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

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, RONALD B. GIVEN, and CHARLES W. TRAUTNER,	)	
Defendants.	)	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Defendants' Motion should be denied because material questions of fact exist. Moreover, this Court should disregard Defendants' irrelevant attack on Plaintiff's pre-filing investigation. Plaintiff's pre-filing investigation is irrelevant because the real premise of Defendants' Motion is that the affidavits they submitted defeat Plaintiff's claims. But Defendants are wrong. As shown below, summary judgment is inappropriate because the contemporaneous documents support Plaintiff's claims.[1] Defendants' irrelevant attack is unwarranted because, as they know, Plaintiff's pre-filing role was to (a) obtain the most reliable source of the underlying occurrence facts -- the contemporaneous documents generated in the time period leading up to and after the filing of Spehar Capital, LLC's ("SC's") California lawsuit against CMGT, Inc. ("CMGT"); and to (b) rely on his special counsel's analysis of whether those occurrence facts support causes of action against Defendants.[2] Because the contemporaneous documents support Plaintiff's claims, summary judgment is not appropriate.

II. RELEVANT FACTS

A. CMGT Hires Defendants

In July 1999, CMGT hired Defendants Mayer Brown Rowe & Maw, LLP ("MBRM") and Ronald Given ("Given") (together, "Defendants") as its attorneys because CMGT's President, Louis Franco ("Franco"), had a pre-existing relationship with Given. (¶1.)[3] CMGT and MBRM entered into a written engagement agreement on January 31, 2000. (Def. SOF ¶10.)

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[1] This Court has already held that the contemporaneous documents it has seen thus far support Plaintiff's claims. (*See* 6/28/07 Mem. Op.) After reviewing the additional contemporaneous documents submitted herewith, this Court can be confident that its decision not to dismiss this case at the pleading stage was correct.

[2] In response to Defendants' personal attack, Plaintiff is providing an accurate record of what happened here pre-filing. To be clear, however, Plaintiff is not asserting an advice of counsel defense to Defendants' Motion. As this Court will see, Plaintiff does not make any arguments that are based on (a) privileged documents or communications, or (b) advice of counsel.

[3] Citations to Plaintiff's Rule 56.1 Stmt are referred to as "(¶__.)" Citations to Plaintiff's Response to Defendants' Rule 56.1 Stmt are referred to as "(Ans. ¶__.)" Citations to Defendants' Rule 56.1 Stmt are referred to as "(Def. SOF ¶__.)"

Payment of Defendants' hourly fees was contingent upon CMGT receiving at least $1,000,000 in funding. (Ans. ¶10.) Consequently, Defendants had a significant interest in CMGT getting any financing.

B. CMGT Hires SC

In June 2001, CMGT hired SC to assist it in obtaining financing. (Def. SOF ¶15.) They entered into a written contract on October 1, 2001. (Ans. ¶15.) SC was entitled to a success fee of 6% of any Accepted Capital [cash, liquid assets, assets to be used as collateral, Letter of Credit or other form of capital acceptable to CMGT] upon the closing of a transaction in which the investor was either: (a) someone introduced to CMGT by SC, or (b) someone with whom CMGT had approved SC to hold discussions regarding CMGT. (Ans. ¶17.) SC's October 1, 2001 contract attached a list, "Exhibit A," that identified the names of all parties who, as of October 1, 2001, met one of those two criteria. (*Id*.)

In June 2002, SC asked CMGT to revise its contract. SC's owner, Gerry Spehar ("Spehar"), stated that the revisions were warranted because SC had made valuable contributions to CMGT. (¶2.) On September 30, 2002, CMGT and SC executed a revised contract (the "SC Contract.") (¶3.) Franco also updated Exhibit A. (Ans. ¶17.) After September 30, 2002, Exhibit A was not formally updated. (*Id*.)

Pursuant to the SC Contract, if CMGT accepted a term sheet or other commitment for Accepted Capital of at least $1,000,000, SC was entitled to receive additional compensation, such as stock, future investment banking rights and a $100,000 management fee. (Ans. ¶17.) SC's Contract was to expire on October 1, 2003, but could be terminated earlier. (¶3.)

C. CMGT Approves SC to Have Discussions with Trautner and Signs a Letter of Intent with Trautner

In January 2003, CMGT (through Franco) approved SC/Spehar to have discussions with a CMGT shareholder, Charles Trautner ("Trautner"), and an individual introduced to CMGT by Trautner, Harlan Smith ("Smith"). (¶¶4-5.) Although Smith was not formally added to Exhibit A of SC's Contract, Franco acknowledged in writing that SC was involved in discussions with him. (¶5.) On January 27, 2003, Franco asked Spehar to participate in a conference call with Trautner to vet Trautner's idea of restructuring CMGT into an entity he referred to as "Newco." (¶4.) Under Trautner's proposal, CMGT's shareholders would receive only about 20% of Newco's stock and Newco would not be responsible for CMGT's liabilities. (*Id*.) Franco (on behalf of CMGT) rejected Trautner's "Newco" idea. (*Id*.)

In May 2003, Given and/or Trautner revived discussions about Trautner's "Newco" proposal. Given spearheaded those negotiations on behalf of CMGT. Given's negotiations resulted in the July 31, 2003 letter of intent ("LOI") that later became the "Trautner Deal." Franco's involvement in the negotiations was very limited. (¶6.) He did, however, condition the deal on Trautner's investment group agreeing to: (a) hire him to be Newco's President, and (b) assist him in resolving his credit card debts, IRS obligation and personal loans, which Trautner agreed to do. (¶¶8, 17 & 21.) On August 8, 2003, Franco sent CMGT's shareholders a letter (dated August 7) recommending the Trautner Deal. He stated that there were "no alternatives" even though the Washoe Tribe ("Washoe"), among others, was considering an investment in CMGT. (¶¶9& 7.)

D. <u>SC Asks CMGT to Add Trautner to Exhibit A of its Contract</u>

After reviewing Franco's letter to CMGT's shareholders, Spehar asked Franco to add Trautner and another potential investor, FlexBen, to Exhibit A of SC's Contract. Spehar

reminded Franco of the conversations that Spehar had with Trautner at Franco's request. (¶10.) Franco did not dispute the accuracy of Spehar's recitation of facts. (¶11.)

Franco forwarded Spehar's request to Given. On August 8, 2003, Given responded to Spehar on behalf of CMGT. Given stated that he and Franco were "big fans" of Spehar, and he acknowledged that Spehar had spoken to Trautner about his "Newco" idea. However, Given asserted that the Trautner Deal was not within the scope of SC's Contract because Spehar's conversations with Trautner were not discussed during Given's subsequent negotiations with Trautner. Given also stated that he was going to advise Franco to refer any future questions SC had regarding the Trautner LOI directly to him (Given.) (¶12.) Spehar responded to Given the next day. Spehar explained his belief that SC's Contract entitled SC to compensation in any deal where the investor was either: (a) someone introduced to CMGT by SC, or (b) someone with whom CMGT had authorized SC to have discussions. Spehar argued that the scope of his involvement in the negotiations was irrelevant. (¶13.)

