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

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

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT BASED ON THEIR UNCLEAN HANDS DEFENSES

Stephen Novack
Mitchell L. Marinello
Steven J. Ciszewski
Novack and Macey LLP
100 N. Riverside Plaza
Chicago, IL 60606
(312) 419-6900
Doc# 284420

Defendants "Mayer Brown" and Ronald B. Given ("Ronald"), by their attorneys, Novack and Macey LLP, submit this memorandum in support of their Motion for Summary Judgment based on their defenses that have at various times been referred to as the "unclean hands," "absurd result" or "fraud on the court" defenses (collectively, the "Unclean Hands Defenses").[1]

SUMMARY OF MOTION

Defendants raised the Unclean Hands Defenses because this case simply makes no sense. After considering the Unclean Hands Defenses at the pleadings stage, the Court expressed its own reservations -- stating that this is a "very odd case" and that the Unclean Hands Defenses are "extremely persuasive." (Oct. 30, 2007 Transcript, attached hereto as Exhibit 1, at 2, 3.) As will be confirmed below, this Court had every right to be suspicious.

First, if successful, this case would yield an absurd result or fraud on the Court. The crux of the case is that Defendants supposedly committed malpractice by allegedly failing to defend CMGT, Inc. ("CMGT") in a California lawsuit (the "Spehar Lawsuit") filed against it by Spehar Capital, LLC ("Spehar"). The Spehar Lawsuit alleged that Spehar was entitled to a commission upon the closing of an asset sale (the "Trautner Deal") that was CMGT's last hope of survival because CMGT was out of money. However, Spehar obtained an injunction prohibiting the closing of the Trautner Deal -- the very closing that, if Spehar's position were valid, would have brought it the commission it sought. That injunction was also the end of CMGT.

Spehar was not done. It amended its Lawsuit to seek damages and later obtained a $17 million default judgment (the "Default Judgment") -- a Default Judgment that was based on self-serving testimony that this Court noted was "nothing more than the speculation of Spehar's principal,

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[1] As ordered by the Court, this motion is limited to the Unclean Hands Defenses. Defendants reserve the right to file an additional summary judgment motion at any appropriate time if this case proceeds (which it should not).

Gerry Spehar." (June 28, 2007 Memorandum Order, d/e 49, at 3 n.1.) Indeed, even the judge that entered the Default Judgment stated that he expected that it would be vacated -- rendering it worthless. Spehar, however, had a different ruse in mind. It turned its sights on Defendants, figuring that, unlike CMGT, Defendants had enough money to pay the trumped-up Default Judgment. So, Spehar used the Default Judgment to file an involuntary bankruptcy proceeding against CMGT, and then convinced the Trustee to file this malpractice case -- a case which, if successful, would provide Spehar with the lion's share (i.e., at least 85%-90%) of any recovery. Yet, to prove malpractice, the Trustee would have to show that the Spehar Lawsuit should have failed and that Spehar had no right to any recovery in the first place. So, in the end, if this case succeeds, Spehar would be rewarded with a multi-million dollar windfall for filing the meritless Spehar Lawsuit that put CMGT out of business. Nothing could be more absurd.

Second, this case could have been avoided if the Trustee had simply moved to vacate the Default Judgment. After all: (1) the judge who entered the Default Judgment said on the record that he expected it to be set aside; (2) the Trustee admitted that vacating the Default Judgment would have been the best thing for CMGT; and (3) the Trustee had sufficient time to file such a motion. Nevertheless, the Trustee made no attempt to do so.

Third, assuming the Trustee did not already know the malpractice case had no merit, he would have realized that if he had conducted even a perfunctory pre-filing investigation. He failed to do this, too. Indeed, all the Trustee had to do was pick-up the phone and talk to any one of CMGT's management or key shareholders -- like Louis Franco, Wayne Baliga, James Wong or Kim Quarles. Yet, the Trustee never spoke with any of them about this malpractice case. If the Trustee had done so, they would have told him facts demonstrating that he had no case.

For any of these three reasons, this case should never have been filed, and should now be rejected. This is particularly true since Plaintiff is a bankruptcy trustee: "Judges must . . . be vigilant in policing the litigation judgment exercised by trustees in bankruptcy." Maxwell v. KPMG LLP, 520 F.3d 713, 718 (7th Cir. 2008). The Maxwell court reasoned as follows:

> The filing of lawsuits by a going concern is properly inhibited by concern for future relations with suppliers, customers, creditors, and other persons with whom the firm deals (including government) and by the cost of litigation. The trustee of a defunct enterprise does not have the same inhibitions. . . . Judges must therefore be vigilant in policing the litigation judgment exercised by trustees in bankruptcy, and in an appropriate case must give consideration to imposing sanctions for the filing of a frivolous suit.

Id. This warning applies with full force here. This case made no sense from the get-go and, if successful, would reward the very party that caused CMGT to fail in the first place. Yet, all of this could have been avoided if the Trustee had either: (1) vacated the Default Judgment; or (2) done a proper pre-filing investigation. He did neither and, instead, chose to partner with Spehar.

Under Maxwell, this Court has a gate-keeping role to ensure that bankruptcy trustees exercise proper and reasonable litigation judgment. Id.; see also Riggs v. Airtran Airways, Inc., 497 F.3d 1108, 1117 (10th Cir. 2007) (court acts as a "gatekeeper" at the summary judgment stage). As previewed above -- and explained further below -- this case is neither proper nor reasonable. Indeed, it can have only one of two outcomes. Either: (1) it succeeds -- so the Trustee will have proven that Spehar would have lost its Lawsuit if Defendants had defended CMGT -- and yet Spehar takes almost all the recovery; or (2) it fails and wastes the Court's and parties' time and money. This Court should exercise its gate-keeping role and stop this case right now.

