

**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' LOCAL RULE 56.1(a) STATEMENT
OF UNDISPUTED FACTS IN SUPPORT OF THEIR MOTION FOR
SUMMARY JUDGMENT BASED ON THEIR UNCLEAN HANDS DEFENSES**

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Defendants “Mayer Brown” and Ronald B. Given (“Ronald”) (collectively, “Defendants”), by their attorneys, Novack and Macey LLP, pursuant to Local Rule 56.1(a), submit this Statement of Undisputed Facts in Support of Their Motion for Summary Judgment Based on Their Unclean Hands Defenses.¹

BACKGROUND

The Parties

1. CMGT, Inc. (“CMGT”) is a Delaware corporation that, on August 24, 2004, became the subject of an involuntary bankruptcy filing pursuant to Chapter 7 of the United States Bankruptcy Code. (Compl. ¶5.)

2. On September 21, 2004, Plaintiff, David Grochocinski (the “Trustee”), was appointed trustee of CMGT’s bankruptcy estate. (Id.)

3. Mayer Brown is a limited liability partnership engaged in the practice of law in Chicago, Illinois and other places. (Id. ¶6.)

4. Ronald was, at all relevant times, a partner at Mayer Brown. (Id. ¶7.)

Venue And Jurisdiction

5. The Trustee originally filed this legal malpractice action in the Circuit Court of Cook County, Illinois. (Compl.)

¹ Filed contemporaneously herewith is Defendants’ Appendix Of Exhibits In Support Of Their Motion For Summary Judgment Based On Their Unclean Hands Defenses (the “Appendix”), which consists exhibits of A through K that will be cited herein as “(Appendix Ex. ___),” unless otherwise noted. Citations in the format “(Compl. ¶____ or Compl. Ex. _____)” refer to the Complaint filed in this action, which is Exhibit A of the Appendix. The allegations in the Complaint cited herein are assumed to be true solely for the purposes of this Motion, and Defendants expressly reserve the right to controvert those allegations if this case continues -- which it should not.

6. On October 12, 2006, Mayer Brown timely filed its Notice of Removal pursuant to 28 U.S.C. §1441.

7. Because CMGT is in bankruptcy, (see Compl.), non-exclusive original jurisdiction exists in this Court pursuant to 28 U.S.C. §1334(b).

8. Venue is proper in this Court because, among other things, a substantial part of the alleged events or omissions purportedly giving rise to the claim occurred in the Northern District of Illinois. (See Compl.)

Louis Franco

9. From November 1, 2000 until the time CMGT ceased operations, Louis Franco (“Franco”) was CMGT’s sole officer -- its President, Chairman and CEO -- and exercised day-to-day control and management over CMGT. (Franco Aff., Appendix Ex. B, ¶2.)²

CMGT Retains Mayer Brown

10. Pursuant to an engagement letter dated January 31, 2000, CMGT hired Mayer Brown to provide legal services “in connection with [CMGT’s] initial capitalization, formative acquisition activities, and other general corporate activities.” (Compl. ¶2, Ex. 1 at 1.)

11. The engagement letter states that Defendants would defer their attorneys’ fees until such time as CMGT obtained financing. (Id. Ex. 1 at 1-2.)

12. The engagement letter says nothing about Mayer Brown representing CMGT in connection with any litigation and states that its scope may be expanded only by “mutual consent,” which “must be in writing.” (Id. Ex.1 at 3.)

² Included in the Appendix of Exhibits are affidavits from Louis Franco (Appendix Ex. B), Wayne Baliga (Appendix Ex. C), Kim G. Quarles (Appendix Ex. D) and James M. Wong (Appendix Ex. E). These affidavits will be cited herein as “___ Aff., Appendix Ex. ___, ¶ ___”.

CMGT Retains Spehar

13. Spehar Capital, LLC (“Spehar”) is a venture capital consulting firm, (Compl. ¶2), and operates as a California limited liability corporation, (Gerry Dep. at 4).³

14. Robert Gerard Spehar (“Gerry”) is, and was, the sole owner, officer and employee of Spehar. (Id. at 4-5.)

15. In June, 2001, CMGT retained Spehar to secure \$2,000,000 in financing that CMGT needed to fund its operations. (Compl. ¶¶20, 24 & Ex. 2.)