In response, Given stated, "[t]here is nothing left to be said regarding the [Trautner] LOI, in my view. If you wish to pursue it, you will be in an adversarial position and should deal with us through counsel." (¶14.) When Spehar asked Franco (by e-mail) what he thought about the dispute, Franco forwarded the email to Given and told him, "[o]f course, you and I are completely one voice on this matter." (¶15.) On August 11, 2003, Franco acknowledged in writing that FlexBen (but not Trautner) was within the scope of SC's contract even though FlexBen was not listed on Exhibit A. (¶16.)

E. CMGT Sends the Washoe a Letter of Intent, Seeks Shareholder Approval of the Trautner Deal and Rejects SC's Settlement Attempts

On August 13, 2003, Franco told Given that the Washoe wanted to do a deal, that they would accelerate their due diligence on CMGT, and that they "can do deals quickly…i.e., in 30-

60 days." Franco stated, "I believe the interest is real," and he recommended sending the Washoe an LOI. (¶18.) The next day, Given suggested sending the Washoe a copy of the Trautner LOI with the "20 percentage [sic] deleted." Franco responded that he did not want to "set the bar down as low as the Newco LOI" because he believed the Washoe wanted to do a "much better deal" with CMGT. (¶19.) Later that day (August 14), Franco told SC to send the Washoe an LOI, which he had approved, that gave the Washoe until September 30 to finish due diligence. SC carried-out Franco's instruction. (¶20.)

On August 16, 2003, Franco sent CMGT's shareholders a letter (dated August 15) seeking approval of the Trautner Deal. Franco did not disclose CMGT's negotiations with the Washoe, his belief that the Washoe's interest was real or his belief that the Washoe wanted to do a deal that was better for CMGT than the Trautner Deal. Given helped prepare the August 15 letter. (¶22.)

Meanwhile, Spehar kept trying to resolve SC's contract dispute regarding the Trautner Deal. On August 19, 2003, Spehar sent Franco and Given an email regarding their discussions of the dispute. Spehar stated:

> Ron [Given], in between your many epithets and derogatory comments, you were extremely dismissive today of my efforts to discuss a settlement based on honoring Spehar Capital's contract. You encouraged me to 'bring it on' and told me that you were 'not afraid' because whatever I do would not affect the [Trautner] deal. In your words: This deal will go forward!

(¶23.)

Given responded that he had listened to Spehar, had told Spehar his view and that there was nothing more CMGT could do. (¶24.) On August 21, 2003, Spehar sent an email to Franco, stating:

> I remain agreeable to further legitimate attempts to resolve this dispute amicably. As stated on our call, however, your delays and the pace of events are quickly

> forcing my hand…Please seek a second legal opinion and reconsider -- you run CMGT, not Ron Given.

(¶25.) Franco forwarded Spehar's settlement request to Given and stated, "[m]y trust is in you and remains so." Given advised Franco to "[j]ust let it be." (¶26.)

F. Defendants Tell Trautner about SC's Contract Dispute, Advise Trautner How to Protect Newco Against a Deal Disruption and Propose that Trautner Pay Legal Fees to MBRM

On August 22, 2003, Given sent a memo to Trautner and Trautner's attorney, John Politan ("Politan"), that disclosed SC's contract dispute regarding the Trautner Deal. Given dismissively stated that Spehar was just "rattling [his] sword a bit." Given also provided his strategy for protecting Newco (Politan's client) in the event that SC was able to stop or unwind the deal. In that regard, Given stated that the deal documents should have CMGT (Given's client): (a) indemnify Newco against third-party claims, (b) allow Newco to escrow the purchase price, and (c) grant Newco a "perpetual, nonexclusive license" covering CMGT's software and business methods. Given also recommended that Newco be formed and enter into an employment agreement with Franco. Given (CMGT's attorney) then stated:

> Interestingly enough, they [SC and Dick Ross] may have actually improved the deal from Newco's perspective. With the license, if either Gerry or Dick [a CMGT shareholder] was successful in disrupting the deal, you [Trautner] could walk away with the software and, most importantly, Lou Franco without making any payment to CMGT whatsoever.

(¶28.) (Emphasis added.)

Given then proposed that Trautner/Newco pay Defendants: (a) $50,000 for MBRM's accrued legal fees immediately, (b) $50,000 for accrued fees when the Trautner Deal closed, and (c) the entire amount of Defendants' expenses and legal fees incurred from July 31, 2003 through closing. Given threatened to stop working on the Trautner Deal if the payment issue was not promptly resolved. He also solicited future legal business from Newco. (¶28.)

The next day (August 23), Franco addressed MBRM's legal fees with Given as follows: "Chuck [Trautner] wants to work something out with you [Given]/MBRM that will not 'look funny,' even if he [Trautner] has to personally 'take care of it.' I told him that you had sent a letter to him and that he should refer to it on this subject. He [Trautner] had not yet picked-up your letter from John Politan's office." (¶30.)

G. Given and Franco Tell CMGT's Shareholders about the SC Dispute, and Given Again Advises Franco to "Ignore" that Dispute

On August 27, 2003, Franco sent CMGT's shareholders a letter (which was written by Given) regarding the Trautner Deal. The letter stated: (a) the shareholders had voted to approve the Trautner Deal, (b) SC has claimed that it is entitled to compensation as a result of the Trautner Deal, (b) CMGT and its legal counsel strongly disagree with that contention, (c) SC's claim should not delay or hinder the proposed transaction, (d) the appropriate venue for the resolution of SC's claim will be in the winding up of CMGT, (e) as a result of SC's claim, Newco will require indemnification and an escrow of the shares, (f) to protect against any threat to break-up the transaction after it is consummated, Newco will require an independent license to CMGT's software that would survive a break-up, and (g) the only substantive effect of SC's claim will be additional documentation complexity and a delay in the winding up of CMGT until such time as the escrow is released. (¶31.)

On August 31, 2003, Spehar sent Franco an email asserting that certain compensation provisions of SC's Contract were trigged when CMGT's shareholders voted in favor of the Trautner Deal and chose to accept Newco stock. (¶33.) Franco asked Given if he should respond in a "legal fashion." Given advised Franco to "ignore it." (¶34.)

On September 1, 2003, Franco sent Given a draft summary of CMGT's liabilities for his review. With respect to SC's contract dispute, the summary stated, "[n]o legal action required,"

"[l]ikelihood of settlement is high if legal action is taken against CMGT," "MBR&M and Management agree there is no basis for a claim," "G. Spehar has indicated he will take legal action to enforce his contract based on his previous introductions to/discussions with Chuck Trautner & various investors," degree of risk is "high," and no curative action is required. (¶35.) On September 2, 2003, Franco sent a final version of that summary, which was unchanged with respect to SC's contract dispute, to a representative of Trautner's investment group, Peter Bentz ("Bentz"). (¶36.)

