarles took in connection with CMGT?

6 A. No.

7 Q. And do you have any plans presently to
8 bring legal action against Ms. Quarles?

9 A. Not as we sit here today.

10 Q. All right. Mr. Charles Trautner, do you
11 know who he is?

12 MR. JOYCE: Trautner?

13 MR. MARINELLO: Yes.

14 BY THE WITNESS:

15 A. I don't know what his position was with
16 CMGT, but I know the name.

17 BY MR. MARINELLO:

18 Q. What's his -- what -- at the time that
19 you filed your legal malpractice claims against
20 Mayer Brown and Ron Given, what was your
21 understanding of Mr. Trautner's connection to CMGT?

22 A. I'm not sure that I can recall offhand
23 what his role was with CMGT as we sit here today.

24 I'd have to look through documents again. Too many

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1 players.
 2 Q. Do you know today what his role was in
 3 connection with CMGT?
 4 A. I looked. If you want to explain it to
 5 me, I would be happy to -- to see the record -- you
 6 know, jog my memory here, but I don't recall it as
 7 we're sitting here.
 8 Q. Do you know if Mr. Trautner was an
 9 investor in the company?
 10 A. I believe he was.
 11 Q. Okay. Do you know what efforts, if any,
 12 he made in connection with trying to find funding
 13 for CMGT?
 14 A. I -- you know, I can't answer that with
 15 a certainty, so I'm going to have to say I don't
 16 know.
 17 Q. Okay. Did you ever bring any legal
 18 claims against Mr. Trautner as trustee?
 19 A. No. In -- as a -- as me personally, you
 20 mean?
 21 Q. No. We --
 22 A. That's what I thought the question --
 23 Q. I thought we crossed that Rubicon a --
 24 A. No, no --

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1 Q. -- long time ago.
 2 A. -- no, no. I meant -- but I meant like
 3 in a bankruptcy cause of action? No, I have not as
 4 a bankruptcy cause of action, no, no -- well, yeah,
 5 preferences obviously. I guess I did, because I
 6 think we avoided his -- whatever his liens were as
 7 well.
 8 Q. Right.
 9 A. And that would be the same thing that --
 10 you know, going backwards in time now, I had
 11 forgotten about the -- the preference suits, but
 12 all of those people were avoided --
 13 Q. Right.
 14 A. -- actions.
 15 Q. Yeah, let's make -- make it clear that
 16 we both understand each other in this regard.
 17 I think you testified earlier that there
 18 are a number of investors that you brought legal
 19 actions against to --
 20 A. Right.
 21 Q. -- avoid any claim that they had a
 22 secured interest --
 23 A. That's --
 24 Q. -- correct?

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1 A. -- correct, right.
 2 Q. And I'm -- I'm not going to --
 3 A. Okay.
 4 Q. -- try and trick you by --
 5 A. I just --
 6 Q. -- raising things --
 7 A. -- wanted to make it clear. I wasn't --
 8 Q. You've made that point clear.
 9 A. Okay.
 10 Q. I accept it.
 11 A. That's fine.
 12 Q. I'm not going to challenge it.
 13 A. That's fine.
 14 Q. My question is, other than that, have
 15 you brought any claims against Mr. Trautner?
 16 A. No, I don't believe so.
 17 Q. As trustee?
 18 A. No.
 19 Q. Okay. And did you ever contact
 20 Mr. Trautner for any purpose?
 21 A. No, not me personally.
 22 Q. Do you know whether your counsel did?
 23 A. I'm not sure.
 24 Q. Did they ever give you a report with

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1 respect to Mr. Trautner?
 2 A. No, not that I recall.
 3 Q. And did Mr. Spehar ever give you or
 4 Mr. Todhunter as counsel ever give you any
 5 information with respect to Mr. Trautner?
 6 A. I suppose it's conceivable, but I don't
 7 recall it offhand.
 8 Q. Okay. Now, previously I mentioned the
 9 Washoe Indian Tribe. Do you remember that?
 10 A. I do.
 11 Q. And you told me that you never spoke
 12 with any representative of that tribe?
 13 A. I have not.
 14 Q. Do you know whether your counsel has
 15 ever spoken with a representative of the Washoe
 16 Indian Tribe?
 17 A. I don't know the answer to that.
 18 Q. Okay. Has your counsel ever given you a
 19 report about anything they learned from the Washoe
 20 Indian Tribe?
 21 A. Not that I recall.
 22 Q. Okay. Have you ever heard of the
 23 Sealaska Indian Tribe?
 24 A. Yes.

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1 Q. In what context?

2 A. In the context of this case.

3 Q. Okay. What's your understanding of the

4 Sealaska Indian Tribe's connection to this case?

5 A. Some type of a -- an attempt to do some

6 financing that was either brought to the table by

7 Mr. Spehar or attempted to, maybe one of the people

8 that were -- that they had spoken to relative to

9 investing in CMGT.

10 Q. Okay. Did you ever contact any

11 representative of the Sealaska Indian tribe for

12 any --

13 A. No.

14 Q. -- any purpose?

15 Do you know whether your counsel ever

16 contacted anyone there?

17 A. I don't know.

18 Q. Have -- has your counsel ever given you

19 a report on anything -- any facts they learned from

20 the Sealaska Indian Tribe or with -- with respect

21 to that tribe?

22 A. Not that I can recall.

23 MR. MARINELLO: Would you please mark this as

24 the next -- the next exhibit. We're up to 28 now?

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1 THE COURT REPORTER: Yes, we are.

2 (WHEREUPON, a certain document was

3 marked Defendant's Exhibit No. 28,

4 for identification, as of

5 01/19/2009.)

6 BY MR. MARINELLO:

7 Q. As Exhibit 28 I've marked an application

8 that I believe you filed to hire Mr. Joyce as your

9 counsel.

10 A. Yes.

11 Q. Is that what that is?

12 A. That's what it looks like.

13 Q. Okay. And that document contains all

14 the papers that you submitted to the Court at that

15 time, including the contingency fee agreement with

16 Mr. Joyce's firm?

17 A. Yes.

18 Q. Okay. No other questions about that

19 now, Mr. Grochocinski.

20 Okay. Now, after you hired Mr. Joyce to

21 be your counsel, did you have any meetings with

22 him?

23 A. I'm sure we spoke on the phone. Are you

24 saying face-to-face meetings?

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1 Q. Yes.

2 A. I don't know. I'd have to look at a

3 calendar or whatever. I can't recall.

4 Q. Did you have any meetings with

5 Mr. Carroll of his firm?

6 A. I'm sure I did. But, again, I don't

7 recall offhand times, dates, places.

8 Q. Um-hum. Do you keep a record of these

9 meetings?

10 A. Sometimes, sometimes not.

11 Q. Would they be reflected in your time

12 slips and time records?

13 A. Sometimes, sometimes not.

14 Q. Your application to hire Mr. Joyce's

15 firm was granted by the Court shortly after the

16 date you presented it?

17 A. I believe so.

18 Q. Okay. After Mr. Joyce was hired, did he

19 express concerns to you about taking the

20 malpractice case?

21 MR. JOYCE: Objection, that would be

22 attorney-client privilege. I direct you not to

23 answer the question.

24 BY MR. MARINELLO:

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1 Q. Did there come a time when you were

2 concerned that Mr. Joyce would not take the case?

3 A. No.

4 Q. Okay.

5 MR. MARINELLO: Would you mark that as the

6 next exhibit, please.

7 (WHEREUPON, a certain document was

8 marked Defendant's Exhibit No. 29,

9 for identification, as of

10 01/19/2009.)

11 BY MR. MARINELLO:

12 Q. Okay. As Exhibit 29 I have marked an

13 e-mail dated July 26, 2006, from Gerry Spehar to

14 David Grochocinski --

15 A. Um-hum.

16 Q. -- with a copy to Mr. Todhunter. You

17 received that e-mail on or about the date it bears,

18 correct?

19 A. I'm sure I did.

20 Q. Okay. And in this e-mail, Mr. Spehar is

21 expressing concern that Mr. Joyce is not going to

22 take the case, the malpractice case?

23 A. I don't know. I -- I guess he's -- I'd

24 have to read all of this and see.