16. The Trustee contends that CMGT’s agreement with Spehar is set forth in a written letter agreement (the “Spehar Agreement”). (See id. ¶25 & Ex. 2.)

17. Under the Spehar Agreement, Spehar was entitled to a success fee of 6% provided that the party supplying the financing was listed on Exhibit A to the Spehar Agreement and the financing transaction closed. (Id. ¶¶26-27 & Ex. 2 at 3 ¶(1)(a).) If the transaction was for \$1 million or more of financing, then Spehar was entitled to certain additional compensation under the Spehar Agreement. (Id. Ex. 2 at 3-4 ¶¶(1)(b) and 2(a).)

18. As of July, 2003, Spehar had not secured any financing for CMGT. (Id. ¶¶32-46; see also Gerry Dep. at 41.)

19. As of July, 2003, CMGT was “in a desperate financial condition,” and Spehar knew it. (Id.)

20. One potential source of financing pursued by Spehar was Sealaska Corporation (“Sealaska”). (Compl. ¶¶33-37.)

³ Citations in the format “(Gerry Dep. at ____)” refer to the transcript of Gerry’s deposition, dated January 21, 2009, included in the Appendix as Exhibit K. The exhibits to Gerry’s deposition are not included in the Appendix because they have not been cited by Defendants.

21. A potential financing deal with Sealaska failed in May, 2003. (Gerry Dep. at 227-28; Franco Aff., Appendix Ex. B, ¶23.) After that time, a financing deal with Sealaska “was not something that was going to happen.” (Gerry Dep. at 228.)

22. Another potential source of financing pursued by Spehar was the Washoe Indian Tribe (the “Washoe”). (Compl. ¶¶44-46.)

23. The Washoe never signed a letter of intent to provide financing and never provided any financing to CMGT. (Id. ¶46; Gerry Dep. at 48-51.)

24. Shortly after the Complaint was filed, Gerry told counsel for the Trustee that the Washoe never signed a letter of intent and that the contrary allegation in the Complaint (at ¶45) -- i.e., that the Washoe did sign a letter of intent -- was false. (Gerry Dep. at 48-51, 278-80 & 287-88.)

25. The Trustee never withdrew that allegation from the Complaint.

The Trautner Deal

26. In May 2003, Charles Trautner (“Trautner”), a CMGT shareholder, proposed the Trautner Deal, the terms of which were set forth in a letter of intent dated July 31, 2003 (the “Trautner LOI”). (Compl. ¶41 & Ex. 3.)

27. Pursuant to the terms of the Trautner LOI, “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. ¶41 & Ex. 3 at 2.)

28. The Trautner LOI states that Newco was to be capitalized with \$2.5 million, thus rendering 20% of its stock or \$500,000 in cash roughly equivalent to each other. (Id. ¶41 & Ex. 3 at 2.)

29. Pursuant to the terms of the Trautner LOI, Newco would not acquire CMGT's liabilities (including the fees owed to Defendants) -- all of which would remain with CMGT. (Id. Ex. 3 at 2 ¶3.)

30. The Trautner LOI states that Trautner would negotiate with Defendants some "agreement to [] reimburse a certain percentage of legal fees that are currently unpaid" by CMGT. (Id. Ex. 3 at 2-3 ¶4(c).) The Trautner LOI does not say that all of Defendants' outstanding fees will be paid. (Id. Ex. 3; Franco Aff., Appendix Ex. B, ¶20.)

31. Franco believed that the Trautner Deal was CMGT's only viable option for survival, (id. ¶11), and recommended it for approval to CMGT's shareholders, (Compl. Ex. 5).

32. In August, 2003, those of CMGT's shareholders who voted approved the Trautner Deal unanimously and chose to accept 20% of Newco's stock. (Compl. Ex. 12B; Franco Aff., Appendix Ex. B, ¶¶12-13.)⁴

Spehar Claims A Right To Compensation As To The Trautner Deal

33. Trautner was not listed on Exhibit A of the Spehar Agreement. (Compl. ¶39 & Ex. 2; Spehar Dep. at 88.)

34. The Trautner Deal: (a) was not financing, but simply an asset sale; (b) was not worth \$1.0 million; and (c) had not closed. (Compare ¶17 supra with Compl. ¶41 & Ex. 3.)