H. <u>The Washoe Reject a Given-Modified LOI</u>

On September 2, 2003, the Washoe delivered an unsigned letter of intent to CMGT on the Washoe's letterhead. (¶¶37-38.) On September 3, Given sent revised copies of the Washoe LOI to SC and Franco. Given shortened the due diligence deadline from September 30 to September 29. He also included language that allowed CMGT to close a competing bid (*e.g.*, the Trautner Deal) prior to September 30. (¶39.) Later that day (September 3), Spehar sent Franco and Given a revised LOI that Spehar had prepared. Spehar's revised LOI incorporated Given's September 29 due diligence deadline, but removed CMGT's ability to close a competing deal before the Washoe finished its due diligence. Spehar asserts that Franco told him to send his revised LOI to the Washoe, which Spehar did on September 3. Franco asserts that he did not authorize Spehar/SC to send that LOI to the Washoe. (¶40.)

On September 4, Franco instructed Spehar to tell the Washoe about Given's additional revisions, e.g., that CMGT could close a competing deal prior to September 29. Spehar warned Franco that the Washoe would not agree to that change, but Franco insisted that Spehar tell the Washoe about Given's revisions. Franco then sent Given an email, confirming that he would support Given's terms to protect the Trauter Deal:

> Gerry [Spehar] contends nothing less than CMGT 'guarantee' that no closing will occur until at least 9/30 will satisfy them [the Washoe] because they intend to use an expensive Philadelphia law firm to accelerate their review/due diligence to be able to commit to funding by 9/30. Of course, we are using 9/29 as the significant date!

(¶41.)

Spehar followed Franco's instructions and told the Washoe about Given's additional revisions. The Washoe told Spehar that it would not agree to Given's changes to the LOI. After learning that the Washoe had rejected the revised LOI, Franco asked Given whether he should suggest to the Washoe that they "step into" the Trautner investment group's position. (¶42.) In response, Given arranged a phone call between himself and the Washoe. There were no discussions during that call about the Washoe "stepping into" the Trautner group's position. Because Given shortened the due diligence deadline and would not guarantee that CMGT would not close a competing deal prior to the Washoe completing due diligence, the Washoe terminated its negotiations with CMGT. (¶43.)

I. Given Provides Trautner's Attorney with a Nine-Point Strategy For Responding to a Potential Temporary Restraining Order, and Given Demands a $50,000 Legal Fee Payment

After having its settlement overtures dismissed, on September 9 and 11, 2003, SC notified Given that it was seeking a TRO to prevent the Trautner Deal from closing. On September 12, 2003, SC obtained a TRO. (¶44.) A few days later, on September 14, Given sent a memo to Politan (Trautner's lawyer). The first issue Given addressed was Defendants' fees. He told Politan what needed to be put into a letter on Politan's letterhead regarding the Trautner group's payment of Defendants' fees. (¶46.)

Given then explained to Politan that the work he (Given) needed to do (and be paid for) included "cleaning up Lou Franco's credit card situation." Given next discussed timing issues. He stated that CMGT's shareholder approval of the Trautner Deal was going to expire on

October 17, 2003. He also stated his understanding that Trautner's investment group might prefer a later closing date, but thought that pushing the date back was a bad idea because (a) a later closing date would require another shareholder solicitation, and (b) he did not think Franco could "hold out much longer." (¶47.)

Because of Franco's credit card situation and the possibility of an SC TRO, Given advised Politan to form Newco as soon as possible and to have Newco immediately enter into an employment agreement with Franco. He stated, "this is the only way to get him [Franco] focused on building Newco's business instead of dealing with less productive things such as the Spehar TRO." (¶48.)

Given then discussed the possibility of SC obtaining a pre-transaction TRO, and he provided Politan with the following nine-point strategy:

> whether we are simply dealing with threats of a pre-transaction TRO, or an actual TRO, I think the following strategy makes sense:
>
> 1. We notify CMGT's shareholders of the threats of the TRO or send them a copy of the actual TRO if it is in fact issued.
>
> 2. Lou Franco and Newco [enter] into an employment agreement, which will confirm the arrangements to deal with Franco's debts and to move him to Phoenix.
>
> 3. I subsequently notify the shareholders (using the E-mail list that includes Spehar) that neither Franco nor Newco has any desire to expend time or funds to engage in litigation, even if they firmly believe the Spehar litigation is frivolous. As a consequence of the Spehar TRO, I will announce that Lou intends to resign and that Newco intends to terminate the LOI. I also announce that I have not been retained to deal with the TRO. Lou's previous correspondence with the shareholders has made it clear that he is on the verge of financial collapse and will need to move on to other opportunities if a transaction cannot happen. Neither Newco nor any other third-party investor group could be expected to get bogged down in this type of litigation when they have many viable alternatives.
>
> 4. When I notify the shareholders that Lou Franco intends to resign, I

will indicate that he will do all he can [to] make arrangements for the servicing of the existing contracts to avoid default and the consequent potential shareholder liability.

5. Spehar will have to return to court to make the TRO permanent. My notice to the shareholders (which includes at least one California lawyer) will give them an opportunity to take their own actions against Spehar. His TRO may simply be dissolved, or he may be convinced to give up his efforts to disrupt the transaction beforehand. In either case, the uncertainty and delay he will have caused will make it reasonable to ask the shareholders to extend the October 17 deadline.

6. If the Spehar situation does not resolve itself, I think Newco should simply start on its own with Lou Franco as its president and CEO. Newco would enter into a commercial transaction to service, in the name of CMGT, Inc., its existing four contracts. In effect, CMGT, Inc., will outsource the servicing of its existing book of business to Newco pursuant to arm's-length agreements. When these existing contracts expire, the clients would be free to roll over their accounts to Newco. For this service, Newco would be paid for its expenses. Any excess amounts could be returned to CMGT, but this would only be done after netting everything Newco has paid on CMGT, Inc.'s behalf (**including legal fees and expenses**). This outsourcing arrangement would require Newco to enter into a service arrangement with Rob Crandall and other Canadian employees, just like it would in the transaction contemplated by the [Trautner/Newco] LOI. I am very confident they would cooperate.

7. Depending on the actual language of the TRO, if it is issued, I think it would be reasonable for Newco to also be granted a license in the software. Again depending on the language of the TRO, we might structure this as an option to acquire a license in the software. I would like to note that if for whatever reason such a license is not deemed appropriate or desirable, Lou Franco is comfortable that we can independently create appropriate software which will not infringe on anything belonging to CMGT, Inc.

8. If the outsourcing alternative is consummated, CMGT, Inc. will not receive any shares of Newco. Also, Newco will not have to be immediately capitalized at the $2.5 million level. CMGT, Inc. and Newco would, of course, be free to subsequently enter into a transaction like that contemplated by the LOI after the Spehar situation is clarified. It may be no longer in Newco's interests to do so, however, in which case all Spehar will have accomplished is to have deprived the CMGT, Inc. shareholder/stakeholder group of a

> 20% interest in Newco. This is not Newco's fault and is, frankly, beyond its control. I think everything that could be done to be fair to the CMGT, Inc. shareholder/stakeholder group has been done.
>
> 9. I believe the outsourcing alternative could be the **functional equivalent** of the transaction contemplated by the LOI. The only difference is that Newco would not be receiving exclusive rights in the software. As a practical matter, however, once Lou Franco leaves CMGT, Inc., there is no one left to do anything with the software anyway.