1 Q. Well, let's start with the first
2 sentence of it. It says, "I'm sure you've thought
3 of this already, but just in case, here's a laundry
4 list of why it will be impossible to find a new
5 special counsel at this late date in my
6 estimation."
7 A. Um-hum.
8 Q. Now, that's referring to new -- new
9 special counsel to replace Mr. Joyce, correct?
10 A. Someone to replace Mr. Joyce or somebody
11 to replace -- replace Mr. -- Mr. Spellmire?
12 Q. No. Mr. Joyce.
13 A. I -- I don't know. I don't read it that
14 way, but I -- okay.
15 Q. Well, let's look at Paragraph No. 2. Do
16 you see that?
17 A. Yeah, I -- no. I -- I'm looking at it.
18 I -- I've not seen this in a very long time, so if
19 you want to give me a chance to look at it, I'll be
20 happy --
21 Q. Sure.
22 A. -- to review it.
23 Q. Take your time.
24 A. Okay. It does -- looks like he's

1 concerned that Mr. Joyce will not take the case.
2 Q. And he's also concerned, if you look at
3 Paragraph 6, about an August 24 filing deadline?
4 A. That's what it says.
5 Q. And what was that filing -- what was
6 your understanding of that filing deadline?
7 A. Well, that might have been the -- what
8 he thought was the last date to file a complaint
9 against Mayer Brown and Mr. Given.
10 Q. What was the date the complaint was
11 filed? Do you recall?
12 A. I don't. I'm sorry.
13 Q. Do you agree that August 24th was the
14 filing date, filing deadline for filing a
15 malpractice --
16 A. I --
17 Q. -- case?
18 A. I don't know. I'd have to go back and
19 recount dates and all the rest. I hadn't -- I'm
20 not prepared to answer that, 'cause I don't know
21 offhand.
22 Q. Okay. Was it, to the best of your
23 recollection, around July 26, 2006, when -- well,
24 strike that.

1 In response to this e-mail, did you call
2 Mr. Spehar and have a discussion with him --
3 A. I don't --
4 Q. -- about this subject?
5 A. I don't recall.
6 Q. Did you call on Mr. Joyce and talk to
7 him about this e-mail?
8 A. Again, I don't recall that either. I'm
9 sorry. I just don't.
10 Q. Um-hum. Okay.
11 MR. MARINELLO: Would you -- would you mark
12 that as the next exhibit, please.
13 (WHEREUPON, a certain document was
14 marked Defendant's Exhibit No. 30,
15 for identification, as of
16 01/19/2009.)
17 BY MR. MARINELLO:
18 Q. As Exhibit 30 I have marked an e-mail
19 from Gerry Spehar to you with a copy to Judson
20 Todhunter dated Friday, July 28, 2006. Did you
21 receive this e-mail on or about that date?
22 A. I'm assuming I did.
23 Q. Now, in the first paragraph of this
24 e-mail, Mr. Spehar is warning you that Mr. Joyce

1 should not conduct last minute depositions of
2 certain witnesses, correct?
3 A. This says it would be -- "unwise last
4 minute scramble by Ed Joyce to quickly depose key
5 witnesses before he's adequately prepared." That's
6 what it says. I don't know.
7 Q. Prior to the date of this e-mail, were
8 you intending there to be depositions of some of
9 the witnesses to the malpractice claim?
10 A. I -- I don't know. I was -- my -- my
11 counsel was proceeding with an analysis of this
12 case whether it should be filed or not, and they
13 were doing what they needed to do.
14 Q. Um-hum.
15 A. That's why I hired special counsel.
16 Q. Do you know whether there were plans to
17 take depositions or not?
18 A. On a day-to-day basis, I wouldn't know
19 offhand. Whatever they need to do.
20 Q. Are you aware of any depositions being
21 taken --
22 A. I --
23 Q. -- by your counsel?
24 A. Honestly, personally, no. As we sit

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1 here today? I mean, no.
 2 Q. You don't know one way or the other?
 3 A. No.
 4 Q. Okay. All right. In the last few lines
 5 of the first paragraph, it says, "as my prior
 6 communications with Joyce and you have stated,
 7 great care must be taken in how we approach and
 8 depose these people if we are to extract maximum
 9 value and their cooperation."
 10 What did you understand Mr. Spehar
 11 telling you there?
 12 A. I have no idea.
 13 Q. Did you ever talk to him about this?
 14 A. Not that I recall.
 15 Q. In the second paragraph of this e-mail,
 16 which quotes from a March 6th memo, Mr. Spehar
 17 says, "We need real fear on our side in dealing
 18 with these people...once we file and leave the door
 19 open to going after them, they will clearly know we
 20 are serious and it will be a different ballgame."
 21 What did you understand that to be referring to?
 22 A. No idea.
 23 Q. You have no idea whatsoever?
 24 A. Well, no. I --

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1 MR. JOYCE: If his answer is no, the answer is
 2 no.
 3 BY THE WITNESS:
 4 A. The answer is no.
 5 MR. JOYCE: Okay.
 6 BY MR. MARINELLO:
 7 Q. Did you talk to Mr. Spehar and ask him,
 8 "What did you mean by this?"
 9 A. Not that I recall.
 10 Q. In the next line, he says, "I'm sorry
 11 we're here, but this current dilemma is Joyce's
 12 fault." What was Joyce's fault?
 13 A. I have no idea.
 14 Q. Did you call Mr. Spehar and say, "What
 15 are you talking about?"
 16 A. No.
 17 Q. Never contacted him to ask him what he
 18 meant by that?
 19 A. No.
 20 Q. In the next sentence, it says, "From my
 21 recent filings, 7/26/06, DG memo to you," that's
 22 referring to a memo that he wrote to you, correct?
 23 A. I -- I don't know. I -- that's what he
 24 says, but I don't know what --

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1 Q. Do you know --
 2 A. -- that is.
 3 Q. -- whether you have a memo of that
 4 date --
 5 A. No.
 6 Q. -- from Mr. Spehar?
 7 A. No idea.
 8 Q. He says, and -- and he quotes, "In
 9 March, I warned Joyce the time was short and we
 10 would be facing the exact situation that we were
 11 currently facing if they didn't get subpoenas out
 12 immediately. I told Joyce then that reviewing
 13 subpoenaed information was just the first step;
 14 armed with that information, we would then have to
 15 depose many individuals in a suggested order to get
 16 optimum value from them. I said then that the
 17 longer we wait, the less likely these individuals
 18 will be cooperative because they will know we are
 19 up against a filing deadline."
 20 Do you know what Mr. Spehar was
 21 referring to there?
 22 A. No.
 23 Q. Well, in March, did Mr. Spehar warn you
 24 and Mr. Joyce that he wanted some action taken to

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1 investigate this case?
 2 A. Mr. Spehar is not in charge of the
 3 litigation. Mr. Spehar can say anything he wants
 4 to say and do whatever he wants to do. I run the
 5 case. It's my special counsel and my decision
 6 ultimately.
 7 I'm satisfied with the way matters
 8 resolved with my counsel, and I don't see any --
 9 the rest of this is Mr. Spehar being Mr. Spehar.
 10 Q. Do you know whether your counsel did
 11 serve any subpoenas for information?
 12 A. I don't know.
 13 Q. Do you know whether your counsel ever
 14 told Mr. Spehar that individuals would be deposed
 15 in order to establish some basis for this case?
 16 A. I don't know of any conversations that
 17 my counsel had with Mr. Spehar.
 18 Q. It's true that your counsel had many
 19 conversations with Mr. Spehar that you were not a
 20 party to, isn't it?
 21 A. I don't know. It's possible. If I
 22 wasn't a party to it, I wouldn't know it.
 23 Q. But you did say more than once in your
 24 correspondence with Mr. Spehar that he had

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1 communicated with your counsel more than you had
 2 about this malpractice claim?
 3 A. He may have tried to; don't know whether
 4 anyone responded from Mr. Joyce's office or not.
 5 Mr. Joyce is my counsel. I would think
 6 that attorney-client privilege he would be
 7 responding to me and not Mr. Spehar, since
 8 Mr. Spehar is not his client.
 9 Q. Do you know whether your client --
 10 whether your attorney has asserted work product
 11 privileges with respect to its communications with
 12 Mr. Spehar?
 13 A. I don't know.
 14 Q. So it's very possible that your
 15 attorneys may have had many communications with
 16 Mr. Spehar which they are now claiming are
 17 privileged for work product reasons?
 18 A. I am not aware of any. To the best of
 19 my recollection, there are no such meetings.
 20 Q. You don't know one way or the other?
 21 A. Again, you asked me that question again,
 22 and I will respond. To the best of my
 23 recollection, I am not aware of any such.
 24 Q. Okay. In the next paragraph, if you