PROCEDURAL HISTORY

Defendants moved to dismiss this case because of the Unclean Hands Defenses (and other defenses). Although the Court held that it could not dismiss at the pleadings stage, it found the Unclean Hands Defenses "very persuasive" and "extremely persuasive." (Ex. 1 at 2, 3 & 6.) As a result, the Court bifurcated the case to allow for discovery (and summary judgment, if appropriate) regarding the Unclean Hands Defenses. (Id. at 3-4.)

With respect to discovery, the Court indicated that the key issues included why the Trustee: (1) agreed to partner with, and be paid by, Spehar; and (2) did not vacate the Default Judgment:

> [T]here is a question lurking about why this was handled in the way it was and issues as to the trustee's position in coming forward and being paid by this entity, issues regarding why the trustee didn't go in and move to vacate the [default], and I think what we need to do is we need to do discovery solely on that, what I would call, unclean hands issue first, so that I can have facts in front of me and decide whether the case should be dismissed on that issue. (Id. at 3.)

The Court also agreed that discovery regarding the Trustee's pre-filing investigation -- or lack thereof -- was appropriate. Specifically, when asked by the Court what discovery they would pursue, Defendants stated they might depose the Trustee, Spehar and CMGT's key shareholders or directors. Defendants' counsel explained that such discovery would show, among other things, that:

> [The shareholders] were not contacted by the trustee to even ask them about the allegations that [Defendants] think are completely unsupported. They're on information and belief. But the people that had the information about this complaint, I think, will testify that they were never contacted by the trustee, that they don't believe in this complaint, and had they been asked by the trustee they would have so told him.

(Id. at 5.) The Court stated that this discovery was "okay." (Id.)

Discovery on the Unclean Hands Defenses is now complete, the relevant facts are undisputed and they fully support the Unclean Hands Defenses. Accordingly, summary judgment should be entered in favor of Defendants.

UNDISPUTED FACTS[2]

A. The Trautner Deal

In June, 2001, CMGT hired Spehar to find $2,000,000 in financing necessary to continue operations. (SOF ¶15.) As of July, 2003, however, Spehar had failed to secure financing. (Id. ¶18.) At that point, CMGT was "in a desperate financial condition," and Spehar knew it. (Id. ¶19.) At around the same time, Charles Trautner ("Trautner"), a CMGT shareholder, proposed the Trautner Deal -- pursuant to which "Newco" -- a new corporation to be formed -- would acquire all of CMGT's assets in exchange for, at CMGT's option, either: (a) 20% of Newco's stock or (b) $500,000 in cash. (Id. ¶¶26-27.) Trautner committed to capitalize Newco with $2.5 million, thus rendering a 20% stock interest in Newco and $500,000 in cash roughly equivalent. (Id. ¶28.) Louis B. Franco ("Franco"), CMGT's President, Chairman and CEO, believed that the Trautner Deal was CMGT's only viable option for survival, and requested that CMGT's shareholders approve the Trautner Deal. (Id. ¶¶9, 31.) In August 2003, CMGT's shareholders unanimously approved the Trautner Deal and chose to accept 20% of Newco's stock instead of cash. (Id. ¶32.)

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[2] The facts stated herein are taken from Defendants' Local Rule 56.1 Statement of Undisputed Facts submitted herewith, and will be cited as "(SOF ¶____)." Those facts that, in turn, are based on the Complaint are assumed true solely for the purposes of this Motion for Summary Judgment, and Defendants reserve the right to deny them at any appropriate time.

B. The Spehar Lawsuit

Although the Trautner Deal was not covered by Spehar's written compensation agreement, Spehar asserted that there was an oral modification providing that Spehar would be compensated if the Trautner Deal closed. (SOF ¶¶33-35, 37.) CMGT disputed this, and the parties were unable to resolve the issue. (Id. ¶36.) On September 9, 2003, Spehar filed the Spehar Lawsuit in California. (Id. ¶38.) Instead of allowing the Trautner Deal to close and seeking to freeze the proceeds thereof until its alleged right to compensation could be decided, Spehar sought a TRO prohibiting CMGT from closing the Trautner Deal. On September 12, 2003, Spehar obtained the TRO. (Id. ¶39.) Thereafter, on October 3, 2003, at Spehar's request, the California court issued a preliminary injunction preventing CMGT from closing the Trautner Deal. CMGT did not appear at that hearing. (Id. ¶43.)

On December 1, 2003 -- despite knowing that CMGT was broke -- Spehar served CMGT with an amended complaint seeking money damages. (Id. ¶45.) On March 18, 2004, Spehar obtained the $17 million Default Judgment. (Id. ¶48.) The Default Judgment was based only on the speculative testimony of Gerard Spehar ("Gerry") -- Spehar's sole owner, officer and employee -- that if CMGT had rejected the Trautner Deal, CMGT would have: (1) promptly obtained $2.5 million in financing; (2) been worth almost $200 million in two years; and (3) done an IPO and hired Spehar to do it, from which Spehar would have received more than $16.5 million. (Id. ¶47.) At the hearing on the Default Judgment, the judge stated that if he entered the Default Judgment, he expected that it would be vacated:

> THE COURT: Once you have the judgment, they're going to come in and set aside the judgment, and the dance starts all over again. (Id. ¶49.)

CMGT did not pay any part of the Default Judgment. (Id. ¶50.)

C. Spehar Initiates The CMGT Bankruptcy

At this point, all Spehar had was a worthless Default Judgment against an entity with no money. So, Spehar set its sights on Defendants -- the proverbial "deep pocket." On August 25, 2004, Spehar filed its single creditor involuntary bankruptcy petition against CMGT. (SOF ¶51.) Spehar admits that the sole purpose of the bankruptcy filing was to give it a back door way to collect on its otherwise worthless Default Judgment through a malpractice action. (Id. ¶52.) Indeed, within days of the Trustee's appointment, Spehar told the Trustee that it was "very interested" in having the Trustee pursue Defendants as a way of collecting on the Default Judgment. (Id. ¶¶54-55.)