(¶49.) (Emphasis added.) (Hereafter, Given's strategy for consummating the Trautner Deal without any payment to CMGT is referred to as the "functional equivalent" deal.) Given ended his letter to Politan by stating he would not do any more work unless the legal fee issue was immediately resolved. (¶50.)

J. Given Receives Notice of SC's TRO and Implements His Nine-Point Strategy, Which Will Culminate in the "Functional Equivalent" Deal

On September 16, 2003, Given received notice of SC's TRO and immediately began implementing his nine-point strategy for dealing with that TRO. (¶¶53-54 & 56.) First, on September 17, he sent an email to CMGT's shareholders and Spehar that attached a copy of SC's TRO, and stated that Defendants had not been retained to "deal with this matter." (¶54.) Then, on September 19, Given implemented points one, three and four of his strategy -- i.e., he sent CMGT's shareholders and Spehar an email stating: (a) Franco was going to resign, (b) Newco was going to terminate the LOI, (c) SC's claim was "absolutely spurious" and its request for injunctive relief was "clearly inappropriate," (d) CMGT had no money to fight SC, and (e) Franco and Given were going to "work on" CMGT not breaching its client contracts. Given invited CMGT's shareholders to call him with questions about SC's lawsuit, but he said nothing about the "functional equivalent" deal he had proposed to Trautner's lawyer. (¶56.)

On September 19, SC's attorney responded to Given's email. He stated, "Spehar Capital was forced to rely on the legal process to preserve its rights because CMGT and its counsel refused to substantively address Spehar Capital's claims, even though it knew of Spehar Capital's position and the potential for legal action." SC's attorney also stated that CMGT could have closed the Trautner Deal while protecting SC's rights, but decided to "just pull the plug." (¶57.)

A CMGT shareholder, John Ross, sent an email to CMGT's other shareholders, stating:

> I have no idea of what, if any, disputes or claims may exist which might delay and/or diminish the ultimate distribution to the rightful shareholders. Further, I have just received a faxed copy of a filing by Spehar Capital, LLC for a temporary restraining order against CMGT in connection with the Newco sale. It sounds as if this is going to be a difficult sale to consummate.

(¶58.) Clearly, Ross was neither asked to contribute money to defend SC's TRO request nor told about Given's conflicted nine-point strategy and the fact that Given and Franco were implementing that strategy.

On September 20, 2003, Baliga sent an email to Spehar, Franco and James Wong ("Wong"). Baliga encouraged them to settle SC's dispute. Spehar stated that he remained willing to talk about solutions. Franco forwarded that email exchange to Given. (¶59.)

K. Trautner's Investment Group Pays Defendants $50,000, and Given's "Functional Equivalent" Deal Moves Full Steam Ahead

On September 21, 2003, Politan sent Given the letter he had requested in his September 14 memo (*see* Ex. 62) regarding payment of Defendants' fees. Politan's letter did not say anything about the Trautner LOI being terminated. Politan enclosed a $50,000 check payable to Defendants. (¶60.) The next day, Franco sent Given several "to do" lists that were prepared by Trautner's representative, Bentz. Bentz's "to do" lists, which are dated September 20, 2003, reveal that Given and Franco were proceeding with Given's "functional equivalent" deal. The

lists also reveal that Newco's name would be "First In Touch." Finally, these lists reveal that Wong knew about and was participating in Given's "functional equivalent" deal. (¶61.)

On October 2, 2003, Given sent CMGT's shareholders and Spehar an email. Pursuant to point 3 of his nine-point strategy, Given stated that because SC had not withdrawn its lawsuit, Trautner's investment group had terminated their LOI. (¶63.) Given did not disclose that Trautner's investment group had just paid MBRM $50,000 or that he was proceeding with the "functional equivalent" deal. (*Id*.) The next day, SC obtained a preliminary injunction. CMGT did not appear for the preliminary injunction hearing. (Def. SOF at ¶43.) That same day, SC's attorney told CMGT's shareholders that SC still wanted to salvage a deal that worked for all parties. (¶64.)

Unaware of Given's "functional equivalent" deal with Trautner, Spehar asked Franco for the Trautner group's contact information so he could try to (a) bring them back to the table, and (b) resolve SC's contract dispute. Franco forwarded Spehar's October 4, 2003 email to Bentz and stated, "Ron and I discussed this and we are not replying to Gerry's email as it is not necessary." (¶66.) Given and Franco then kept pursuing the "functional equivalent" deal. (¶¶67-69.)

On or about October 6, 2003, Given, Franco, Bentz and Trautner discussed "the many issues" before them, including SC's preliminary injunction and TRO. (¶67.) By October 2003, Given's "functional equivalent" deal was in full-swing. Instead of Trautner's investment group forming and owning Newco/First In Touch, the plan was to have an existing company, Keenan & Associates ("Keenan"), with whom CMGT had a pre-existing relationship, form First In Touch as its subsidiary. Keenan would then enter into an outsourcing agreement with CMGT to

service CMGT's four existing clients. That outsourcing work would be done by First In Touch, which would have an Arizona-based call center called the "Arizona Call Center." (¶68.)

According to the draft deal documents, Trautner's investment group was to have funded CMGT's operating deficit from July 31, 2003 through the formation of First In Touch. The draft documents gave Trautner's investment group an option to purchase an ownership interest in the Arizona Call Center. The formula for the purchase price was based on the difference between (a) the amount spent by Keenan with respect to First In Touch, and (b) the amount paid by Trautner's investment group to fund CMGT's operating deficit. The deal documents also contemplated that Franco would be the President of both First In Touch and the Arizona Call Center. Franco also had an opportunity to become an owner of the Arizona Call Center. (¶69.)

L. Given Advises Franco About SC's Lawsuit and How to Respond to Shareholder Inquiries Regarding CMGT's Status

While working towards consummating Given's "functional equivalent" deal, Franco repeatedly consulted with Given about SC's lawsuit. (¶¶55, 62 &70-71.) For example, Franco sought Given's advice about SC's amended complaint seeking damages, and SC's motion for default judgment, which SC obtained on March 18, 2004. (¶¶70-71.)

In March 2004, Franco and Given began receiving emails from or on behalf of CMGT shareholders inquiring about the status of CMGT. One such email stated, "[i]s CMGT still active? We have heard nothing since being advised of the Spehar injunction…Please fulfill your obligation to respond." Franco asked Given how to respond. Given told Franco to "send your note out to everyone regarding the LA lawsuit. I wouldn't bother with them [the CMGT shareholders] anymore than that." (¶72.)

Pursuant to that advice, Franco sent CMGT's shareholders an email which had been reviewed by Given. The email stated that Franco had resigned as CMGT's President and CEO.