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1 would look at Mr. Spehar's e-mail --
 2 A. Sure.
 3 Q. -- Page 2.
 4 A. Which one are we talking about now?
 5 Q. Well, I'm talking about the very top of
 6 Page 2.
 7 A. "To my knowledge"
 8 Q. Yeah. Why don't you read that out loud,
 9 that first sentence.
 10 A. "To my knowledge, no one has been
 11 deposed under oath and Joyce had only one
 12 conversation with Wayne Baliga as of last week.
 13 I have suggested --"
 14 Q. No, no. That's -- that's enough. One
 15 sentence.
 16 A. Okay.
 17 Q. Do you know whether it's true that no
 18 one was deposed under oath as of the date of this
 19 e-mail?
 20 A. No, I don't know.
 21 Q. Do you know whether it's true that Joyce
 22 had only one conversation with Wayne Baliga as of
 23 last week --
 24 A. I--

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1 Q. -- with respect to the malpractice
 2 claims?
 3 A. I don't know.
 4 Q. Do you have any reason to believe those
 5 statements aren't true?
 6 A. I don't know.
 7 MR. JOYCE: I object. If he doesn't know, he
 8 doesn't know. You're asking him to speculate now.
 9 BY THE WITNESS:
 10 A. I don't have any basis on which to
 11 either believe or not believe.
 12 BY MR. MARINELLO:
 13 Q. Okay. Robert Spaeth and Dick Ross, do
 14 you know who they are?
 15 A. I know that Mr. Ross was a -- an
 16 investor. The name Robert Spaeth, I think he was,
 17 too, but I can't be certain offhand. I don't
 18 remember the names of everybody, but I thought
 19 Mr. Ross was involved with them.
 20 Q. Have you ever heard of Mr. Melvin
 21 Spaeth?
 22 A. Who?
 23 Q. Melvin Spaeth?
 24 A. I don't know. Doesn't -- name doesn't

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1 sound familiar to me, so I'm not sure.
 2 Q. Is there -- was there ever a time prior
 3 to your filing the legal malpractice claims against
 4 Mayer Brown and Ron Given that you spoke with
 5 Robert Spaeth, Melvin Spaeth, or Dick Ross?
 6 A. I will be honest with you. I don't
 7 recall having conversations. Doesn't mean that it
 8 didn't happen, but I don't recall.
 9 Q. Okay. Now, in Paragraph d) on this
 10 Page 2, Mr. Spehar talks about Franco, and he says,
 11 "We haven't even approached him yet, and it would
 12 not be wise to do so without setting it up" -- "all
 13 up properly per the above."
 14 Do you know whether on the date that
 15 this e-mail was sent, July 28, 2006, it was true
 16 that no one had approached Mr. Franco yet about the
 17 malpractice claims?
 18 A. No clue.
 19 Q. Okay. If you look at -- if you go down
 20 two paragraphs from d) --
 21 A. Is it this one here, "There's simply no
 22 way"?
 23 Q. Yes. Why don't you read that out loud,
 24 please.

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1 A. "There's simply no way anyone but Joyce
 2 can do all this by August 24th. Hopefully, it
 3 won't come to this, but if it does, Joyce should
 4 not be allowed to terminate; Joyce should be held
 5 to his agreement, made to file and properly
 6 investigate this case."
 7 Q. Isn't it clear -- wasn't it clear to you
 8 from reading this e-mail that, as of the date of
 9 this e-mail, Mr. Spehar was convinced that there
 10 had been no proper investigation of the case as
 11 of -- as of the date?
 12 A. Again, Mr. Spehar is not the one that
 13 runs the case. The cause of action belonged to the
 14 estate. I hired special counsel, and I was not
 15 unhappy with the way matters were proceeding. I
 16 relied on my special counsel to do what -- such
 17 investigation as they deemed appropriate.
 18 Mr. Spehar can, again, say whatever
 19 Mr. Spehar wants. He believes very passionately in
 20 his situation. It does not surprise me that he
 21 says anything in these things.
 22 Q. Um-hum. Now, as of July 28, 2006, do
 23 you know what your counsel had done to investigate
 24 this malpractice claim or these malpractice claims

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1 against Ron Given and Mayer Brown?
 2 A. Say that again, please.
 3 Q. Yeah. As of July 28, 2006 -- well,
 4 strike that.
 5 You said a moment ago that you were
 6 satisfied with the way that things were proceeding,
 7 so I'm asking you, on July 28, 2006, what had your
 8 counsel done to investigate the legal malpractice
 9 claims against Mayer Brown and Ron Given?
 10 MR. JOYCE: Objection, that's privileged. I
 11 direct you --
 12 BY THE WITNESS:
 13 A. Attorney-client privilege.
 14 MR. JOYCE: -- not to answer the question.
 15 BY THE WITNESS:
 16 A. I'm not going to answer that.
 17 BY MR. MARINELLO:
 18 Q. Well, my question isn't what they said
 19 to you, but what they did.
 20 MR. JOYCE: That's privileged. He's not
 21 answering that question.
 22 MR. MARINELLO: You're instructing him not to
 23 answer?
 24 MR. JOYCE: I am.

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1 MR. MARINELLO: Okay.
 2 MR. JOYCE: And he's following my instruction.
 3 BY MR. MARINELLO:
 4 Q. Are there any facts that your counsel
 5 reported to you as of July 28, 2006, that related
 6 to the malpractice claims?
 7 MR. JOYCE: I'm directing you not to answer
 8 that question.
 9 MR. MARINELLO: Well, facts cannot be
 10 privileged, sir.
 11 MR. JOYCE: I've directed him not to answer
 12 the question.
 13 BY MR. MARINELLO:
 14 Q. All right. Are you going to take your
 15 counsel's instruction?
 16 A. Yes.
 17 Q. All right. Did you ever approach Mike
 18 Cherry to take this case?
 19 A. I don't even know who Mike Cherry is.
 20 MR. JOYCE: Well, that could be good for you.
 21 BY MR. MARINELLO:
 22 Q. Okay. At the very end of this e-mail,
 23 Mr. Spehar asks you a question. He says, "Did
 24 Joyce get back to you today as promised?"

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1 A. Okay.
 2 Q. Had Mr. Joyce agreed to get back to you
 3 on that day with respect to whether or not he would
 4 take the case?
 5 A. I would have no recollection of what
 6 happened on July 28th, 2006 --
 7 Q. Was --
 8 A. -- on that date.
 9 Q. Was there ever a time when Mr. Joyce got
 10 back to you and said, "Yes, I'll take the case,"
 11 or, "No, I won't"?
 12 A. Well, we hired him as special counsel,
 13 so...
 14 Q. I'm aware of that, but that was --
 15 A. So --
 16 Q. That was long before this date, right?
 17 A. I don't recall the date, again. I mean,
 18 I'm sorry. I would have to put the -- together the
 19 dates. You're assuming that I remember all the
 20 dates of the orders entered.
 21 Special counsel was employed on
 22 November 18th. This is on July 28th, 2006.
 23 Q. So that's almost --
 24 A. Special counsel was employed on

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1 November 18th, 2005.
 2 Q. Right, so this is --
 3 A. So this is post --
 4 Q. -- some eight months later, right?
 5 A. Right.
 6 Q. Okay. So special counsel was employed
 7 to investigate whether there was --
 8 A. Yeah.
 9 Q. -- a claim, correct?
 10 A. Right.
 11 Q. Did Mr. -- Mr. Joyce get back to you on
 12 July 28th or thereabouts to give you information
 13 about whether he would or would not take the case?
 14 MR. JOYCE: He said he didn't recall.
 15 BY THE WITNESS:
 16 A. Yeah, I don't -- I told you before that
 17 I don't -- I wouldn't remember what happened on the
 18 28th or thereabouts. I mean, obviously, we filed
 19 the lawsuit, so I guess that should say to you that
 20 we chose to go forward.
 21 MR. MARINELLO: Would you mark this as the
 22 next exhibit.
 23 MR. JOYCE: 31.
 24 (WHEREUPON, a certain document was

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1 marked Defendant's Exhibit No. 31,
 2 for identification, as of
 3 01/19/2009.)
 4 BY MR. MARINELLO:
 5 Q. As Exhibit 31 I've marked a series of
 6 e-mails. The first one is from Gerry Spehar to
 7 you, and its dated July 31st, 2006, and then there
 8 are several other e-mails from you to Mr. Spehar
 9 and -- after that.
 10 Can you identify this as an e-mail
 11 you -- you sent -- you received from Mr. Spehar on
 12 July 31st, 2006?
 13 A. Looks like it.
 14 Q. Okay. And the e-mail chain that's
 15 beneath that, those are communications that you and
 16 Mr. Spehar had, correct?
 17 A. Looks like it.
 18 Q. Okay. Now, if you look on Page 3 of
 19 this chain of e-mails, there's an e-mail dated
 20 July 31st, 2006, from you to Mr. Spehar, correct?
 21 A. Yes, I guess. Okay.
 22 Q. And you -- it's -- it says here -- and
 23 the statements you make in this e-mail were
 24 truthful, were they not?