As if that was not enough, Spehar's proposed malpractice claim could succeed only if its own complaint that led to the Default Judgment was meritless. E.g., Webb v. Damisch, 842 N.E.2d 140, 146 (Ill. App. Ct. 2005) (a malpractice plaintiff "must prove that counsel's negligence resulted in the loss of the underlying action"); see also Tri-G, Inc. v. Burke, Bosselman & Weaver, 856 N.E.2d 389, 394-95 (Ill. 2006). Particularly coupled with the other matters discussed herein, that should have set off the Trustee's alarm buttons. Instead, once Spehar offered to finance the malpractice case and find a contingency fee lawyer to take it, (SOF ¶¶56-57), the Trustee uncritically agreed to go along.

D. The Trustee Makes No Effort To Vacate The Default Judgment

The Order of Relief was entered on September 15, 2004, (SOF ¶53), and the Trustee was appointed on September 21, 2004 (id. at ¶2). Pursuant to 11 U.S.C. § 108, the Trustee had sixty (60)

days from the date of the Order of Relief -- i.e., until November 14, 2004 -- to seek to vacate the Default Judgment. However, the Trustee made no attempt to do so. Among other things, he never: (1) looked at any case law, hornbooks or treatises on California law relating to whether the Default Judgment could be vacated; (2) talked to a California attorney about how default judgments can be vacated; (3) contacted anyone from CMGT or Defendants to determine if they could help vacate the Default Judgment; (4) reviewed (or even tried to obtain) the transcript of the Default Judgment hearing in which the California Judge stated that he expected a motion to vacate to be filed; or (5) filed a motion to vacate the Default Judgment. (SOF ¶¶61-65.)

Consistent therewith, the Trustee's time records contain no reference to any time the Trustee or anyone else in his office spent analyzing or determining whether a motion to vacate the Default Judgment was timely or possible or whether to file such a motion. (Id. ¶66.)

E. The Trustee Fails To Conduct A Proper Pre-Filing Investigation

As will be explained in Argument Section III below, the Trustee uncritically filed this case without conducting a proper pre-filing investigation. In order to avoid undue repetition and length, we will discuss the undisputed facts relating thereto (and to other arguments) in the Argument section.

ARGUMENT

I. IF SUCCESSFUL, THIS CASE WOULD YIELD AN ABSURD RESULT AND FRAUD ON THE COURT

Spehar was CMGT's enemy. It failed to find financing for CMGT for over two years and then, when CMGT was in desperate financial condition, sued to prevent CMGT from closing the Trautner Deal -- which was CMGT's last chance of survival. Spehar's TRO prevented the closing,

and caused CMGT to go out of business. Then, despite the fact that CMGT was defunct, Spehar amended its complaint to seek damages, and obtained a $17 million Default Judgment based only upon Gerry's speculative testimony that CMGT would have promptly found financing from another source, making CMGT worth $200 million just two years later. This, even though Spehar could not find a penny of financing for CMGT.

Spehar then used the Default Judgment to put CMGT into bankruptcy, and perversely told the Trustee that CMGT had been wronged by Defendants' alleged failure to stop Spehar's own attacks on CMGT. Nevertheless, the Trustee uncritically joined hands with Spehar and -- at no cost to himself -- filed this case.

Oddly (to use the Court's word), (Ex. 1 at 3), for this malpractice action to succeed, the Trustee must prove that the Spehar Lawsuit was doomed to failure and that Spehar was never entitled to recover. But, then, if the Trustee succeeds, he must hand over the lion's share of any recovery to Spehar -- whom he would have just proved had no right to recovery in the first place. By shielding Spehar with his official office, the Trustee is fraudulently trying to help Spehar collect a meritless claim and be rewarded for causing the losses suffered by CMGT and its shareholders.

The Seventh Circuit encountered an analogous scenario in Maxwell, supra. That case started in 1999, when KPMG -- the debtor's pre-bankruptcy auditor -- negligently approved the debtor's over-stated earnings statement. 520 F.3d at 714-15. Then, in 2000, the debtor purchased a "dot-com" company called US Web. Still later, the "dot-com" bubble burst and US Web pulled the debtor into bankruptcy. The bankruptcy trustee then filed a $600 million accounting malpractice claim against KPMG, alleging that, if it had corrected the 1999 over-stated earnings statement, the debtor would not have been able to purchase US Web and, thus, would not have gone into

bankruptcy. The trustee sought recovery on this theory even though the largest beneficiary thereof would have been the shareholders of US Web, the very entity that caused the bankruptcy. The Seventh Circuit saw through the trustee's ruse:

> An immediate problem . . . is that the principal beneficiaries should the trustee prevail in this suit would be the former shareholders of U.S. Web . . . . The trustee is asking for damages far in excess -- more than $500 million in excess -- of the $93.6 million owed [the debtor's] unsecured creditors. The bulk of the recovery would thus go to the shareholders, and U.S. Web's shareholders received 57 percent of the stock of [the debtor]. Yet the linchpin of the trustee's case is that U.S. Web pulled [the debtor] down to its doom. **U.S. Web cannot be at once the cause of the bankruptcy and its principal beneficiary.** Id. at 715-16 (emphasis added).

Sound familiar? It is. Indeed, it is the same situation facing this Court. In Maxwell, the trustee argued that US Web caused the debtor's failure, and that KPMG was negligent because it did not prevent that from happening. Here, the Trustee argues that Spehar caused CMGT's failure, and that Defendants were negligent because they did not prevent that from happening. Just like US Web, Spehar **"cannot be at once the cause of the bankruptcy and its principal beneficiary."** Yet, if this case succeeds, that is exactly what would happen.