(Franco later testified, in a citation deposition, that he resigned on September 19, 2003.) Attached to Franco's email were a copy Given's September 19 email, SC's $17 million default judgment and other "legal papers." Franco's email did not disclose that he was negotiating to become First In Touch's President as part of Given's proposed deal that was the "functional equivalent" of the Trautner Deal. (¶73.)

III. SUMMARY OF PLAINTIFF'S CLAIMS

Claim One: Defendants committed malpractice when they: (a) negligently advised CMGT to ignore SC's contract dispute, (b) failed to make a reasonable effort to settle that dispute, and (c) devised a conflicted strategy for dealing with the SC dispute that protected Defendants' and Franco's interests, but was destructive to CMGT. As a result of Defendants' malpractice, SC filed its lawsuit and obtained both injunctive relief and a $17 million default judgment. In addition, Defendants' malpractice caused CMGT to lose the Trautner Deal and be forced into involuntary bankruptcy.

Claim Two: Defendants committed malpractice when they advised CMGT to shorten the Washoe due diligence deadline from September 30 to September 29, and advised against giving the Washoe a guarantee that CMGT would not close a competing deal before the Washoe finished its due diligence. Defendants did this even though they knew that the Trautner Deal might not close before October 16 and that Trautner's investment group would agree to a post-October 16 closing date. Moreover, even if Defendants did not learn that Trautner's investment group would agree to a later closing date until after September 4 (the date the Washoe walked away), Given (who had negotiated with the Washoe on CMGT's behalf) should have tried to resurrect the Washoe deal. He did not do that because he was putting Defendants' interests (i.e., an immediate $50,000 payment) and Franco's personal interests (i.e., resolving credit card

collection actions and getting a job as First In Touch's President) ahead of CMGT's interests. As a result of this malpractice, CMGT lost a valuable financing opportunity.

Claim Three: Defendants committed malpractice when, instead of making a real effort to settle with SC after it filed its lawsuit and/or obtain a defense fund to defend SC's lawsuit, Given developed and implemented his conflicted nine-point strategy (*see* Ex. 62.) As a result of Defendants' malpractice, SC obtained injunctive relief and a $17 million default judgment. Moreover, CMGT lost the Trautner Deal and was forced into involuntary bankruptcy.

IV. ARGUMENT

A. Legal Standard

Summary judgment is appropriate only when the record demonstrates that there are no genuine issues of material fact. Fed.R.Civ.P. 56. A genuine issue of material fact exists if there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court must review all evidence in a light most favorable to the non-moving party and draw all inferences in the non-movant's favor. *Judsen Rubbert Works, Inc. v. Mfg., Production & Service Workers Union Local No. 24*, 889 F. Supp. 1057, 1060 (N.D. Ill. 1995.)

Defendants do not cite any cases regarding the standard for a summary determination. They also fail to cite any "fraud on the court" cases. Instead, Defendants rely exclusively on dicta from *Maxwell v. KPMG, LLC*, 520 F.3d 713 (7th Cir. 2008). Specifically, Defendants rely on *Maxwell*'s discussion about KPMG's right to move for sanctions after summary judgment had already been granted (and affirmed) in its favor. 520 F.3d at 718-19. That dicta from *Maxwell* is irrelevant because Defendants' Motion is for summary judgment, not sanctions. Moreover, the

contemporaneous documents demonstrate that this case is neither appropriate for summary judgment nor frivolous.

B. Defendants' "Absurd Result" Argument Should Be Rejected

Citing *Maxwell*, Defendants argue that summary judgment is appropriate because SC cannot be both the cause of CMGT's insolvency/bankruptcy and its primary beneficiary. Defendants' argument should be rejected because the *Maxwell* statement on which Defendants' rely is obiter dictum. *Maxwell*, 520 F.3d at 715-16. The statement is obiter dictum because (a) it was a passing remark on an issue that was not addressed by the parties, and (b) it was not necessary to the outcome of the case. *See Exelon Corp. v. Dept. of Revenue*, -- N.E. 2d --, 2009 WL 426468 at *5-6 (Ill. Feb. 20, 2009) (defining obiter dictum); *see also*, *Dedham Water Co., Inc. v. Cumberland Farms Dairy, Inc.*, 972 F.2d 453, 459 (1st Cir. 1992) (defining obiter dictum) and *Passmore v. Astrue*, 533 F.3d 658, 661 (8th Cir. 2008) (defining dictum.) Because the *Maxwell* statement is obiter dictum, it is not binding. *Id*. Obiter dictum is not binding, in part, because the statement may not have been as fully considered as it would have been if it were essential to the outcome. *Id*. Indeed, because the *Maxwell* statement was obiter dictum, the court did not explain what it meant by the phrase "cause the bankruptcy."[4] Additionally, Defendants' argument should be rejected because, as explained below, even if the *Maxwell* statement was not dicta, the issue of whether Defendants or SC was a proximate cause of CMGT's insolvency is a disputed question of fact.

Defendants also argue that summary judgment is appropriate because this case will produce an "absurd result." Defendants' "absurd result" argument is based on the false premise that: (a) in order to win, Plaintiff must prove that SC's contract claim in the underlying case was

[4] Plaintiff interprets the phrase "cause the bankruptcy" in this context to mean cause the debtor's insolvency.

"meritless," and (b) if that happens, the result will be contrary to law because SC is the "real party in interest" and will be unjustly enriched.

The first premise of Defendants' argument is false because Plaintiff does not need to (and is not going to) prove that SC's contract claim was "meritless." Instead, Plaintiff will prove that SC had a colorable claim that should not have been "ignored" (as Given advised). For instance, the contemporaneous documents demonstrate that: (1) CMGT authorized SC to have discussions with Trautner (specifically about the structure of what later became the Trautner Deal) (¶4), (2) CMGT and SC did not formally updated Exhibit A after September 30, 2002, even though Franco acknowledged that additional investors were within the scope of SC's Contract (¶¶5 & 16 and Ans. ¶17), and (3) SC's Contract could be interpreted as requiring CMGT to compensate SC whenever any investor who is within the scope of the contract closes any deal with CMGT (¶13 and Ex. 5 at p. 3, ¶1.)[5] Under those circumstances, it was negligent for Given to advise that CMGT "ignore" SC's claim and "just let it be." Given gave that bad advice both before and after SC filed its lawsuit. (*E.g.*, ¶¶ 26, 34 & 66.) Moreover, CMGT had technical defenses that would have prevented SC from obtaining a judgment for damages, regardless of the merit of SC's contract claim. (*See* pp. 27-28, *infra*.) Finally, as this Court previously noted, it is immaterial whether this Court believes that SC's default judgment is "speculative" because it is a valid judgment that cannot be collaterally attacked.[6] (9/26/07 Tr. at p. 52.)

Even if Defendants' first false premise is not wrong (which it is), their second false premise -- that the posture of this case is contrary to law -- is wrong. This Court previously

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[5] SC's Contract explicitly accounted for a transaction that involved the sale of CMGT's assets to a successor company, e.g., the Trautner Deal. (Ans. ¶34.)