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1 A. Reasonably. I'm speaking to Mr. Spehar,
 2 so, you know, dealing with Mr. Spehar -- well, I --
 3 I guess there's nothing else to say. To the -- for
 4 the most part that -- they are correct.
 5 Q. Okay. And you say in your e-mail that
 6 you hired Joyce's firm on Spehar's recommendation,
 7 correct?
 8 A. Where is that in there?
 9 Q. In the middle of your e-mail --
 10 A. This is just very --
 11 Q. -- of July --
 12 A. -- small.
 13 Q. -- 31st, 2006. Is it --
 14 MR. JOYCE: What page is it on? 3?
 15 MR. MARINELLO: PL 2223, Page 3 of 7.
 16 BY THE WITNESS:
 17 A. Which -- where are we? What -- what
 18 line? I'm sorry. I just don't -- I'm not sure
 19 that I see what you're saying.
 20 BY MR. MARINELLO:
 21 Q. Fifth line, "frankly" is the word that
 22 begins the sentence. Do you see that?
 23 A. "Frankly, I hired Joyce's firm on your
 24 recommendation."

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1 Q. Why don't you read that out loud.
 2 A. "Frankly, I hired Joyce's firm on your
 3 recommendation, and you have consulted with the
 4 attorneys from his firm more often than me."
 5 Q. Okay. Is that a truthful statement?
 6 A. I don't know. He tried to:
 7 Q. Well, you -- you made that statement,
 8 didn't you?
 9 A. Well, yeah, I made the statement, but,
 10 again, I don't know whether anybody from Joyce's
 11 firm talked to him or not.
 12 He attempted to communicate with them,
 13 because, obviously, there are other e-mails that
 14 he's tried to contact him. I don't know whether
 15 anybody else from -- from Joyce's firm called him
 16 back and talked to him.
 17 Q. Well, don't you say here, "You have
 18 consulted with the" -- "with the attorneys from his
 19 firm far" -- "far often" -- "more often than me"?
 20 Doesn't it -- isn't that what you wrote?
 21 A. It says -- that's what it says. "I
 22 hired Joyce's firm on your recommendation, and you
 23 have consulted with the attorneys from his firm far
 24 often than me."

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1 Q. "From his firm far more often than me,"
 2 aren't those the words?
 3 A. That's what it says.
 4 Q. Okay. And you wrote that, correct?
 5 A. I did.
 6 Q. Okay. At this point in time, are you
 7 aware of Mr. Joyce having done any investigation
 8 into the malpractice claims?
 9 MR. JOYCE: Objection. That's attorney-client
 10 privilege. He wouldn't answer that question.
 11 BY MR. MARINELLO:
 12 Q. Well, the question is not what the
 13 investigation revealed or what the advice was, but
 14 simply whether you're aware of an investigation
 15 having been done as of July 31st, 2006, into the
 16 legal malpractice claims.
 17 MR. JOYCE: I'm directing him not to answer
 18 that question, and he's going to follow my
 19 direction.
 20 BY MR. MARINELLO:
 21 Q. All right. Mr. Grochocinski, that's --
 22 you're going to follow your counsel's direction?
 23 A. Yes.
 24 Q. All right. If you look at Page 2 of

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1 this e-mail, looks like you were having a lot of
 2 communications with Mr. -- with Mr. Spehar that
 3 day, because there -- there -- there are many
 4 e-mails dated July 31st, correct?
 5 A. I -- it appears so. There are days like
 6 that with this case.
 7 Q. Okay. And then at 1:25 you wrote him an
 8 e-mail. Would you please read that into the
 9 record.
 10 A. "I understand your position. As a
 11 creditor, you are owed an fiduciary duty even if
 12 you are the smallest creditor, but his contract is
 13 not given the ability to exit if he feels the case
 14 is not a good one or the collectibility is bad.
 15 Naturally, he has to arrive at that decision via
 16 good faith and investigation, but I do not want to
 17 trade one lawsuit for another. We still have a
 18 little time, and I will give him a chance to
 19 respond."
 20 Q. Okay. The only comment I have about
 21 your reading it is you put the word "not" in.
 22 A. Where -- where did I not put in?
 23 Q. You -- you put the word -- you said,
 24 "but his contract does not give him the ability."

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1 In fact, the e-mail reads, "but his contract
 2 does --"
 3 A. "Does give him the ability to exit,"
 4 right, okay. I apologize, "but his contract does
 5 give him the ability to exit if he feels the case
 6 is not a good one or the collectibility is bad."
 7 Q. Does that e-mail indicate to you that as
 8 of July 31st, 2006, you had not received a report
 9 from your counsel about any investigation he'd done
 10 into the legal malpractice claims against
 11 Mayer Brown?
 12 MR. JOYCE: That's privileged. I direct you
 13 not to answer.
 14 BY THE WITNESS:
 15 A. I'm going to follow what my counsel
 16 says.
 17 BY MR. MARINELLO:
 18 Q. All right. We can put this e-mail aside
 19 for now.
 20 MR. MARINELLO: Excuse me. That was
 21 Exhibit what?
 22 MR. JOYCE: 31.
 23 MR. MARINELLO: 31, thank you.
 24 Okay. Would you mark that as the next

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1 exhibit, please.
 2 (WHEREUPON, a certain document was
 3 marked Defendant's Exhibit No. 32,
 4 for identification, as of
 5 01/19/2009.)
 6 BY MR. MARINELLO:
 7 Q. As Exhibit 32 I have marked a memo dated
 8 July 24, 2006. Can you identify that as a -- as a
 9 memo that Mr. Spehar wrote to you and your counsel?
 10 A. You know, I don't know. I -- it's
 11 conceivable, but I just don't remember.
 12 Q. Um-hum.
 13 MR. JOYCE: Where does this show to whom it's
 14 addressed?
 15 THE WITNESS: It doesn't.
 16 BY MR. MARINELLO:
 17 Q. Well, didn't Mr. Spehar testify at
 18 your -- during your litigation with him that this
 19 is an e-mail he sent to Mr. Joyce and to you on or
 20 about the date that it bears?
 21 A. It -- it's possible, but as I told you
 22 before, there are so many documents here that I
 23 don't recall offhand, but -- but if you want to ask
 24 me something about it, go ahead.

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1 Q. Did -- did you review this document
 2 prior to filing the malpractice claims?
 3 A. I'm sure that I must have seen hundreds
 4 of documents. I -- you know, this one
 5 specifically, I assume that we did.
 6 But I don't know -- again, I just don't
 7 have the recollection. It's not that I'm trying to
 8 give you a hard time. I just don't know.
 9 Q. I'm sorry. But I need to take a break
 10 for two minutes.
 11 A. Sure.
 12 Q. I'll be right back with you.
 13 THE VIDEOGRAPHER: Going off the video record
 14 at 1:15 p.m.
 15 (WHEREUPON, the deposition was
 16 recessed from 1:15 p.m. until
 17 1:19 p.m.)
 18 THE VIDEOGRAPHER: Going back on the video
 19 record at 1:19 p.m.
 20 BY MR. MARINELLO:
 21 Q. Mr. Grochocinski, you are aware, are you
 22 not, that Mayer Brown and Ron Given have filed a
 23 motion asserting that the case you have filed
 24 against them is a fraud on the Court?

