

DAVID GROCHOCINSKI, JANUARY 19, 2009

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 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 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

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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

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.

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. Todhunter,  
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.

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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. Rummler? 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?

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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,

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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 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

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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 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. MARINELLO:

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,

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?

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

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.

DAVID GROCHOCINSKI, JANUARY 19, 2009

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.

DAVID GROCHOCINSKI, JANUARY 19, 2009

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. Rummler 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. Rummler, 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

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 judgement 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?

DAVID GROCHOCINSKI, JANUARY 19, 2009

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?

DAVID GROCHOCINSKI, JANUARY 19, 2009

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

DAVID GROCHOCINSKI, JANUARY 19, 2009

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?

DAVID GROCHOCINSKI, JANUARY 19, 2009

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

DAVID GROCHOCINSKI, JANUARY 19, 2009

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,

DAVID GROCHOCINSKI, JANUARY 19, 2009

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?

DAVID GROCHOCINSKI, JANUARY 19, 2009

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,

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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 --

DAVID GROCHOCINSKI, JANUARY 19, 2009

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.

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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.

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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

DAVID GROCHOCINSKI, JANUARY 19, 2009

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

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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

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

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

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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

DAVID GROCHOCINSKI, JANUARY 19, 2009

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?

DAVID GROCHOCINSKI, JANUARY 19, 2009

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

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1 that Mr. Franco had been CEO and president of CMGT  
2 for a number of years prior to the bankruptcy?

3 A. I knew 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

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

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.



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

DAVID GROCHOCINSKI, JANUARY 19, 2009

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.

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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

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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 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?

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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.

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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.



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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

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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 a 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 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