[6] Because the bankruptcy court has held that SC is an unsecured creditor of CMGT, SC will share in any recovery just like any other unsecured creditor, i.e., it will receive its pro rata share. (Ans. ¶58.) Any objections to the fairness of SC receiving its pro rata share of a recovery should be made by the unsecured creditors to the bankruptcy court at the appropriate time. Indeed, bankruptcy law has rules, such as equitable subordination, to deal with that type of objection.

noted that it has not seen "any posture like this in a case before," i.e., where a judgment creditor (SC) seeks to collect on its judgment through a legal malpractice case by the insolvent judgment debtor (CMGT/Plaintiff) against the attorneys (Defendants) who represented the judgment debtor in the underlying case. (9/26/07 Tr. at p. 4.) However, since this Court made that statement, the Illinois Appellate Court has addressed a case that has that same posture. In *Brandon Apparel Group v. Kirkland and Ellis*, 382 Ill. App. 3d 273 (1st Dist. 2008), a judgment creditor (Johnson Bank) sought to collect on its judgment through a legal malpractice case by the insolvent judgment debtor (Brandon Apparel Group) against the attorneys (Kirkland and Ellis) who represented the judgment debtor in the underlying case. In its reversal of the circuit court's summary determination in favor of Kirkland, the Illinois Appellate Court did not express any concern that the case was "absurd" or that Johnson Bank (the judgment creditor) would be unjustly enriched. Instead, the court remanded for trial. This Court should follow *Brandon Apparel Group* and deny Defendants' Motion.

C. The Contemporaneous Documents Support Plaintiff's Claims

1. Claim One: Malpractice Before SC Filed its Lawsuit

a. Existence of Attorney-Client Relationship

The undisputed evidence proves that: (a) CMGT (through Franco) routinely consulted with Given about SC's contract dispute (¶¶12-15, 23-26, 31 & 34-35); (b) Given advised Franco to direct all communications regarding the dispute to himself (¶12); (c) Given responded to SC's contract dispute on behalf of CMGT (¶¶ 12-15, 23-26 & 34-35); (d) Franco believed that he and Given were of "one voice" with respect to the matter (¶15); and (e) Franco's "trust" was in Given (¶26.) Thus, Plaintiff has established the existence of an attorney-client relationship with respect to Defendants' pre-lawsuit conduct as it relates to SC's contract dispute. *Morris v.*

Margulis, 307 Ill. App. 3d 1024, 1035 (5th Dist. 1999), *reversed on other grounds*, 197 Ill. 2d 28 (2001).

b. Breach of Duty and Proximate Cause

When SC's contract dispute arose, Defendants should have pursued a settlement with SC that would treat the Trautner Deal as, at least arguably, within the scope of SC's Contract in exchange for SC's agreement to "give-up" some aspect or percentage of its compensation. But Defendants did not do that. Instead, Defendants wrote-off SC's colorable claim (*see* p. 19 *supra*) as a "meritless" distraction that would not disrupt the deal, advised CMGT to "ignore" the claim and even dared SC to "bring it on." (¶¶12-14, 23-26, 28, 31, 34-35 & 48.) Defendants' negligent response to SC's dispute caused SC to file its lawsuit, to obtain injunctive relief and to obtain a default judgment. It also caused SC to thereafter put CMGT into involuntary bankruptcy. Moreover, Defendants' negligent failure to settle combined with their conflicted strategy for responding to SC's lawsuit was a proximate cause of the Trautner investment group's abandonment of the Trautner Deal and acceptance of Given's "functional equivalent" deal, which only benefited Franco, Trautner and Defendants.

Defendants argue that summary judgment is appropriate because four of CMGT's shareholders -- Franco, Wong, Baliga and Quarles (the "Affiants") -- believe/assert that CMGT: (a) had no money to settle with SC, and (b) tried to settle with SC, which included making a $250,000 cash offer, but that SC refused to settle. Defendants' arguments fail for several reasons.

First, the contemporaneous documents show that SC was not demanding a pre-closing cash payment to settle the dispute. (*See* Exhibits 6 and 28.) Thus, whether CMGT had cash to pay SC before closing the Trautner Deal is irrelevant.

Second, the contemporaneous documents contradict the Affiants' purported beliefs/assertions. Those documents reveal that Given's responses to SC's settlement attempts were uncompromising. For example, in just his second correspondence regarding the dispute, Given told SC that if it pursued the issue any further it would be in an "adversarial position" and should deal with CMGT "only through counsel." (¶14.) When SC subsequently tried to settle with Franco, Given advised Franco to "just let it be." (¶26.) Later, Given advised Franco to "ignore" SC. (¶34.) The evidence also shows that CMGT believed that SC was willing to settle. In its September 1, 2003 summary of CMGT's liabilities, CMGT correctly noted that if SC filed a lawsuit the likelihood of a settlement was "high." (¶35.) Thus, the failure to settle was the result of Given's malpractice.

Third, the contemporaneous documents are inconsistent with Franco's assertion that Trautner's investment group offered to pay SC $250,000. None of the contemporaneous documents mention any such purported settlement offer. (¶27.) Moreover, Given's August 22 memo to Trautner, which disclosed SC's contract dispute for the first time, advised Trautner that his investment group could acquire CMGT's assets without paying anything to CMGT if SC disrupted the deal. (¶28.) Amazingly, Given told Trautner that it was better for his investment group if SC disrupted the deal. (*Id*.) It is not believable that Trautner's investment group would offer to pay SC $250,000 after being advised by Given (CMGT's counsel) that it was better for them if SC disrupted the deal.

In sum, the evidence creates material questions of fact as to whether Defendants breached their duty and whether that breach was a proximate cause of CMGT's insolvency. None of the Affiants even addressed any of the contemporaneous documents. Because material questions of

fact exist as to what/who caused CMGT's insolvency, Defendants' *Maxwell* argument, *i.e.*, that SC cannot be both the cause of the bankruptcy and its primary beneficiary, should be rejected.

c. Damages

Plaintiff discusses damages for all three claims at page 30 *infra*.

2. Claim Two: The Washoe Negotiations

a. Attorney-Client Relationship

The undisputed evidence proves that CMGT (through Franco) asked for and received advice from Given concerning CMGT's negotiations with the Washoe. (¶¶18-19, 39 & 41-43.) In fact, Given negotiated directly with the Washoe on behalf of CMGT. (¶43.) Thus, an attorney-client relationship existed with respect to Defendants' conduct as it relates to the Washoe negotiations.

b. Breach of Duty and Proximate Cause

Defendants argue that summary judgment is appropriate because the Affiants have opined that Defendants did everything required of them with respect to the Washoe negotiations and that "Franco made a business decision not to pursue financing from the Washoe." However, the contemporaneous documents tell a different story.

Those documents reveal that Franco: (a) believed the Washoe's interest in CMGT was "real" (¶18), (b) believed that the Washoe wanted to do a deal with CMGT that was better for CMGT than the Trautner Deal (¶19), (c) believed that the Washoe could complete due diligence quickly (¶18), and (d) asked for Given's advice about whether to suggest to the Washoe that it step into the Trautner group's position. (¶42.)