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1 A. I know that there's a motion. I
 2 guess -- I'm not saying that. I don't know if it
 3 was a fraud on the Court, but I know there's some
 4 kind of a motion relative to another aspect of the
 5 case that we haven't gotten to, even underlying
 6 discovery on the principal case yet, so I assume
 7 that's why I'm here today.
 8 Q. Right, and that -- you understand that
 9 they've filed a motion accusing you of filing a
 10 case that is misconceived and is in fact a fraud on
 11 the Court?
 12 MR. JOYCE: Their motion's a fraud on the
 13 Court, actually.
 14 BY THE WITNESS:
 15 A. The motion says whatever it says. I
 16 don't know.
 17 BY MR. MARINELLO:
 18 Q. I'm just asking you if you're aware of
 19 it.
 20 A. If I'm -- I don't know what you mean by
 21 whether I'm aware of it yet.
 22 Q. Well, are you aware of --
 23 A. Did I read it?
 24 Q. -- the fact -- well, did you -- let's

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1 start there. Did you read the motion?
 2 A. A long time ago.
 3 Q. Are you -- are you aware of the fact
 4 that Mayer Brown and Ron Given have asserted that
 5 your complaint is a fraud on the Court?
 6 A. Again, that's your interpretation. Does
 7 it say it's a fraud on the Court? I don't recall
 8 it saying that, but it -- if -- if you say that's
 9 what it says, okay.
 10 I'm not trying to give you a hard time,
 11 but if there's a motion to dismiss then -- or a
 12 motion, then it is whatever it is.
 13 What -- what is it that you want from
 14 me? What do you want me to ask -- answer? Ask me
 15 a question.
 16 Q. Well, I did. I asked you if you were
 17 aware that there was an allegation that's being
 18 made against you that you've filed a frivolous case
 19 that's a fraud on the Court? And I think --
 20 MR. JOYCE: He answered that.
 21 BY MR. MARINELLO:
 22 Q. I thought you would have remembered
 23 that.
 24 MR. JOYCE: He answered that question.

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1 BY MR. MARINELLO:
 2 Q. Do you know that?
 3 A. I know.
 4 Q. Okay. Do you agree that your complaint
 5 is a fraud on the Court?
 6 A. No.
 7 Q. Why not?
 8 A. Why not?
 9 Q. Yes.
 10 A. Well, let me just put it to you this
 11 way. We filed a complaint. A motion to dismiss
 12 was presented by your firm. It was denied by the
 13 Judge. A motion for rehearing was filed by you and
 14 likewise dismissed -- denied by the Court.
 15 So I guess, from my perspective, the
 16 complaint states a cause of action.
 17 Q. Do you realize that the litigation --
 18 you -- you understand we're doing some discovery
 19 right now that's not on the merits of the case?
 20 A. Yes, I understand.
 21 Q. And do -- do -- are you aware of the
 22 fact that the Court has allowed us to do that
 23 discovery?
 24 A. Yes.

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1 Q. And -- and are you also aware of the
 2 fact that the Court has allowed us to do that
 3 discovery in order to establish evidence showing
 4 that your complaint is a fraud on the Court?
 5 A. Okay.
 6 MR. JOYCE: No, that's not true at all. The
 7 Court has given you leave to take discovery.
 8 You're endeavoring to use it and twist it any way
 9 you want, okay?
 10 BY MR. MARINELLO:
 11 Q. But you understand we're -- we've been
 12 given the right to take discovery to prove that
 13 your claim is a fraud on the Court?
 14 A. Your -- my deposition testimony is
 15 whatever it is today. Use it, whatever it is.
 16 Q. I understand that. But I'm just asking
 17 you if you're aware of the status of the case.
 18 MR. JOYCE: He's aware of the status of the
 19 case. Now why don't --
 20 MR. MARINELLO: The witness --
 21 MR. JOYCE: -- you ask a question --
 22 MR. MARINELLO: The witness can answer.
 23 MR. JOYCE: -- that's relevant.
 24 MR. MARINELLO: The witness can answer.

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1 MR. JOYCE: We're not going to stick around
 2 here for nonsensical questions all day.
 3 BY MR. MARINELLO:
 4 Q. My question to you, sir, is why do you
 5 believe that the case -- the case you have filed is
 6 not a fraud on the Court in terms of the things
 7 that you know?
 8 A. I don't know of anything.
 9 MR. JOYCE: I -- hold on. I object to the
 10 question as being almost impossible to answer.
 11 He's not here to sit and speculate about what your
 12 question means.
 13 If you ask a question that can be
 14 answered, he'll answer it.
 15 BY MR. MARINELLO:
 16 Q. What do you believe to be the -- the --
 17 why do you believe that the complaint that you have
 18 filed against Mayer Brown and Ron Given is valid?
 19 MR. JOYCE: He's already told you. It
 20 withstood two motions --
 21 MR. MARINELLO: Let him answer the question.
 22 MR. JOYCE: -- to dismiss. He's already
 23 answered the question. It withstood two motions to
 24 dismiss.

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1 Okay. What's your next question?
 2 BY MR. MARINELLO:
 3 Q. Would you answer the question?
 4 A. I -- I think I already have.
 5 Q. Upon what factual basis --
 6 A. Didn't we ask --
 7 Q. -- does your complaint have --
 8 A. -- this this morning?
 9 Q. -- complaint have -- I don't believe so.
 10 MR. JOYCE: Let -- let him finish the
 11 question.
 12 THE WITNESS: Okay.
 13 BY MR. MARINELLO:
 14 Q. What factual basis does your complaint
 15 have that you believe makes it not a fraud?
 16 MR. JOYCE: Object. It's a --
 17 BY THE WITNESS:
 18 A. Come one.
 19 MR. JOYCE: That's ridiculous.
 20 BY THE WITNESS:
 21 A. You don't really expect me to answer
 22 that question, do you?
 23 MR. JOYCE: It can't even be answered. The
 24 only fraud on the Court is the fraud by your firm

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1 who concocted a totally bogus objection, taking
 2 advantage of the fact the Court is not a Bankruptcy
 3 Court.
 4 MR. MARINELLO: Well, I'll move to strike your
 5 comments, and we can --
 6 MR. JOYCE: Denied.
 7 MR. MARINELLO: -- disagree.
 8 MR. JOYCE: Motion denied.
 9 MR. MARINELLO: All right.
 10 All right. Would you mark this as the
 11 next exhibit, please.
 12 (WHEREUPON, a certain document was
 13 marked Defendant's Exhibit No. 33,
 14 for identification, as of
 15 01/19/2009.)
 16 MR. JOYCE: Could you imagine if Cherry was
 17 defending this dep? There would be a footprint on
 18 your head right now. Okay.
 19 BY MR. MARINELLO:
 20 Q. Mr. Grochocinski, this is a -- this is a
 21 copy of the complaint that you've filed that we've
 22 marked as Exhibit 33, correct?
 23 A. Looks like it.
 24 Q. Okay. And your complaint was filed on

1 August 23, 2006?
 2 A. I can't read the front, but I think that
 3 that's right.
 4 Q. Okay. Are you aware of any
 5 investigation that was done between July 31st,
 6 2006, and August 23, 2006, with respect to the
 7 malpractice claims?
 8 MR. JOYCE: Do you mean by his counsel?
 9 MR. MARINELLO: Yes, by --
 10 MR. JOYCE: Then I --
 11 MR. MARINELLO: -- his counsel.
 12 MR. JOYCE: -- direct you not to answer it as
 13 privileged.
 14 BY MR. MARINELLO:
 15 Q. Well, are you aware of any investigation
 16 by anyone other than your counsel?
 17 A. Well, I didn't personally do any further
 18 investigation between those dates, and I'm not
 19 aware --
 20 MR. JOYCE: That's all you have to --
 21 BY THE WITNESS:
 22 A. I don't have knowledge of anybody else.
 23 MR. JOYCE: All right, fine.
 24

1 accepted engagements which created irreconcilable
 2 conflicts between their clients CMGT and SC." What
 3 does that refer to, sir?
 4 A. I'm not sure.
 5 Q. Do you have any facts on which to base
 6 your assertion that S -- that SC, which stands for
 7 Spehar Capital in your complaint, was a client of
 8 Mayer Brown?
 9 A. No, I don't think so.
 10 Q. Okay. Turn the page, please, to
 11 Paragraph 11. Paragraph 11 refers to CMGT being
 12 formerly known as Caremanagement.com, Inc.?
 13 A. Um-hum.
 14 Q. And that it was founded in January of
 15 1999, correct?
 16 A. That's what it says, right.
 17 Q. Yes. Where do those facts come from?
 18 A. I assume in our documentation that was
 19 turned over from Franco, and it's possible that
 20 other from the Secretary of States. It's possible.
 21 Q. And is it also possible it came from
 22 Mr. Spehar?
 23 A. I -- sure.
 24 Q. Okay.