Indeed, for at least two reasons, our situation is worse than Maxwell. First, in Maxwell, US Web did not intentionally cause the debtor's demise. Rather, US Web fell victim to the inevitable market correction that devalued all "dot-com" businesses. Conversely, here, Spehar's intentional acts -- filing its Lawsuit, obtaining the TRO and Default Judgment and initiating this bankruptcy -- caused CMGT's failure. Second, in Maxwell, US Web's former shareholders would have received

"only" 57% of the recovery, whereas, here, Spehar stands to receive at least 80-90% thereof. (SOF ¶58.)

For this reason alone, this case should be stopped. But there is more.

II. THE TRUSTEE MADE NO EFFORT TO VACATE THE DEFAULT JUDGMENT

As this Court has already noted, there is "a question lurking" about why the Trustee did not move to vacate the Default Judgment. (Ex. 1 at 3.) Well, we now know that the Trustee: (A) knew that the best course was to vacate the Default Judgment; and (B) had the opportunity to vacate it; but (C) took no steps to do so. We address each in turn.

A. The Trustee Admitted That The Best Course Was To Vacate

The Trustee knew that vacating the Default Judgment would eliminate any possible damage to CMGT. Indeed, he said so in an affidavit submitted to the Bankruptcy Court (the "Bankruptcy Affidavit"):

> It appeared to me that if [the Default Judgment] could be vacated, the [CMGT bankruptcy] estate could not claim to have suffered injury from entry of the judgment. (SOF ¶59.)

Then, during his deposition in this case, the Trustee testified as follows:

> Q. Well, if -- if the default judgment was vacated, then the -- the estate wouldn't have a claim against it for $17 million, correct?
>
> A. I suppose that's true.
>
> Q. So it would be in the interest of the estate to get rid of that claim so that other creditors could share in the -- whatever assets CMGT had, correct?
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> A. I suppose. (Id. ¶60.)

B. The Trustee Had The Opportunity To Vacate

The Order of Relief was entered on September 15, 2004, and the Trustee was appointed on September 21, 2004. (SOF ¶¶2, 53.) Pursuant to 11 U.S.C. §108, the Trustee had an additional sixty (60) days from the date of the Order of Relief -- i.e., to November 14, 2004 -- to move to vacate the Default Judgment. Thus, the Trustee had a full 54 days to move to vacate.

C. The Trustee Took No Steps To Vacate

Despite having a full opportunity to do so, the Trustee made no effort to vacate the Default Judgment. Specifically, he:

- Never reviewed the transcript of the Default Judgment hearing -- during which the California Judge all but invited a motion to vacate the Default Judgment. (SOF ¶¶49, 64.)
- Never asked Defendants or any of CMGT's officers or shareholders if they knew anything that might help the Trustee vacate the Default Judgment or if they would assist him in trying to do so. (Id. ¶63.)
- Never looked at any case law, hornbooks or treatises on California law relating to whether the Default Judgment could be vacated. (Id. ¶61.)
- Never talked to a California attorney about how default judgments can be vacated. (Id. ¶62.)
- Never filed a motion to vacate. (Id. ¶65.)

Indeed, the Trustee's time records contain no reference to the issue of a motion to vacate, let alone any time analyzing or determining whether the same was timely or possible, or whether such a motion should be filed. (Id. ¶66.)

D. The Trustee's Excuses Either Help Defendants Or Make No Sense

The Trustee has never claimed that he made an effort to vacate the Default Judgment. Instead, he has offered conflicting excuses for why he chose not to do so. First, the Trustee testified in his Bankruptcy Affidavit that "it was not economically feasible to retain an attorney in California, since the estate had no assets." (SOF ¶67.) If true, this excuse helps Defendants. After all, the Trustee stepped into the shoes of CMGT as it existed at the time of the bankruptcy filing. If the bankruptcy estate had no money to hire a lawyer to vacate the Default Judgment, neither did CMGT have the money to resist the Spehar Lawsuit or seek to vacate the Default Judgment prior to bankruptcy. (See id. ¶139 (the Trustee is not aware of CMGT having any more assets when the Spehar Lawsuit was filed than when it went into bankruptcy).) In fact, the Trustee admitted as much in a draft letter to Spehar's counsel:

> While I appreciate the fact that your client [i.e., Spehar] has a large judgment [i.e., the Default Judgment], it was entered by default largely due to the lack of funds by the debtor [i.e., CMGT]. (Id. ¶137 (emphasis added).)

The Trustee's knowledge that CMGT had no money to defend the Spehar Lawsuit makes his decision to file this case all the more odd. Why did the Trustee go along with Spehar's far-fetched theory that Defendants advised CMGT not to appear in defense of the Spehar Lawsuit? Why did the Trustee ignore his own realization that CMGT had no money to fund a defense? Why didn't the Trustee simply ask someone from CMGT why CMGT did not defend itself?

The Trustee's second excuse gets him no further. He testified that, although he knew that there were a number of grounds for vacating a default judgment, the only one that could apply was the one based on Defendants admitting that the default resulted from their error. (Id. ¶67.) Yet,

California law also allows the Court to vacate a default judgment resulting from the client's allegation that its lawyer made a mistake. State Farm Fire & Casualty Co. v. Pietak, 109 Cal. Rptr. 2d 256, 263-64 (Cal. Ct. App. 2001) (relief from judgment based on lawyer's mistake of law without attorney's admission of error). So, if the Trustee is right that there is malpractice here, then the Trustee should have brought a motion to vacate and brought those facts to the attention of the California Judge. And, given that the California Judge virtually invited a motion to vacate, there is every reason to believe that such a motion would have been successful. But, the Trustee never even bothered to try.