35. When Spehar learned of the Trautner Deal, Spehar claimed a right to various compensation allegedly pursuant to the terms of the Spehar Agreement. (Id. ¶47 & Ex. 8.)

⁴ The Complaint contains two attachments labeled Exhibit 12. The Citation to Exhibit 12B herein refers to the second Exhibit 12 attached to the Complaint. It is an August 26, 2003 letter from Franco to CMGT's shareholders.

36. CMGT disputed Spehar's claimed right to compensation for the Trautner Deal, and the parties were unable to resolve that dispute. (Id. ¶¶47-48, 50-57 & Exs. 8-12B.)

37. Spehar acknowledged that he was not entitled to receive any cash compensation in connection with the Trautner Deal unless and until the Trautner Deal closed. (Gerry Dep. at 88-90.)

38. On September 9, 2003, Spehar sued CMGT in California state court, claiming a right to compensation for the Trautner Deal (the "Spehar Lawsuit"). (Compl. ¶58.)

39. On September 12, 2003, Spehar obtained a temporary restraining order prohibiting CMGT from closing the Trautner Deal. (Id. ¶59 & Ex. 15 at 4-6.)

40. On September 16, 2003, Spehar sent Ronald a copy of the TRO. (Id. Ex. 15 at 2-3.)

41. On September 17, 2003, Ronald sent an e-mail to Franco and all of CMGT's shareholders attaching the TRO and notifying them: (a) that Spehar had obtained a TRO in the Spehar Lawsuit; and (b) that Defendants "have not been retained to deal with [the Spehar Lawsuit], and [] do not expect to be." (Id. Ex. 15 at 1.)

42. Ronald's September 17, 2003 e-mail attached a copy of the TRO, which specifically stated that a preliminary injunction hearing would be held on October 3, 2003. (Id. Ex. 15 at 4.)

43. On October 3, 2003, CMGT did not appear, and the California state court converted Spehar's TRO to a preliminary injunction. (Id. ¶62.)

44. The very next day, Spehar informed CMGT that a preliminary injunction had been entered against CMGT. (Id. ¶63.)

45. On December 1, 2003, Spehar served CMGT with an amended complaint in the Spehar Lawsuit seeking money damages, but CMGT defaulted. (Id.)

46. On February 26, 2004, there was a prove-up hearing with respect to CMGT's default. (Transcript of Proceedings in the Spehar Lawsuit dated February 26, 2004 at 2-6, included in the Appendix as Exhibit F.)

47. At the hearing, Gerry testified that, if CMGT had rejected the Trautner Deal, then: (a) CMGT promptly would have obtained \$2.5 million in financing from another source; (b) within two years, CMGT would have been worth almost \$200 million; and (c) CMGT would have done an IPO, CMGT would have hired Spehar to do it, and Spehar would have received more than \$16.5 million therefrom in banking fees and stock. (Id.)

48. On March 18, 2004, Spehar obtained a \$17 million default judgment against CMGT (the "Default Judgment") in the Spehar Lawsuit. (Compl. Ex. 17.)

49. At the hearing, the California Judge stated that:

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.

(Appendix Ex. F at 5.)

50. CMGT did not pay any part of the Default Judgment. (Trustee Dep. at 54.)⁵

Spehar Initiates CMGT's Involuntary Bankruptcy

51. On August 25, 2004, based on the Default Judgment, Spehar filed a single creditor involuntary bankruptcy petition against CMGT (the "Involuntary Petition"). (Trustee Dep. at 7-9 & Ex. 2.)

52. Spehar filed the Involuntary Petition for the express purpose of collecting the Default Judgment from Defendants through a legal malpractice action. (Gerry Dep. at 109-111.)

⁵ Citations in the format "(Trustee Dep. ___)" refer to the transcript of the Trustee's deposition, dated January 19, 2009, included in the Appendix as Exhibit J.