1 BY MR. MARINELLO:
 2 Q. Okay. Do you know whether your --
 3 whether your counsel actually did an investigation
 4 between those dates?
 5 MR. JOYCE: I direct you not to answer that as
 6 being privileged.
 7 MR. MARINELLO: Again, I'll -- I'll point out
 8 that I'm not asking him what the substance of it --
 9 MR. JOYCE: I --
 10 MR. MARINELLO: -- was --
 11 MR. JOYCE: -- understand.
 12 MR. MARINELLO: -- merely whether it was done.
 13 MR. JOYCE: I understand what you're asking.
 14 MR. MARINELLO: Okay. And you're directing
 15 him not to answer?
 16 MR. JOYCE: I am.
 17 BY MR. MARINELLO:
 18 Q. Mr. Grochocinski, are you not going to
 19 answer?
 20 A. I'm taking the advice of counsel.
 21 Q. All right. Okay. If you would turn to
 22 Paragraph 3, please, of the complaint.
 23 Paragraph 3 refers to engagements --
 24 in -- Paragraph 3(c) says that "Mayer Brown

1 A. There's no reason why not. It could
 2 have.
 3 Q. Okay. And it says that -- here in
 4 Paragraph 11 that CMGT was going to implement an
 5 aggressive growth plan through key acquisitions.
 6 Do you see that?
 7 A. Yes.
 8 Q. Do you know if CMGT -- well, strike
 9 that.
 10 What does that mean to you?
 11 A. I assume the company was going to grow
 12 based on acquisitions of other companies or
 13 acquisition of technologies. Could have been
 14 anything.
 15 Q. And what does an aggressive growth plan
 16 mean?
 17 A. I -- I assume it means that it's going
 18 to go fast and try to grow as quickly as it could.
 19 Q. Do you know whether CMGT had the money
 20 to engage in an aggressive growth plan in 1999?
 21 A. I think it was trying to find the money
 22 to do that.
 23 Q. My question was, do you know whether it
 24 had the money?

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1 A. No. I don't know that.
 2 Q. Okay.
 3 A. I don't believe it did, but that -- you
 4 know.
 5 Q. Okay. If you look at Paragraph 13, the
 6 very last sentence, would you read that.
 7 A. "Franco relied heavily on given's advice
 8 throughout Franco's tenure at CMGT."
 9 Q. What -- what facts do you have to
 10 support that assertion?
 11 A. Again, I don't have the -- the
 12 documentation or the information in front of me
 13 now, but my recollection is that certainly
 14 Mr. Given was counsel to CMGT.
 15 It appeared that he had given advice to
 16 CMGT on -- on other financing ventures, and I think
 17 that Mr. Franco, because of Mr. Given's position
 18 with CMGT as its counsel, that he relied on them,
 19 because they were largely -- the finance documents
 20 are largely legal in nature.
 21 So he would have to have relied not only
 22 on financial people but on people who would have
 23 done the finance documents and the like.
 24 Q. Are you aware of CMGT actually doing any

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1 finance transaction during the time prior to the
 2 bankruptcy?
 3 A. They were attempting to.
 4 Q. I -- I --
 5 A. Whether it ever completed or not, I
 6 don't -- I don't believe so, otherwise we probably
 7 wouldn't be here.
 8 Q. Okay. Well, if they never completed --
 9 completed a financial transaction, then Mr. Franco
 10 couldn't have relied on Mr. Given's advice for
 11 those transactions, could he?
 12 MR. JOYCE: I object. That's argumentative.
 13 BY THE WITNESS:
 14 A. I don't know what --
 15 BY MR. MARINELLO:
 16 Q. Well, are you aware of -- other than --
 17 other than Mr. --
 18 A. I don't know why not.
 19 Q. Other than Mr. Franco -- strike that.
 20 Did -- again, you've not spoken to
 21 Mr. Franco, you've not spoken to Mr. Given, right,
 22 about this subject?
 23 A. I don't recall about Mr. Franco, but I
 24 don't -- I've not spoken to Mr. Given. That's for

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1 sure.
 2 Q. So this statement that -- that Franco
 3 relied heavily on Mr. Given's advice throughout
 4 Franco's tenure at CMGT, what you mean by that is
 5 that it's your belief based on documents that you
 6 saw that Mr. Given was the person who drafted the
 7 attempts at getting financing?
 8 A. Well, or certainly assisted in it or
 9 reviewed them or whatever he might have done, gave
 10 legal advice respecting those.
 11 Q. Okay. And it's your belief that
 12 Mr. Franco must have relied on Mr. Given's advice
 13 with respect to those financial transaction
 14 documents?
 15 A. Yes, it is.
 16 Q. Okay. Is there anything else that you
 17 believe Mr. Franco -- any other kinds of advice
 18 Mr. -- you believe Mr. Given gave to Mr. Franco
 19 that he heavily relied on?
 20 A. I don't know.
 21 Q. Okay. All right. Now, in Paragraph 15,
 22 you talk about how CMGT in the year 2000 acquired a
 23 company called Touch Speed Technology,
 24 incorporated. Do you see that?

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1 A. I do.
 2 Q. And you also say in your -- in your
 3 Paragraph 15 that Touch Speed added significant
 4 value to CMGT because of its Absence Expert
 5 software.
 6 A. Um-hum.
 7 Q. Correct?
 8 A. That's what it says.
 9 Q. Yes, and is that the same software that
 10 you sold to Spehar for \$1500?
 11 A. You know what? I don't know the answer
 12 to that. I didn't open the software disk that I
 13 received, so I don't know the answer to that.
 14 Q. You did sell Mr. Spehar software,
 15 correct?
 16 A. In accordance with the Court Order, yes.
 17 Q. And it was for \$1500?
 18 A. I believe so.
 19 Q. Okay. And is there any other software
 20 that you're aware of CMGT having besides that
 21 software?
 22 A. Not that I'm aware of, but that doesn't
 23 mean it doesn't exist.
 24 Q. Okay. Now, also, this same paragraph of

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1 yours refers to a First in Touch call center/live
 2 operator intake service. Do you see that?
 3 A. Yes.
 4 Q. Okay. At the time that -- in
 5 September of 2003, do you know whether that call
 6 center was still operating?
 7 A. I don't know the answer to that.
 8 Q. Do you know how many people worked in
 9 that call center at any point in time?
 10 A. No.
 11 Q. Okay. Now, your next sentence in
 12 Paragraph 15 refers to Touch Speed bringing two
 13 existing and valuable clients to CMGT, Sun Life of
 14 Canada and Packard Bell/NEC. Do you see that
 15 reference?
 16 A. Yes.
 17 Q. Do you know whether in -- in August of
 18 2003 Sun Life of Canada was still a client of CMGT?
 19 A. I don't recall.
 20 Q. Do you know whether Packard Bell/NEC was
 21 still a client of CMGT?
 22 A. I don't recall, no.
 23 Q. Do you know whether -- do you know how
 24 much revenue came to CMGT from Sun Life at any

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1 point in time?
 2 A. No.
 3 Q. Do you know how much revenue came to
 4 CMGT from Packard Bell at any point in time?
 5 A. No.
 6 Q. Okay. Do you know what value these
 7 alleged clients had to CMGT?
 8 A. You mean monetarily? I don't.
 9 Q. Do you know any --
 10 A. I wasn't asked to do a calculation for
 11 today, so I didn't do anything like that.
 12 Q. Do you know anything --
 13 A. I don't know.
 14 Q. Do you know any -- anything at all about
 15 how valuable they were in terms of revenue or
 16 anything else?
 17 A. I don't have that information today.
 18 Q. Did you ever have that information?
 19 A. I don't know. I'd have to go back to
 20 the office and take a look and see in the
 21 documentation that's -- that Franco had given to me
 22 to do that.
 23 Q. Okay. If you turn, please, to the next
 24 page, Page 5 of your complaint, your complaint

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1 refers to a strategy that CMGT had that was -- and
 2 I'm going to quote -- "designed to leverage the
 3 relationships and reputations of CMGT's key
 4 principals who were and are well known in the
 5 insurance industry."
 6 Who is that referring to?
 7 A. I don't know. I don't have the
 8 information with me right now.
 9 Q. Do you have any idea who that is
 10 referring to?
 11 A. Not as we sit here right now, no.
 12 Q. Did you ever know what that -- what
 13 those individuals were?
 14 A. I'm sure that I must have discussed it,
 15 but I don't recall right now.
 16 Q. Okay. Paragraph 18 says that after CMGT
 17 acquired Touch Speed, it solidified, and then it
 18 says, "As a result, CMGT became an established
 19 business."
 20 What does the term, "established
 21 business" -- what do you mean by that?
 22 A. Operating company.
 23 Q. Do you know whether, after the
 24 acquisition of Touch Speed, CMGT -- what its income