* * *

The foregoing two sections are sufficient to mandate summary judgment, and the Court need read no further. However, there is another substantial failure -- the Trustee's failure to do a pre-filing investigation. Defendants address that failure -- not to prove that they are right on the merits -- but to show that if the Trustee had done his duty and investigated the facts, he would have seen that the circumstantial bill of goods Spehar sold him was completely off-base and this case would never have seen the light of day. It is to a discussion thereof that this Memorandum now turns.

III. THE TRUSTEE DID NO PRE-FILING INVESTIGATION

The Maxwell case reinforces the principle that bankruptcy trustees must exercise reasonable litigation judgment, and may not pursue frivolous or illogical claims simply because there is no financial downside to doing so. That rationale applies here because Spehar agreed to pay litigation costs and to find a contingency fee lawyer for the Trustee. It is obvious that the Trustee did not care whether the case did or did not have merit.

Indeed, after deciding to join hands with Spehar and making no effort to vacate the Default Judgment, the Trustee then failed to conduct a meaningful pre-filing investigation. The questions at the heart of the Trustee's malpractice case include: (a) why CMGT did not defend the Spehar Lawsuit; and (b) why CMGT did not settle with Spehar. To determine the answers, the Trustee should have at least spoken to the CMGT management and shareholders involved in CMGT's decision making process, as well as to Ronald, Mayer Brown and Charles Trautner. Yet, he did not speak to any of them. (SOF ¶¶98-104.)

CMGT's management and shareholders included: Franco, CMGT's only officer, and the person who ran CMGT; James M. Wong ("Wong"), who functioned as CMGT's accountant, was a major shareholder and assisted Franco; Wayne Baliga ("Baliga"), another major shareholder who provided funds to keep CMGT afloat and also assisted Franco; and Kim Quarles ("Quarles"), a CMGT shareholder who is also an attorney. (Id. ¶¶9, 94-97.) These witnesses had first-hand knowledge of, and were directly involved in, CMGT's decisions relating to the Spehar Lawsuit. Each signed an affidavit, testifying, among other things, that the Trustee did not talk to him or her about the negligence case. (Id. ¶¶98-101.)[3]

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[3] Except for Baliga, each of these witnesses also confirms that the Trustee's attorneys also did not talk to him or her about this malpractice case before it was filed. (SOF ¶¶98-99, 101.) Although the Trustee testified that he has no knowledge as to whether his attorneys had spoken to Baliga (id. at 100), we have information that those attorneys did meet with him about certain matters. However, because the Trustee has taken the position that, for purposes of the Motion, he is not relying on any investigation by his attorneys, Baliga's affidavit does not address his meeting with those attorneys. (E.g., Pl's Memo. in Support of His Privilege Log Assertions, d/e 90, at 26-27 (Trustee does not intend to rely on any material protected by attorney client privilege or work product doctrine to respond to the Unclean Hands Defenses).) Further, the substance of Baliga's affidavit (at ¶¶2-9) precludes any notion that he could have said anything to the Trustee's attorneys supportive of the Trustee's malpractice allegations.

The affidavits establish that, had the Trustee contacted these key witnesses, he would have learned that they believe that Defendants did nothing wrong. (Id. ¶107.) Instead, they believe that Spehar was the cause of CMGT's demise. (Id. ¶108.) The Trustee also would have learned that, according to these key witnesses, the central allegations of his Complaint have no merit whatsoever. In short, all the Trustee had to do was contact the key CMGT witnesses who were directly involved in the decisions at issue and had first-hand knowledge about what happened. They would have told him there was no case. Instead, the Trustee accepted as true everything that Spehar told him, ignoring other -- more logical -- explanations for why CMGT acted as it did. In so doing, the Trustee failed to meet his obligations under Maxwell and as an officer of this Court, as will now be shown.

A. This Case Was Begging For A Thorough Pre-Filing Investigation

As a threshold matter, any reasonable bankruptcy trustee would have realized that this case required a thorough pre-filing investigation. This is so for at least five reasons.

1. Spehar Was Not Trustworthy

From the get-go, it should have set off alarm bells that Spehar was suggesting that Defendants were negligent in failing to defend CMGT against Spehar's own Lawsuit. After all, for Defendants to have damaged CMGT, the Trustee would have to show that Spehar had no right to recovery in its Lawsuit. Tri-G, 856 N.E.2d at 394-95; Webb, 842 N.E.2d at 146. Moreover, more than a year before the Trustee filed his Complaint, many of CMGT's officers and shareholders advised him in writing that the Spehar Lawsuit was totally meritless and that Spehar was the cause of CMGT's demise. (SOF ¶¶127-33.) Any reasonable trustee would have viewed Spehar's story with a skeptical eye and realized that his allegations needed to be thoroughly investigated.

2. Spehar Was Biased Against Defendants

Spehar had a multi-million dollar financial motive to falsely accuse Defendants. CMGT had no assets and Defendants were the only deep pocket around. Gerry also likely had a personal animus toward Ronald, who had told him that Spehar had no right to payment from CMGT. (SOF ¶36.) Because of Spehar's bias, the Trustee needed to investigate his allegations.

3. Spehar's Actions Were Manipulative

Illinois law does not allow a party to recover on another party's attorney malpractice claim. E.g., Clement v. Prestwich, 448 N.E.2d 1039, 1041 (Ill. App. Ct. 1983). Thus, from the get-go, the Trustee knew that Spehar's intention was to use the Bankruptcy Court and the Trustee's office to accomplish something the law did not permit. Indeed, as will be explained in greater detail in Section III.C below, Spehar also told the Trustee that he should try to "scare" key witnesses into supporting the claim. (SOF ¶140.) All of this surely alerted the Trustee that he needed to investigate this claim before it was filed.

4. Spehar's Allegations Were Not Plausible

The gravamen of Spehar's allegations was that Defendants either: (a) agreed to defend CMGT and then failed to do so; or (b) told CMGT to ignore the Spehar Lawsuit. These are serious charges, but they make no sense and are contradicted by other facts establishing a much more logical explanation for why CMGT acted as it did.