The documents also reveal that: (a) Given negotiated directly with the Washoe on behalf of CMGT (¶43), (b) the Washoe terminated negotiations with Given on September 5th because

Given shortened the due diligence date and refused to guarantee that CMGT would not close a competing deal before the Washoe finished its due diligence (¶43), (c) sometime before September 14, Given learned that Trautner's investors would accept a later closing date (¶47), but (d) Given did not want to push back the Trautner Deal's closing date because he was concerned about Franco's personal financial situation and he was trying to collect from Trautner an immediate $50,000 payment towards MBRM's accrued fees. (¶47; *see also*, Ex. 62.)

In sum, regardless of what the Affiants now say they believe, the contemporaneous documents support Plaintiff's allegations that Defendants' conduct with respect to the Washoe negotiations did not advance CMGT's interests, was a breach of their fiduciary duties and was a proximate cause of the Washoe's decision to terminate negotiations.[7]

c. Damages

Plaintiff discusses damages for all three claims at page 30 *infra*.

3. Claim Three: Malpractice After SC Filed Suit

a. Attorney-Client Relationship

Given's August 22 and September 14 memos to Politan prove that he provided legal advice about SC's lawsuit. (*See* Exhibits 34 & 62.) Other contemporaneous documents prove that Given implemented his strategy for responding to SC's lawsuit. (*See* ¶¶54, 56, 60-61, 66 & 67-69.) The documents also prove that Given advised CMGT about his view of the validity of SC's lawsuit. (*E.g.*, ¶¶31, 35 & 56.) Moreover, as this Court previously noted, Given invited CMGT's shareholders to contact him with questions regarding SC's lawsuit. (¶56; *see also*, 6/28/07 Mem. Op. at p. 14.) The documents also prove that Franco repeatedly sought Given's

[7] Defendants make too much of the fact that Plaintiff mistakenly alleged that the Washoe signed a letter of intent. Certainly, if the Washoe had signed the LOI that they delivered, it would be clear evidence that they were serious about investing in CMGT. But, there is plenty of other evidence, including Franco's admissions, that the Washoe were serious about doing a deal with CMGT. (*See e.g.*, ¶¶18-20, 32 & 37-38.) Plaintiff intends to seek leave to file an amended complaint at an appropriate time, at which time the mistaken allegation will be corrected.

advice about SC's lawsuit. (¶¶55, 62 &70-71.) Finally, Given's September 17 email, with its "Mayer Brown has not been retained to deal with this matter" statement, was prepared and sent as part of Given's conflicted nine-point strategy for responding to a potential TRO. (Ex. 62 at pt. 3.) Thus, the evidence supports Plaintiff's allegation that Defendants owed CMGT fiduciary duties with respect to SC's lawsuit. *Morris*, 307 Ill. App. 3d at 1035.

b. Breach of Duty

When Defendants realized that SC would likely sue to stop the Trautner Deal from closing or, at the very latest, when Defendants learned that SC was seeking a TRO, they should have immediately advised CMGT to notify CMGT's shareholders and Trautner of SC's plan and to pursue a settlement with SC. In fact, just before SC filed its lawsuit, Franco and Given noted that the likelihood of settling with SC was "high" if SC filed a lawsuit. (¶35.) If settlement negotiations did not work, Given should have told CMGT why he believed injunctive relief was inappropriate and advised CMGT to encourage its shareholders and Trautner's investment group to contribute to a defense fund so that CMGT could prevent SC from obtaining injunctive relief.

But Defendants did not do any of that. Instead, before SC filed its lawsuit, Given developed a strategy for responding to an SC lawsuit that was not in CMGT's best interests. (¶28 and Ex. 62.) That strategy was not in CMGT's best interests because it counseled Trautner and Franco to cut CMGT out of the deal. (*Id.*) Before SC filed its lawsuit, Given actually told Trautner that it was better for him if SC disrupted the deal. (*Id.*) Given then misled CMGT's unconflicted shareholders -- e.g., shareholders other than Franco and Wong -- into believing that SC's dispute could not stop the Trautner Deal from closing. (¶31.) He did not disclose his concern that SC could stop the deal from closing, that he had developed a strategy that would allow Trautner's investment group to acquire CMGT's assets without paying anything to CMGT,

or that the "functional equivalent" deal would take care of Franco's and Trautner's interests and get $100,000 of Defendants' accrued fees paid. (*Id*.)

When Given learned that SC had filed an action seeking a TRO, he further developed his conflicted strategy for responding to an SC deal disruption. (¶¶44 & 49.) That strategy protected everyone in the deal from SC's TRO, except for CMGT (Given's client). (*Id*.) Accordingly, when CMGT's shareholders began asking Franco and Given about CMGT's status after SC obtained an injunction, Given advised Franco to send the shareholders a note regarding SC's lawsuit, but not to "bother with them any more than that." (¶72.) Moreover, when Spehar tried to revive the Trautner Deal in October 2003, Given told Franco and Trautner's investment group that there was no reason to respond. There was no reason to respond because they had abandoned CMGT and were proceeding with the "functional equivalent" deal. (¶66.)

Instead of being candid about these well-documented facts, Defendants ignore them and feign dismay that Plaintiff would allege that an "internationally-recognized law firm" would fail to appear in a lawsuit and let its client default four times. Defendants fail to acknowledge that CMGT defaulted because defending SC's lawsuit was not part of Given's strategy. Given's strategy was to send emails to CMGT's shareholders and SC that lulled them into believing that CMGT would be dead unless SC immediately withdrew its TRO. (Ex. 62.) Knowing that would not happen, Given's plan was to abandon CMGT and proceed with the "functional equivalent" deal. (*Id*.) That deal benefited Trautner's investment group, Franco and Defendants, but it destroyed CMGT and made its shareholders' investments worthless.[8] (*Id*.)

[8] Defendants sarcastically ask, "[w]ould even a first year law student advise a client to ignore litigation and just pretend it does not exist?" (Mot. p. 18.) But even Defendants' hypothetical first year law student would know not to develop and implement a conflicted strategy that advances your interests and your opposition's interest, but destroys your client.

Because Given's strategy included telling CMGT's shareholders that Trautner's investment group had terminated the LOI, that Franco had resigned, that CMGT had no money to fight Spehar and that CMGT could not protect their investment from SC's lawsuit, it is not surprising that CMGT's shareholders wrote-off their investment in CMGT and did not want to contribute money to defend SC's lawsuit. (*See* Exhibits 62 & 68.) Moreover, after SC obtained its TRO, Given's and Franco's efforts were focused on consummating the "functional equivalent" deal -- not on settling or defending SC's lawsuit. (¶¶60-61, 65-69 & 72-73.) Finally, Franco testified that CMGT "could not step foot in California for legal reasons" that would have to be explained by Given. (¶52.) The evidence supports an inference that at least one of those "legal reasons" was that Given did not want to subject CMGT to California jurisdiction. (Ex. 68.) Another "legal reason" was that Given did not want CMGT's unconflicted shareholders to discover that he was the source of the strategy whereby Trautner's group could acquire all of CMGT's key assets without paying for them, Franco's interests would be taken care of, and MBRM would be paid at least $100,000.