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1 was?
 2 A. Not as we sit here right now.
 3 Q. Do you know whether it was operating at
 4 a -- a profit or a loss?
 5 A. I don't know the answer to that.
 6 Q. Do -- do you know how big a loss it was
 7 operating at?
 8 A. Don't know the answer to that right now.
 9 Q. Do you know how many employees it had
 10 approximately?
 11 A. Again, I -- I don't know. If I would
 12 have known that you wanted me to give that
 13 information, I would have been happy to take a look
 14 to see if I could find it, but --
 15 Q. Okay.
 16 A. You're asking me to -- to remember
 17 things about the company back in 2003 when it
 18 didn't file the bankruptcy until much later and it
 19 wasn't necessary for my administration.
 20 Q. Do you have any --
 21 A. I don't know --
 22 Q. -- idea --
 23 A. -- the answer to that.
 24 Q. Do you have any idea how many claims it

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1 had, if any?
 2 A. Again, not that I recall simply because
 3 I was not --
 4 MR. JOYCE: Just --
 5 BY THE WITNESS:
 6 A. -- asked to do it.
 7 MR. JOYCE: Just not that you recall. You
 8 don't have to justify it.
 9 THE WITNESS: Okay.
 10 BY MR. MARINELLO:
 11 Q. All right. If you look at Paragraph 19,
 12 it says that, "In or around May of 2001, CMGT
 13 signed a binding letter of intent to establish a
 14 strategic partnership with the Hartford Life
 15 Insurance Companies." Where did that information
 16 come from?
 17 A. I believe that was in some of the
 18 documents that -- that was turned over to me
 19 from --
 20 Q. What is --
 21 A. -- Franco, but I'm not positive.
 22 Q. Could have come from Mr. Spehar, too,
 23 right?
 24 A. It's conceivable. Mr. Spehar was

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1 involved in trying to find financing, so it --
 2 there's no reason why he wouldn't have some of that
 3 information.
 4 Q. Isn't it --
 5 A. So it's conceivable.
 6 Q. Isn't it -- isn't it also true -- that
 7 you had Mr. Spehar review the complaint and edit
 8 the complaint before it was filed?
 9 A. No.
 10 Q. Your counsel didn't do that?
 11 A. Not to the best of my knowledge.
 12 Q. You don't -- do you know for a fact that
 13 your client didn't do it -- that your -- I'm sorry.
 14 Do you know for a fact that your counsel
 15 didn't share the complaint with Mr. Spehar and give
 16 him an opportunity to comment on it and revise it
 17 before it was filed?
 18 A. No.
 19 Q. So it may have happened, for all you
 20 know; you just don't know?
 21 A. I just don't know.
 22 Q. Okay.
 23 A. But I certainly didn't --
 24 MR. JOYCE: Wait, wait.

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1 BY THE WITNESS:
 2 A. -- give it to him.
 3 MR. JOYCE: You just don't know.
 4 THE WITNESS: No.
 5 MR. JOYCE: Okay.
 6 BY MR. MARINELLO:
 7 Q. Do you know what a strategic -- what do
 8 you mean by a strategic partnership with the
 9 Hartford Life Insurance Company?
 10 A. I assume there was a relationship
 11 developed between CMGT and Hartford so that they
 12 could take advantage of the software that was being
 13 developed or that was owned by CMGT at the time.
 14 This was a -- these kind of call centers
 15 were -- were the kind of things that -- that
 16 insurance companies were looking to do, so this was
 17 not -- at the time, this was not a -- an unusual
 18 circumstance, and if CMGT had a -- a reasonably
 19 decent system, which it appeared that they had --
 20 and I'm not a software guy, so I don't know. It
 21 sounds like Hartford thought enough of them to
 22 enter a -- a relationship with them.
 23 Q. Do you know what that relationship was?
 24 A. No, I don't offhand.

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1 Q. Okay. What is meant by the word
 2 "strategic" in that phrase, "a strategic
 3 partnership"?
 4 A. I don't know.
 5 Q. Okay. In the next sentence, you say,
 6 "CMGT obtained several important clients through
 7 its relationship with The Hartford," and then you
 8 name a bunch of clients. Do you see that?
 9 A. I do.
 10 Q. Okay. Do you know whether in August of
 11 2003 NCS Pearson was a client of -- well, first of
 12 all, do you know whether CMGT, in fact, acquired
 13 NCS Pearson as a client?
 14 A. I don't know.
 15 Q. How about Honda Manufacturing of
 16 Alabama?
 17 A. I don't know.
 18 Q. Honda Manufacturing of Ohio?
 19 A. I don't know.
 20 Q. Platinum Equity and Ball Corporation?
 21 A. I don't.
 22 Q. Do you know how -- if the -- if -- if
 23 CMGT had any of these clients for any period of
 24 time, do you have any idea how much money or

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1 revenue it would obtain from them?
 2 A. I don't as we sit here.
 3 Q. And do you know in August of 2003
 4 whether any of those companies were still clients
 5 of CMGT?
 6 A. I do not know.
 7 Q. Okay. The paragraph goes on to talk
 8 about strategic partnership relationships with
 9 several other major insurance companies, such as
 10 Cigna, Liberty Mutual, ICS, and Standard Insurance
 11 Company.
 12 Do you know -- what does that mean,
 13 strategic partnership relationships with those
 14 companies?
 15 A. I don't know. You just asked me the
 16 same question before about Hartford, so I assume
 17 the same answer. I don't know.
 18 Q. Okay. Do you know whether Cigna or
 19 Liberty Mutual, ICS, or Standard Insurance Company
 20 were ever clients of CMGT?
 21 A. I don't know as we sit here today.
 22 Q. Do you know whether they were clients in
 23 August of 2003?
 24 A. I don't know.

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1 Q. Okay. And then -- then the last
 2 sentence says that CMGT acquired clients such as
 3 Howard Hughes Medical Institute, McCord Travel,
 4 Atlanta Gas and Light Resources, ZILOG, and eBay.
 5 Inc., through these relationships that it had with
 6 the insurance companies. Do you know if that
 7 statement is true?
 8 A. I -- I don't know.
 9 Q. Do you know whether in August of 2003,
 10 CMGT still had any of these companies as clients?
 11 A. I -- I don't have the information with
 12 me today to answer yes or no.
 13 Q. Okay. And do you know -- do you have
 14 any idea how much revenue, if any, CMGT obtained
 15 from any of these clients?
 16 A. I'm sorry. I just don't know.
 17 Q. All right. Now, in Paragraph 20, you
 18 say that although CMGT had an established business
 19 plan, it required approximately 2 million in
 20 additional financing to fully explore its
 21 potential.
 22 What was CMGT going to do with that
 23 \$2 million?
 24 A. I don't know if I could answer that.

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1 Q. Have you ever known what it was going to
 2 do with that money?
 3 A. I'd have to look through the documents
 4 again to see. I don't want to speculate.
 5 Q. Have you ever --
 6 A. I -- I could --
 7 Q. Have -- do -- do you --
 8 A. -- guess, but I don't want to guess.
 9 Q. Um-hum. All right. Let's look at the
 10 last sentence here. It says, "CMGT conservatively
 11 projected that it would achieve a net profit of
 12 over 10 million per year within four years of
 13 receiving approximately 2 million in financing."
 14 A. Um-hum.
 15 Q. Who did those projections?
 16 A. Well, I didn't.
 17 Q. Do you know who did?
 18 A. No.
 19 Q. Did you ever see them?
 20 A. I don't recall.
 21 Q. Do you know when -- when the projections
 22 were made?
 23 A. No.
 24 MR. JOYCE: I'm sorry. Read the question

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1 back, please.
 2 Listen to the question for a minute.
 3 (WHEREUPON, the record was read by
 4 the reporter.)
 5 MR. JOYCE: Oh, I thought he said objections.
 6 Projections.
 7 THE WITNESS: Projections.
 8 MR. JOYCE: Okay. Fine.
 9 BY MR. MARINELLO:
 10 Q. And your answer was no?
 11 MR. JOYCE: His answer was no.
 12 BY THE WITNESS:
 13 A. Yeah.
 14 BY MR. MARINELLO:
 15 Q. Okay. And then the last sentence of
 16 that paragraph says, "CMGT also projected that it
 17 would have 24 million in working capital within
 18 four years of receiving additional financing." Do
 19 you know who made that projection?
 20 A. No.
 21 Q. Do you know when it was made?
 22 A. No.
 23 Q. Do you know what the basis for it was?
 24 A. No.