53. On September 15, 2004, the Order of Relief was entered in the CMGT bankruptcy. (Appendix Ex. G.)

Spehar Approaches The Trustee About Filing A Malpractice Action

54. Within days of the Trustee's appointment, Spehar approached the Trustee about filing a legal malpractice claim against Defendants because they did not defend CMGT in the Spehar Lawsuit. (Trustee Dep. at 22-23, 62.)

55. Gerry told the Trustee that he was very interested in having the Trustee collect on a legal malpractice claim against Defendants so Spehar could collect the Default Judgment. (Id. at 31.)

56. Spehar offered to finance the malpractice litigation. (Id. Ex. 10.)

57. Spehar found a contingency fee lawyer to take the case. (Id. at 29-30, 41, 174, 196 & Ex. 28.)

58. If the Trustee prevails on the Complaint, Spehar will receive at least 80-90% of any recovery. (See March 17, 2009 Memorandum Opinion, Grochocinski v. Spehar Capital, LLC at 31, included in the Appendix as Exhibit H; Trustee Dep. Ex. 10 at PL 007421.)

The Trustee Fails To Vacate The Default Judgment

59. The Trustee testified in an affidavit submitted to the Bankruptcy Court that:

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 default judgment.

(Trustee Dep. Ex. 16 at ¶12.)

60. During his deposition in this case, the Trustee testified:

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?

A. I suppose.

(Id. at 60.)

61. The Trustee never looked at any case law, hornbooks or treatises on California law relating to whether the Default Judgment could be vacated in California. (Id. at 64.)

62. The Trustee never talked to a California attorney about how default judgments can be vacated in California. (Id.)

63. The Trustee never contacted anyone from CMGT or Defendants to determine if they could help vacate the Default Judgment. (Id. at 64, 66, 85-87.)

64. The Trustee never reviewed or tried to obtain the transcript of the Default Judgment hearing. (Id. 87.)

65. The Trustee never filed a motion to vacate the Default Judgment. (Id. at 99-105 & Ex. 16 at ¶12.)

66. 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. (Appendix Ex. I.)

67. In the affidavit he submitted to the Bankruptcy Court, the Trustee testified:

On investigation, several factors persuaded me that even if the time for bringing such a motion had not run, I would not be able to vacate the default judgment. First, it was not economically feasible to retain an attorney in California, since the estate had no assets. Even assuming that the estate could find funds to bring a motion in the [Spehar

Lawsuit], I concluded that such a motion would be futile. Under California law, a default judgment may be vacated upon an application supported by an attorney's sworn affidavit attesting the judgment was entered as a result of the attorney's "mistake, inadvertence, surprise or neglect. . ." See Cal. Civ. Proc. Code § 473(b). In my estimation, that issue would likely have to be resolved as part of the proposed malpractice litigation, since [Defendants] likely would not admit negligence on [their] own part.

(Trustee Dep. Ex.16 at ¶12.)

68. On December 16, 2004, in a letter responding to correspondence sent by Kim Quarles ("Quarles"), a CMGT shareholder, the Trustee stated: "It is likely that the time period to vacate the [Default Judgment] has now expired." (*Id.* Ex. 15.)

The Trustee's Lack of Knowledge Regarding This Malpractice Case

69. The Trustee does not know the factual basis for the allegation in paragraph 27 of his Complaint that Spehar and CMGT regularly agreed to oral modifications to the Spehar Agreement. (Compl. ¶¶27, 47; Trustee Dep. at 237-39.)

70. The Trustee does not know the factual basis for the assertion in paragraph 41 of his Complaint that, in May, 2003, Ronald and Trautner revived the Trautner Deal on the same terms that Franco had rejected in January, 2003. (*Id.* at 244-45.)

71. The Trustee has "no idea at all" whether CMGT's business took a downturn between January, 2003 and May, 2003. (*Id.* at 245.)

72. The Trustee does not know if the statement in paragraph 43 of his Complaint that Ronald pressured Franco to agree to the Trautner Deal is true. (*Id.* at 256-57.)

73. The Trustee does not know the factual basis for the allegation in paragraph 43 of his Complaint that Defendants failed to advise Franco that a better financing deal was available from Sealaska or other potential investors. (Id. at 279.)