For example, Defendants' engagement letter says they were hired "in connection with [CMGT's] initial capitalization, formative acquisition activities, and other general corporate

activities." (SOF ¶10.)[4] The engagement letter says nothing about litigation and states that its scope may be expanded only by "mutual consent," which "must be in writing." (Id. ¶12) Yet, the Complaint does not refer to any such written document. Moreover, immediately after the TRO was entered, Ronald sent an e-mail to CMGT's President and all of CMGT's shareholders stating that Defendants "have not been retained to deal with [the Spehar Lawsuit], and [] do not expect to be." (Id. ¶41.) Not a single disagreement with that statement has been produced. Thus, as a start, the Trustee needed to investigate whether Defendants were hired to represent CMGT in the Spehar Lawsuit and whether CMGT really expected Defendants to do so.

In addition, it would be quite extraordinary for an internationally-recognized law firm not to appear and let its client default. And, if it did make such a terrible mistake, one would not expect it to be repeated over and over again. The TRO was entered on September 12, 2003; the preliminary injunction was entered on October 3, 2003; Spehar amended its complaint to seek damages on December 1, 2003; and the Default Judgment was entered on March 18, 2004. (Id. ¶¶39, 43, 45, 48.) Particularly without asking anyone at CMGT about it, it was unreasonable for the Trustee to believe that Defendants were retained to defend CMGT, knew about these four separate events, yet still failed to appear time and again.

Spehar's alternate theory -- i.e., that Defendants advised CMGT to ignore the Spehar Lawsuit -- is equally unlikely. Would even a first year law student advise a client to ignore litigation and just pretend it does not exist? And what about after the preliminary injunction was entered and the complaint was amended to seek money damages? Is it reasonable to think Defendants were so

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[4] The engagement letter provided that Defendants would defer their fees until such time as CMGT obtained financing. (SOF ¶11.)

stubborn that they just kept telling CMGT not to worry? Would any rational bankruptcy trustee take such extraordinary allegations at face value without investigating them?

And what about CMGT's own responsibility? The Complaint shows that CMGT and all its shareholders knew a TRO had been entered and that a preliminary injunction hearing had been scheduled. (Id. ¶¶41-42.) Some shareholders also knew that a preliminary injunction was entered and that Spehar amended its complaint to seek damages. (Id. ¶¶44-45.) If Defendants failed to show up or told CMGT not to worry about the Spehar Lawsuit, wouldn't CMGT's shareholders and officers be the ones coming to the Trustee to complain about purported malpractice? None did. To the contrary, CMGT's key shareholders told the Trustee that Spehar was to blame, (id. ¶108), and they insist to this day that Defendants did nothing wrong (id. ¶107). Indeed, the only one complaining about Defendants was Spehar -- who was CMGT's adversary and never a part of CMGT's attorney-client relationship with Defendants. Wouldn't a reasonable trustee have investigated -- and obtained confirmation of -- Spehar's "facts" from someone who was actually a part of the attorney-client relationship? The Trustee never did.

5. The Trustee Was Aware Of A More Plausible Explanation

Long before the Trustee filed his legal malpractice claim, the Trustee had information that provided a much more plausible explanation for why CMGT did not defend itself -- i.e., CMGT simply did not have the money to do so. Thus:

- In a September 19, 2003 email to CMGT's shareholders just after the TRO, Ronald stated "**CMGT has no money to fight this battle [i.e., the Spehar Lawsuit]**." (SOF ¶135 (emphasis added).)

- On December 15, 2004, two years before this case was filed, Quarles advised the Trustee in writing that: "**CMGT was left unfunded and**

without the financial means to battle the spurious allegations of the [Spehar Lawsuit]." (Id. ¶130 (emphasis added).)

- On December 8, 2004, Wong wrote the Trustee that: "**[Spehar] and his counsel[] knew that CMGT was never funded and did not have the financial resources to defend itself.**" (Id. ¶128 (emphasis added).)

- On July 21, 2005, Franco wrote a letter to Ira Bodenstein, the United States Trustee, a copy of which was provided to the Trustee. In that letter, Franco explained that "**CMGT was never funded and could not defend itself in court.**" (Id. ¶133 (emphasis added).)

Wouldn't a rational, unbiased bankruptcy trustee investigate what he was being told by CMGT's officers and shareholders -- that CMGT did not defend the Spehar Lawsuit because it lacked the funds to do so and not because of malpractice by its attorneys? The Trustee did not do so.

Moreover, the Trustee was no stranger to CMGT's bad financial condition. He analyzed CMGT's financial condition and put together a list of CMGT's assets and liabilities. As a result, he knew that CMGT's only asset was a software program that he sold to Spehar for $1500. He also knew CMGT had plenty of unpaid bills and other liabilities. (Id. ¶¶138-139.) In short, the Trustee knew CMGT was in terrible financial shape, and that gave him reason to wonder how CMGT supposedly could have afforded to defend itself two thousand miles away in California.

Indeed, the Trustee admitted that CMGT's lack of funds was largely responsible for it not defending itself. In a letter he drafted to Spehar's counsel before filing this case, the Trustee stated that Spehar's judgment was entered by default "largely due to the lack of funds by the debtor [CMGT]." (Id. ¶137.) And, in a letter dated December 16, 2004, the Trustee responded to Ms. Quarles' statement that CMGT could not afford to defend itself by suggesting that she and the other shareholders should have contributed money to CMGT to fund a defense. (Id. ¶136.)

Further, in his Bankruptcy Affidavit, the Trustee excused his own decision not to seek to vacate the Default Judgment by referring to CMGT's lack of funds: "[I]t was not economically feasible to retain an attorney in California, since the [CMGT] estate had no assets." (Id. ¶67.) Exactly -- and the same was true for CMGT before bankruptcy, as it had no money to retain an attorney to defend itself or to vacate the Default Judgment. And, although CMGT's shareholders could have contributed more money for a legal defense, they "chose" not to do so -- which the Trustee acknowledges was their right. (Id. ¶93.)