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1 Q. Now, your -- your memo says -- I'm
 2 sorry, your complaint says that -- that CMGT
 3 retained Spehar Capital to help it obtain financing
 4 in June of 2001 and -- and that they entered into a
 5 written agreement on October 1st, 2001, right?
 6 A. That's what it says.
 7 Q. Now, have you reviewed that October 1st,
 8 2001 agreement?
 9 A. Long time ago.
 10 Q. What did it provide?
 11 A. In what respect?
 12 Q. Well, what was the gist of the
 13 agreement?
 14 A. CMGT -- Spehar Capital was to help find
 15 financing for the money that CMGT needed in order
 16 to expand its business operations.
 17 Q. Okay. And was -- was -- was Spehar
 18 going to be compensated for -- if it did find some
 19 financing?
 20 A. On a -- yeah, on a percentage of
 21 whatever.
 22 Q. Whatever came in?
 23 A. I -- I believe that's the case.
 24 Q. Okay. And then your Paragraph 25 says

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1 that that agreement, the letter agreement dated
 2 October 1, 2001, was revised on September 30th,
 3 2002, and then it attaches a copy as Exhibit 2,
 4 correct?
 5 A. That's what the complaint says.
 6 Q. Did you review that agreement, the
 7 September 30th, 2002 agreement?
 8 A. Long time ago.
 9 Q. Okay. Now, if you look at the last
 10 sentence in Paragraph 26, it says that the
 11 agreement provided for a hundred thousand dollar
 12 management consultant fee and stock compensation,
 13 which was to be awarded upon CMGT's acceptance of a
 14 term sheet or other commitment. Do you see that?
 15 A. I do.
 16 Q. Is that your understanding of the
 17 agreement, Paragraph --
 18 A. It's been --
 19 Q. -- attached as Exhibit 2?
 20 A. It's been a while since I've seen it,
 21 but I think that that accurately describes that.
 22 (WHEREUPON, Mr. Stephen Novack
 23 entered the deposition proceedings.)
 24

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1 BY MR. MARINELLO:
 2 Q. Let's look at Exhibit 2 for a minute.
 3 The compensation provisions for this are stated on
 4 Page 3. Do you see that?
 5 A. It says "Compensation."
 6 Q. Yes. Do you see a place where it says
 7 that there's going to be a hundred thousand dollar
 8 management consultant fee that's going to be
 9 awarded upon the acceptance of a term sheet?
 10 MR. JOYCE: Which exhibit are you looking at?
 11 MR. MARINELLO: Exhibit 2.
 12 BY MR. MARINELLO:
 13 Q. Look at Page -- let's look at Page 4.
 14 That's -- that -- do you see -- do you see No. 2
 15 there where it says, "Management Consulting
 16 Services"?
 17 A. Yeah. Yeah, management consulting,
 18 okay, a hundred thousand dollars --
 19 MR. JOYCE: 2(a).
 20 BY THE WITNESS:
 21 A. Yeah, okay. Will pay Spehar a
 22 management consulting fee of a hundred thousand
 23 dollars.
 24

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1 BY MR. MARINELLO:
 2 Q. And then doesn't it say, "Such fee shall
 3 be paid to Spehar as a monthly consulting fee
 4 commencing on the first calendar day of the first
 5 calendar month immediately following such closing
 6 transaction date"?
 7 A. That's what it says.
 8 Q. So that's after there's a closing,
 9 correct?
 10 A. I -- I'm only reading the contract that
 11 it says.
 12 Q. It's not to be awarded to CMG -- upon
 13 CMGT's acceptance of a term sheet the way your
 14 complaint says?
 15 MR. JOYCE: This document's different from the
 16 complaint. Is that what you want him to say?
 17 MR. MARINELLO: Well, he's attached it as an
 18 exhibit to substantiate the allegations.
 19 MR. JOYCE: You're asking him to read a
 20 document. He's read a document. We've wasted a
 21 lot of time today having him read the documents.
 22 MR. MARINELLO: Um-hum.
 23 MR. JOYCE: Okay. He read it.
 24 BY MR. MARINELLO:

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1 Q. Is that what you were referring to when
 2 you said in Paragraph 26 that the agreement
 3 provided for a hundred thousand management
 4 consulting fee which was to be awarded upon CMGT's
 5 acceptance of a term sheet?
 6 A. I don't know.
 7 Q. Okay. The -- does the agreement -- do
 8 you understand the agreement to say that a
 9 management consulting fee will be payable only
 10 after a closing transaction?
 11 MR. JOYCE: You mean the document you just
 12 pointed him to?
 13 MR. MARINELLO: Yes, Exhibit 2, which is the
 14 document he defined as the agreement.
 15 MR. JOYCE: No, that's not true. He didn't
 16 define it as the agreement. You did.
 17 BY MR. MARINELLO:
 18 Q. Well, let's clarify that.
 19 Mr. Grochocinski, please go to
 20 Paragraph 25 of your complaint. Doesn't
 21 Paragraph 25 of your complaint identify the
 22 agreement between CMGT and SC as Exhibit 2?
 23 MR. JOYCE: Read the question back, please.
 24 (WHEREUPON, the record was read by

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1 the reporter.)
 2 BY THE WITNESS:
 3 A. It says which was to be awarded upon
 4 CMGT's acceptance of a term sheet.
 5 MR. JOYCE: That's not the question he asked
 6 you, okay?
 7 THE WITNESS: Yeah.
 8 BY MR. MARINELLO:
 9 Q. Let's take it step by step. Looking at
 10 Paragraph 25 --
 11 A. Okay.
 12 Q. -- have you identified the agreement
 13 between CMGT and Spehar Capital as Exhibit 2 to
 14 your complaint, yes or no?
 15 A. It appears so.
 16 Q. Okay. And if we turn to Paragraph -- if
 17 we turn to Exhibit 2 of your complaint --
 18 A. Um-hum.
 19 Q. Doesn't the portion of that agreement
 20 that talks about management consulting services
 21 provide that they are not payable until there's a
 22 closing?
 23 MR. JOYCE: Yes, we've read that already.
 24 MR. MARINELLO: You're stipulating to that

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1 sir?
 2 MR. JOYCE: I'm stipulating that's what it
 3 says.
 4 MR. MARINELLO: Okay.
 5 MR. JOYCE: But you're confusing the agreement
 6 with a September 30th letter agreement, okay?
 7 BY MR. MARINELLO:
 8 Q. Well, that's another question I have for
 9 you, Mr. Grochocinski.
 10 Exhibit 2 appears to be a document that
 11 is in kind of a draft form, and it has comments in
 12 boxes to the right, correct?
 13 A. That's what it appears to be, right.
 14 Q. Didn't you -- you couldn't find a
 15 formal -- a finalized copy of this agreement when
 16 you were looking through the records?
 17 A. No, this is the only document that I
 18 had, I guess. Whatever I have, I have.
 19 Q. Did you ask Mr. Spehar if he had a -- an
 20 agreement that didn't have all of these formatting
 21 edits all over the place?
 22 A. I didn't ask Mr. Spehar anything.
 23 Q. Okay. Your counsel has made a
 24 distinction between the letter agreement and --

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1 strike that,
 2 In Paragraph 27 -- now you'll notice
 3 that -- that Exhibit 2 has attached to it a list of
 4 people, companies, who were approached as a
 5 accredited investor/firms or other parties,
 6 correct?
 7 A. I'm sorry. Where was it? Where were
 8 we?
 9 Q. Let's go to Exhibit 2.
 10 A. Okay.
 11 Q. Okay? And at the back of Exhibit 2,
 12 there's a list of what -- what's -- what are called
 13 accredited investors/firms and other parties. Do
 14 you see that?
 15 A. (Witness reading document.) Okay.
 16 Q. Okay. What do you understand that list
 17 of persons to be?
 18 A. I don't know.
 19 Q. What function does that list of persons
 20 perform in the context of this agreement?
 21 A. I'm not sure.
 22 Q. Okay. If you turn to Paragraph 27 of
 23 your complaint --
 24 A. Okay.