74. The Trustee does not know the factual basis for the allegation in paragraph 37 of his Complaint that CMGT and Sealaska were close to closing a financing deal. (Id. at 243.)

75. Paragraph 33 of the Complaint alleges that Sealaska signed an LOI to provide \$2 million in financing to CMGT. The Trustee does not recall seeing a signed LOI from Sealaska. (Id. at 240-41.)

76. The Trustee knows that Sealaska rejected the idea of investing in CMGT. (Id. at 241.)

77. The Trustee is not aware of any potential financing available to CMGT as of September 29, 2003, other than the Trautner Deal and the alleged deal with the Washoe. (Id. at 279.)

78. Trustee never asked to see a signed copy of the Washoe LOI. (Trustee Dep at 268-69.)

79. Paragraph 49 of the Complaint alleges that Defendants had a conflict of interest because both Spehar and CMGT were their clients. The Trustee does not know the factual basis for the assertion that Spehar was Defendants' client. (Id. at 211, 240.)

80. The Trustee does not know the factual basis for the allegation in paragraph 42 of his Complaint that all of Defendants' legal fees would have been paid if the Trautner Deal had closed. (Id. at 247-54.)

81. Paragraph 54 of the Complaint alleges that Ronald negligently failed to advise CMGT to settle with Spehar. The Trustee does not know if Ronald, in fact, recommended settlement to CMGT. (Id. at 323-24.)

82. The Trustee does not know if CMGT's shareholders were interested in settling with Spehar. (Id. at 322.)

83. The Trustee does not know if Spehar would have settled for anything less than full adherence to every demand that it made. (Id. at 289.)

84. The Trustee does not know if CMGT had any money or other assets to pay Spehar as part of any settlement. (Id. at 287, 314-15.)

85. The Trustee does not know if a settlement with Spehar was possible before the closing of the Trautner Deal. (Id. at 288.)

86. The Trustee does not know if CMGT had the financial resources to defend itself in the Spehar Lawsuit. (Id. at 140, 347.)

87. The Trustee never took any action to determine if Franco's letter stating that CMGT had no money to defend the Spehar Lawsuit was true. (Id. at 140.)

88. Paragraph 58 of the Complaint alleges that Defendants advised CMGT not to appear and defend CMGT in the Spehar Lawsuit. The Trustee does not know if that allegation is true or if Ronald ever advised CMGT not to appear or not to defend the preliminary injunction. (Id. at 355.)

89. The Trustee does not know why CMGT did not defend itself against Spehar's amended complaint. (Id. at 355-56.)

90. The Trustee does not know if CMGT made a deliberate decision not to appear for the Default Judgment prove-up hearing. (Id. at 97.)

91. The Trustee never asked anyone at CMGT any questions about why CMGT did not attempt to vacate the Default Judgment. (Id. at 79-81.)

92. The Trustee does not know whether Franco and the other CMGT shareholders wanted to give up the business and let it disappear rather than appear and defend the Spehar Lawsuit. (Id. at 322.)

93. The Trustee acknowledges that shareholders of a company are entitled to walk away from a company if they so choose and “can close up a company any time they feel like it.” (Id. 322-23.)

The Trustee Made No Pre-Filing Investigation

94. James M. Wong (“Wong”) was CMGT’s accountant and a major shareholder, and he has submitted an affidavit in this case. (Wong Aff., Appendix Ex. E, ¶2.)

95. The Trustee believed that Wong was equivalent to CMGT’s controller or chief financial officer. (Trustee Dep. at 136.)

96. Wayne Baliga (“Baliga”) was a major CMGT shareholder, who made loans to help keep CMGT afloat and who, with Franco and Wong, was involved in some of CMGT’s decisions, and he has submitted an affidavit in this case. (Baliga Aff., Appendix Ex. C, ¶¶2, 4 & 9.)

97. Quarles was a CMGT shareholder who is also an attorney, and she has submitted an affidavit in this case. (Quarles Aff., Appendix Ex. D, ¶2.)

98. Neither the Trustee nor his counsel talked to Franco about this malpractice case before it was filed. (Franco Aff., Appendix Ex. B, ¶¶18, 45-47; see also Trustee Dep. at 150.)