Incredibly, not only did the Trustee not investigate what he was being told by the shareholders, but he actually forwarded some of these letters to Spehar's counsel. (Id. ¶134.) So, now we know exactly what happened here. When the Trustee got "facts" from Spehar, he accepted them as true, never shared them with anyone at CMGT and never asked them for their side of the story. Conversely, when the Trustee got the real facts from CMGT's shareholders, he took no action except to forward their letters to Spehar's counsel. If this is not the exact scenario of which the Seventh Circuit warned in Maxwell, nothing else ever will be.

B. The Trustee Did No Investigation

At bottom, the Trustee did absolutely nothing to determine if the central premise of his case -- that Defendants committed legal malpractice when they failed to defend CMGT or told CMGT to ignore the Spehar Lawsuit -- was true. Indeed, the Trustee did not contact any witnesses with first-hand knowledge thereof before he filed his Complaint -- not Franco, Wong, Baliga, Quarles, Given or Trautner. And, all he had to do was call them. Or, if he wanted their answers under oath, he had the specific power to examine them pursuant to Bankruptcy Rule 2004. In re Wilcher, 56 B.R. 428, 433 (Bkrtcy. N.D. Ill. 1985) (trustee may examine the debtor, its agents, creditors and third

parties who have had dealings with the debtor). Nor did he take any action to determine if the numerous letters stating that CMGT had no money to defend the Spehar Lawsuit were true. (SOF ¶87.) Indeed, he never asked anyone at CMGT even one question about why CMGT did not attempt to vacate the Default Judgment. (Id. ¶91.)

Further confirming that the Trustee did not conduct an investigation, to this day he does not know the most basic facts about why CMGT did not defend itself. For example, the Trustee:

- Does not know whether Ronald ever advised CMGT not to appear and defend the preliminary injunction. (Id. ¶88.)
- Does not know if it is true that CMGT did not have the financial resources to defend itself. (Id. ¶86.)
- Does not know why CMGT did not defend itself against Spehar's amended complaint. (Id. ¶89.)
- Does not know if CMGT made a deliberate decision not to appear for the Default Judgment prove-up hearing. (Id. ¶90.)
- Does not know if Franco and other CMGT shareholders just wanted to give up the business and let it disappear rather than defend the Spehar Lawsuit. (Id. ¶92.)

Similarly, to this day the Trustee does not know the most basic facts about his allegations concerning Defendants' alleged role in settlement. For example, the Trustee:

- Does not know if Ronald recommended settlement to CMGT. (Id. ¶81.)
- Does not know if CMGT's shareholders were interested in settling with Spehar. (Id. ¶82.)
- Does not know if Spehar would have settled for anything less than full adherence to every demand that it made. (Id. ¶83.)
- Does not know if CMGT had any money to pay Spehar as part of any settlement. (Id. ¶84.)

- Does not know what assets CMGT had available to give to Spehar in settlement before the Trautner Deal closed. (Id.)

- Does not know if a settlement with Spehar was even possible before the closing of the Trautner Deal. (Id. ¶85.)

- Did know, however, that at the time of the bankruptcy, CMGT had no assets other than the right to some software -- which the Trustee sold to Spehar for $1500. (Id. ¶138.)

Another key premise of the malpractice claim is that Defendants "negligently pushed" CMGT to accept the Trautner Deal instead of better offers from the Sealaska or Washoe Indian tribes. Yet, there were no other deals offered to CMGT -- let alone any better ones. Further, as Spehar admits, any possible deal with Sealaska was dead and beyond redemption. (Id. ¶21.) And the Washoe never made any offer. (Id. ¶23.) But the real point, again, is that the Trustee did not know -- and still does not know -- the most basic facts concerning his own allegations about this issue. For example, the Trustee:

- Does not know if Given pressured Franco to agree to the Newco LOI. (Id. ¶72.)

- Does not know the factual basis for his allegation that Given did not advise Franco that better deals were available from Sealaska or other potential investors. (Id. ¶73.)

- Never contacted anyone with Sealaska. (Id. ¶105.)

- Does not recall seeing a signed LOI from Sealaska, which the Complaint alleges offered a better deal to CMGT than the Trautner Deal but which, in fact, does not exist. (Id. ¶¶75-76.)

- Does not know the factual basis for his allegation that CMGT and Sealaska were close to closing a financing deal. (Id. ¶74.) This is particularly telling given that Spehar admitted that any potential deal with the Sealaska was long dead. (Id. ¶109.)

- Never spoke to anyone from the Washoe whom the Complaint alleges signed a letter of intent ("Washoe LOI") to finance CMGT. (Id. ¶¶24, 106.)

Most telling, the Trustee never asked to see a signed copy of the Washoe LOI. (Id. ¶78.) This is important, because the Complaint alleges that the Washoe LOI offered CMGT a better deal than the Trautner Deal and that, in violation of their duties, Defendants convinced CMGT to reject that offer. The Complaint even attaches what it alleges to be a signed copy of the Washoe LOI as Exhibit 6 -- except that Exhibit 6 is not signed. In his deposition, Spehar admitted that the Washoe never signed any LOI, that the Complaint's contrary allegation is false, and that he told the Trustee that it was false. (Id. ¶24.) Despite this, the Trustee never withdrew that allegation. (Id. ¶25.)

As his testimony makes clear, the Trustee knows next to nothing about his own Complaint. He did virtually no investigation before filing this case -- and certainly did not conduct the thorough investigation that was called for under the circumstances and required by Maxwell.