In sum, the evidence supports Plaintiff's allegation that Defendants breached their fiduciary duty when Given developed and implemented his conflicted strategy for not responding to SC's lawsuit. Thus, summary judgment is not appropriate here.

c. <u>Proximate Cause</u>

By implementing his nine-point strategy instead of advising CMGT to settle with SC or to seek money from its shareholders and/or Trautner to defend SC's lawsuit, Defendants were a proximate cause of SC obtaining injunctive relief and a default judgment. If CMGT had defended SC's request for a TRO, CMGT would have won because, as Defendants admit, adequate legal remedies were available to SC. (Ex. 68.)

Moreover, Defendants knew that SC was in bad shape financially. (Ans. at ¶43.) If CMGT had defended SC's request for injunctive relief, it would have convinced the California court to require SC to post an injunction bond substantially in excess of $25,000, which was the amount SC was required to post. *See* Cal. Civ. Code § 529; *see also, Hummell v. Republic Federal Savings & Loan*, 133 Cal. App. 3d 49 (Cal. Ct. App. 1982.) Because SC could not have done that (Ans. ¶43), it would not have obtained injunctive relief. Moreover, Defendants should have advised CMGT that it could recover its attorney's fees from SC's bond. *See Surety Savings and Loan Assoc. v. Nat'l Automobile & Cas. Ins. Co.*, 8 Cal. App. 3d 752 (Cal. Ct. App. 1970) (attorney's fees resulting from issuance of injunction are recoverable); *see also, Casitas Investment Co. v. Paratore*, 203 Cal. App. 2d 811, 818 (Cal. Ct. App. 1962) (attorney's fees reasonably incurred in securing release of a TRO are recoverable.) That information would have made the unconflicted shareholders even more willing to contribute to a defense fund.

If CMGT had defeated SC's attempts to stop the Trautner Deal from closing, SC would not have amended its complaint to seek damages. (Ans. ¶45.) However, even if SC would have pursued a lawsuit for damages, CMGT could have prevented a $17 million award, even if SC prevailed on liability. Thus, regardless of the merit of SC's contract claim, CMGT could have obtained a different and better result if it had defended SC's lawsuit. *See Bucci v. Rustin*, 227 Ill. App. 3d 779, 784-85 (1st Dist. 1992) (whether legal malpractice plaintiff was guilty of the misconduct alleged in the underlying suit is a different issue than whether the attorney's negligence was a proximate cause of the findings in the underlying suit.)

Defendants argue that Plaintiff cannot establish causation because CMGT had no money to defend the SC lawsuit. Plaintiff already addressed this argument at pp. 25-27 *supra*, but has one additional point to make. In his September 14 memo to Politan, Given stated that if SC

obtained a TRO, he would tell CMGT's shareholders that "neither Lou Franco nor Newco has any desire to expend time or funds to engage in litigation." (Ex 62 at p. 3, pt. 3.) (Emphasis added.) Given's frankness in this memo is significant because it reveals that Franco and/or Newco had the ability to fund a defense. Given's September 14 memo also reveals that the "desire" was not there because Given had a different plan for responding to SC's lawsuit. (*Id*. at pp. 2-4.) In sum, whether CMGT's shareholders and/or Trautner's investment group would have contributed money to a defense fund if Given had not devised and implemented his nine-point strategy is a material question of fact that cannot be resolved on the evidence presently before this Court. Because several material questions of fact exist as to whether Defendants or SC proximately caused CMGT's insolvency, Defendants' *Maxwell* argument should be rejected.

Defendants also argue that Plaintiff could have gotten the default judgment vacated if he had tried. Defendants are wrong. To get the default judgment vacated, Plaintiff had the burden of convincing the California court that CMGT failed to appear and defend due to either: (a) mistake, inadvertence, surprise or excusable neglect, or (b) Defendants' inexcusable neglect. Cal. Civ. Proc. Code § 473 (2006). Citing *State Farm & Fire Cas. Co. v. Pietak*, Defendants argue that Plaintiff could have gotten the default judgment vacated simply by alleging that Defendants made a mistake, *i.e.*, without an admission of fault by Defendants. Defendants' argument is misleading. *State Farm* held that a court can vacate a judgment on the basis of an attorney's mistake without an admission of error only where the attorney's mistake was excusable. *State Farm*, 90 Cal. App. 4th at 610-15; *see also*, *Metropolitan Service Corp. v. Casa de Palms, Ltd.*, 37 Cal. App. 4th 1481, 1486-87 (Cal. Ct. App. 1995.) For a judgment to be vacated on the basis of inexcusable neglect by an attorney, the moving party must submit an

affidavit from its attorney admitting the inexcusable error. *State Farm*, 90 Cal. App. 4th at 608-09.

Here, the Parties present two conflicting explanations for CMGT's failure to appear and defend. Plaintiff argues that CMGT failed to appear and defend because Defendants were guilty of malpractice -- i.e., inexcusable neglect.[9] Defendants argue that CMGT failed to appear and defend because it had no money or desire to do so. Neither reason constitutes mistake, inadvertence, surprise or excusable neglect. Thus, Plaintiff needed an affidavit from Defendants confessing inexcusable neglect. Plaintiff did not move to vacate the default judgment because he believed he could not obtain such an affidavit. (Ans. ¶63.) He was right. Defendants have denied any wrongdoing. (*Id*.) Thus, Plaintiff could not have gotten SC's default judgment vacated.

d. Damages (all claims)

This Court has already held that SC's default judgment constitutes damage. (6/28/07 Mem. Op. at pp. 11-12.) That ruling has been reinforced by *Fox v. Seiden*, 382 Ill. App. 3d 288 (1st Dist. 2008.) This Court has also held that determining what the value of the Newco stock would have been is a fact question. (9/26/07 Tr. at p. 53.) Likewise, what CMGT's profits would have been if it had received funding from the Washoe is a fact question.

V. CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that this Court enter an order denying Defendants' Motion for Summary Judgment.

[9] For an attorney's mistake to be "excusable," the legal problem posed must be "complex and debatable." *State Farm*, 90 Cal. App. 4th at 611. The "controlling factors" for that determination "are the reasonableness of the misconception and the justifiability of the failure to determine the correct law." *Id*. Clearly, Defendants malpractice does not fall within this definition of "excusable."

Dated: July 13, 2009

Respectfully submitted,
DAVID GROCHOCINSKI, not individually,
but solely in his capacity as the Chapter 7
Trustee for the bankruptcy estate of
CMGT, INC.

BY: ____/s/ Edward T. Joyce_____
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CERTIFICATE OF SERVICE

The undersigned attorney, certifies that on July 13, 2009, he caused the attached **Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment** to be served upon

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by electronically delivering a copy through the Court's CM/ECF filing system.

/s/ Edward T. Joyce