99. Neither the Trustee nor his counsel talked to Wong about this malpractice case before it was filed. (Wong Aff., Appendix Ex. E, ¶¶12-14; see also Trustee Dep. at 159.)

100. The Trustee did not talk to Baliga about this malpractice case before it was filed, and does not know if his counsel did so. (Id. at 164, 166.)

101. Neither the Trustee nor his counsel talked to Quarles about this malpractice case before it was filed. (Quarles Aff., Appendix Ex. D, ¶¶5-7; see also Trustee Dep. at 70.)

102. The Trustee did not talk to Trautner about this malpractice case before it was filed. (Id. at 171.)

103. The Trustee did not talk to anyone at Mayer Brown -- including Ronald -- about this malpractice case before it was filed. (Id. at 131, 354.)

104. The Trustee cannot recall talking to any CMGT officers, employees or shareholders about the malpractice claim before it was filed. (Id. at 129-130.)

105. The Trustee never contacted anyone with Sealaska. (Id. at 173.)

106. The Trustee never spoke to anyone from the Washoe. (Id. at 172).

What The Trustee Would Have Learned If He Had Spoken With Franco, Baliga, Quarles And/Or Wong

107. Franco, Baliga, Quarles and Wong would have told the Trustee that they all believe that Defendants did nothing wrong. (Franco Aff., Appendix Ex. B, ¶¶18-44; see also Baliga Aff., Appendix Ex. C, ¶¶5, 7; Quarles Aff., Appendix Ex. D, ¶4; Wong Aff., Appendix Ex. E, ¶6.)

108. Franco, Baliga, Quarles and Wong would have told the Trustee that they all believe that Spehar caused CMGT to fail. (Franco Aff., Appendix Ex. B, ¶¶16, 39-40; Trustee Dep. Ex. 23; Baliga Aff., Appendix Ex. C, ¶¶6-8; Quarles Aff., Appendix Ex. D, ¶5 & Ex. A; Wong Aff., Appendix Ex. E, ¶12 & Ex. A.)

109. Franco would have told the Trustee that by May, 2003, any potential Sealaska financing deal had completely and irrevocably fallen apart. (Franco Aff., Appendix Ex. B, ¶23; see also Gerry Dep. at 228.)

110. Franco would have told the Trustee that he believed that Defendants did everything asked of them in connection with the Washoe financing and that Ronald made a consistent and diligent effort to help CMGT obtain a viable financing offer from the Washoe. (Franco Aff. ¶24.)

111. Franco would have told the Trustee that he made a business decision not to pursue financing from the Washoe. (Franco Aff., Appendix Ex. B, ¶¶27-36.)

112. Franco would have told the Trustee that he believed that there was no bona fide financing available to CMGT -- much less better financing -- at the time CMGT and its shareholders accepted the Trautner Deal. (Id. ¶¶21-22.)

113. Franco would have told the Trustee that Defendants did not pressure him into recommending the Trautner Deal. (Id. ¶19, 36.)

114. Franco would have told the Trustee that he was aware that the Trautner Deal had certain provisions concerning Defendants' unpaid legal fees and that he openly discussed this fact with Ronald, CMGT's shareholders and CMGT's other professional advisors. (Id. ¶20.)

115. Franco, Baliga, Quarles and Wong would have told the Trustee that CMGT did not hire Defendants to be CMGT's litigation counsel, and that they did not expect Defendants to defend CMGT in the Spehar Lawsuit. (Id. ¶¶38, 42; Baliga Aff., Appendix Ex. C, ¶7; Quarles Aff., Appendix Ex. D, ¶4; Wong Aff., Appendix Ex. E, ¶¶6-7.)

116. Franco would have told the Trustee that Defendants did discuss the possibility of settling with Spehar before the Spehar Lawsuit was filed and efforts were made to settle the dispute but they were not successful. (Franco Aff., Appendix Ex. B, ¶14-16 & 43.)

117. Franco, Baliga and Wong would have told the Trustee that they believed that Spehar's claim was without merit and that Spehar's settlement demands were unreasonable. (Franco Aff., Appendix Ex. B, ¶¶14-16 & 43; Baliga Aff., Appendix Ex. C, ¶6; Wong Aff., Appendix Ex. E, ¶5.)