C. An Investigation Would Have Revealed That There Is No Case

If the Trustee had done an honest investigation, it would not have taken him long to conclude that there was no valid malpractice claim here. Indeed, all the Trustee had to do was call or formally examine CMGT's officers or significant shareholders. Any of these witnesses -- all of whom (as CMGT creditors) have a financial incentive to assert a malpractice claim against Defendants if one existed -- would have told the Trustee that Defendants did nothing wrong. Instead, they would have told the Trustee that Defendants were not responsible for CMGT's downfall. Indeed, the affidavits of Franco, Baliga, Wong and Quarles state that they would have told the Trustee the following:

- By May, 2003, any potential Sealaska financing deal had completely and irrevocably fallen apart. (SOF ¶109.)

- Defendants made a consistent and diligent effort to help CMGT obtain a viable financing offer from the Washoe. (Id. ¶110.)

- Franco made a business decision not to pursue financing from the Washoe. (Id. ¶111.)

- At the time CMGT and its shareholders accepted the Trautner Deal, Franco believed that there was no bona fide financing available to CMGT, much less better financing. (Id. ¶112.)

- Ronald did not pressure Franco to recommend the Trautner Deal. Franco reached that decision on his own. (Id. ¶113.)

- Franco was aware that the Trautner Deal had certain provisions concerning Defendants' unpaid legal fees and Franco openly discussed this fact with Ronald, CMGT's shareholders and CMGT's other professional advisors. (Id. ¶114.)

- Many of CMGT's shareholders felt that Spehar's claims were without merit and they were not interested in contributing money to settle them. (Id. ¶¶117-18.)

- Ronald did discuss the benefits of CMGT settling with Spehar before the Spehar Lawsuit and CMGT did make an effort to settle. (Id. ¶116.) But, settlement was not possible because Spehar's demands were unreasonable. (Id. ¶117.)

- Franco knew that if Spehar filed suit, the Trautner Deal would be withdrawn, that any small chance CMGT had to find immediate financing would probably disappear and that CMGT would have to cease operations. (Id. ¶119.)

- Defendants did not advise CMGT to ignore the Spehar Lawsuit. (Id. ¶124.)

- CMGT never hired Defendants as their litigation counsel and did not expect Defendants to defend them in the Spehar Lawsuit. (Id. ¶115.)

- Franco knew that all lawsuits can be lost, and that if one fails to defend a lawsuit, a default judgment is almost certain to be awarded. Defendants also informed Franco of these facts, and their application to the Spehar Lawsuit. (Id. ¶121-22.)

- Baliga knew that CMGT would go out of business if it did not mount a defense to the Spehar Lawsuit. (Id. ¶123.)

- At different times after the Spehar Lawsuit was filed, Franco, Baliga and Wong contacted and, in some cases, interviewed attorneys in California and Chicago to represent CMGT in the Spehar Litigation. (Id. ¶126.) Ultimately, they decided that CMGT could not afford to hire counsel because CMGT had no money, the expense of hiring counsel was too high, and CMGT's shareholders were unwilling to contribute more money to be spent for that purpose. (Id. ¶125-26.)

Again, however, the Trustee never contacted Franco, Wong, Baliga or Quarles to discuss what they knew about the malpractice case. Instead, the Trustee threatened to name Franco and Wong as defendants in this case unless they signed tolling agreements that allegedly would give him a chance to further investigate potential claims against them. (Id. ¶¶142,145.) But, then, true to form, the Trustee never did any such "investigation" of Franco or Wong, and has no intention of bringing any legal actions against them. (Id. ¶143-44, 146-47.) So, all of this appears to have been a ruse. Instead of getting time to investigate Franco and Wong, these threats seem to have been in compliance with Spehar's "instructions" (albeit futile) to "scare" these witnesses into supporting the malpractice claim against Defendants. But let Spehar's own July 28, 2006 e-mail to the Trustee speak for itself:

> I know these potential witnesses [Franco, Wong and Baliga] . . . great care must be taken in how we approach & depose these people if we are to extract maximum value and their cooperation . . . .
>
> We need real fear on our side in dealing with [Franco, Wong and Baliga] . . . once we file and leave the door open to going after them, they will clearly know we are serious and it will be a different ball game . . . .
>
> Once Ed [Joyce] receives and properly reviews the current subpoenas, issues additional subpoenas (e.g., Franco, Wong & Trautner's communications), and scares these gentlemen by filing the case. . .

> then he'll be ready to extract some real value. (Id. ¶140 (emphasis added).)

Indeed, Spehar's commentary on the lack of an overall meaningful investigation as of July 28, 2006 -- less than thirty days prior to the filing of the Complaint -- speaks volumes:

> David [Grochocinski], I must reiterate, it is simply too late now to get all of this properly done by the filing deadline . . . let alone investigate, depose & file before the filing deadline. . . .
>
> Once we get by the statute of limitations and Joyce conducts a proper investigation, he should become more comfortable. (Id. ¶141 (emphasis added).)

By failing to do an investigation of these obvious witnesses -- people closely associated with CMGT and its attorney-client relationship with Defendants, who were known to the Trustee, who had written to the Trustee before the Complaint was filed and who had every reason to support a malpractice action against Defendants if one truly existed -- the Trustee totally failed to investigate this case. Instead, the Trustee blindly went forward with this illogical case -- which has already wasted enough of this Court's and Defendants' time and resources. Enough is enough. The Court should apply Maxwell and exercise its gate-keeping function to end this case once and for all by granting this Motion for Summary Judgment.

CONCLUSION

For the reasons set forth above, the Court should grant Defendants' Motion for Summary Judgment in its entirety, and grant Defendants such other and further relief as is appropriate.

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' Memorandum of Law in Support of their Motion for Summary Judgment Based On Their Unclean Hands Defenses 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.
Chicago, IL 60603

on this 29th day of May, 2009.

/s/ Stephen Novack