118. Franco, Baliga and Wong would have told the Trustee that they were unwilling to settle with Spehar because CMGT had no money to do so and that CMGT's shareholders were not willing to contribute more money to CMGT to fund any settlement. (Franco Aff., Appendix Ex. B, ¶¶14-16 & 43; Baliga Aff., Appendix Ex. C, ¶6; Wong Aff., Appendix Ex. E, ¶5.)

119. Franco would have told the Trustee that he 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. (Franco Aff., Appendix Ex. B, ¶¶39-40.)

120. Franco would have told the Trustee that he discussed these issues with Ronald and that Defendants did not fail to advise CMGT that a lawsuit by Spehar would preclude CMGT from obtaining financing. (Id.)

121. Franco would have told the Trustee that he knew that any lawsuit can be lost, and that if one fails to defend a lawsuit, a default judgment is almost certain to be awarded to the plaintiff. (Id. ¶41.)

122. Franco would have told the Trustee that Defendants did not fail to advise him that CMGT could lose the Spehar Lawsuit and that Ronald informed him that, regardless of the merits, lawsuits can be lost -- including the Spehar Lawsuit. (Id.)

123. Baliga would have told the Trustee that he knew that CMGT would go out of business if it did not mount a defense to the Spehar Lawsuit. (Baliga Aff., Appendix Ex. C, ¶8.)

124. Franco would have told the Trustee that Defendants never advised CMGT not to defend or to ignore the Spehar Lawsuit. (Franco Aff., Appendix Ex. B, ¶44.)

125. Franco, Baliga, Quarles and Wong would have told the Trustee that CMGT did not defend itself in the Spehar Lawsuit because it had no money to hire counsel to do so and CMGT's shareholders (other than Baliga and Wong) were not willing to contribute additional money to the company to fund a defense. (*Id.* ¶¶42, 44; Baliga Aff., Appendix Ex. C, ¶¶7-8; Quarles Aff., Appendix Ex. D, ¶4; Wong Aff., Appendix Ex. E, ¶7.)

126. Franco, Baliga, Quarles and Wong would have told the Trustee that 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 Lawsuit, but that CMGT decided it could not afford to hire counsel. (Franco Aff., Appendix Ex. B, ¶¶42; Baliga Aff., Appendix Ex. C, ¶9; Quarles Aff., Appendix Ex. D, ¶4; Wong Aff., Appendix Ex. E, ¶¶9-10.)

The Trustee Ignored The Evidence Handed To Him

127. R. Leonard Carroll, M.D., a CMGT shareholder, wrote a letter to the Trustee dated December 1, 2004, which stated, in part, that he "thought the company was finally to be capitalized [*i.e.*, by the Trautner Deal]. That was until Gerry Spehar stopped the capitalization and now the company is bankrupt." (Trustee Dep. Ex. 22 at PL 01388.)

128. Wong wrote a letter to the Trustee dated December 8, 2004, which stated, in part: "To put it simply, [Spehar] initiated a lawsuit against CMGT without merit or sustaining damages, rendered CMGT unacceptable as an investment to any potential investor and caused its demise." The same letter stated: "[Spehar] and his counsel[] knew that CMGT was never funded and did not

have the financial resources to defend itself.” (Id. at PL 01389; Wong Aff., Appendix Ex. E, ¶12 & Ex. A.)

129. William Donwen, a CMGT shareholder, wrote a letter to the Trustee dated December 10, 200[4], which stated, in part: “Having followed this company for several years, it is my firm opinion that Gerry Spehar and his various activities was responsible for the failure of CMGT.” (Trustee Dep. Ex. 22 at PL 01366.)

130. Quarles wrote a letter to the Trustee dated December 15, 2004, which stated, in part: “Spehar’s [L]awsuit was the sole, direct and proximate, cause of irreparable damage to CMGT and its shareholders,” and that “[b]ecause of Spehar’s egregious conduct, CMGT was left unfunded and without the financial means to battle the spurious allegations of the [Spehar Lawsuit].” (Trustee Dep. Ex. 14; Quarles Aff., Appendix Ex. D, Ex. A.)

131. Ron Holman, Ph.D., a CMGT shareholder, wrote a letter to the Trustee dated December 17, 2004, which stated, in part: “As a result of [Spehar’s] actions, the chance for CMGT to find funding and survive disappeared. I think Spehar is directly responsible for any losses.” (Trustee Dep. Ex. 22 at PL 01421.)

132. Lee M. Rask, a CMGT shareholder, wrote a letter to the Trustee dated December 27, 2004, which stated, in part: “[Spehar] brought a frivolous suit against the company and because of that suit [CMGT’s] window of opportunity to raise capital was eliminated.” (Id. Ex. 22 at PL 01388.)

133. Franco wrote a letter to Ira Bodenstein, the United States Trustee, a copy of which was provided to the Trustee, dated July 21, 2005, in which he stated that the Spehar Lawsuit was “meritless” and “directly caused CMGT to fail,” and that “CMGT was simply never funded and could not defend itself in court.” (Trustee Dep. Ex. 23.)

134. The Trustee forwarded some of these letters to Spehar's counsel for handling, but cannot recall which specific letters he forwarded. (Trustee Dep. at 132-34.)

The Trustee Knew There Was A Reasonable Explanation Why CMGT Defaulted In The Spehar Lawsuit

135. On September 19, 2003 Ronald wrote an email to CMGT's shareholders stating: "CMGT has no money to fight this battle [i.e., the Spehar Lawsuit]." (Compl. Ex. 16.)

136. On December 16, 2004, the Trustee responded to Quarles's letter by stating: "If [CMGT did not defend the Spehar Lawsuit] for a lack of money you and other shareholders might have provided funds for a defense. The fact that you chose not to do so and yet have such strong feelings respecting a potential defense to the suit brought by Spehar is curious to me." (Trustee Dep. Ex. 15.)

137. In a draft letter to Spehar's counsel dated February 21, 2005, the Trustee stated as follows:

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].

(Trustee Dep. Ex. 24.)

138. After the bankruptcy petition was filed against CMGT, the Trustee knew that the CMGT bankruptcy estate had no assets other than the rights to certain software, which the Trustee sold to Spehar for \$1500. (Id. at 20, 216, 310-311, 319.)

139. The Trustee is not aware of CMGT having any more assets when the Spehar Lawsuit was filed than when CMGT went into bankruptcy, (id. at 318-19), and he also knew that CMGT had numerous liabilities, (id. at 11-16 & Exs. 3, 4).

Threats

140. In a July 28, 2006 email to the Trustee, Gerry stated:

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.

(Trustee Dep. Ex 30 at 1, 2-3.)

141. Gerry's July 28, 2006 email to the Trustee further stated:

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. at 2.)

142. The Trustee threatened to name Wong as a defendant in this case if he did not sign a tolling agreement, the alleged purpose of which was to give the Trustee more time to investigate his potential claims against Wong. (Wong Aff., Appendix Ex. E, ¶13; Trustee Dep. Ex. 26.) Wong did so, but the tolling agreement is now expired. (Id. 162.)

143. The Trustee did not investigate Wong's actions in connection with CMGT. (Id. at 160.)

144. The Trustee is unaware of anything Wong did wrong in connection with CMGT and has no intention of bringing a lawsuit against Wong. (Id. at 162-63.)

145. The Trustee threatened to name Franco as a defendant in this case if he did not sign a tolling agreement, the alleged purpose of which was to give the Trustee more time to investigate his potential claims against Franco. Franco did so, and the tolling agreement expired on August 27, 2007. (Franco Aff., Appendix Ex. B, ¶18; Trustee Dep. at 149-50, 152 & Ex. 25.)

146. The Trustee did not investigate whether Franco did anything wrong in connection with CMGT. (Id. at 150.)

147. The Trustee is unaware of anything Franco did wrong in connection with CMGT and has no intention of bringing a lawsuit against Franco. (Id. at 153.)

Respectfully submitted,

MAYER BROWN LLP AND
RONALD B. 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' Local Rule 56.1(a) Statement Of Material Facts 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