

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

Edward T. Joyce  
Arthur W. Aufmann  
Robert D. Carroll  
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11 South LaSalle Street, Ste., 1600  
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## **BACKGROUND**

### **The Parties**

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

**RESPONSE:** Admit.

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

**RESPONSE:** Admit.

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

**RESPONSE:** Admit.

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

**RESPONSE:** Admit

### **Venue And Jurisdiction**

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

**RESPONSE:** Admit.

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

**RESPONSE:** Admit.

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

**RESPONSE:** Admit.

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

**RESPONSE:** Admit.

## Louis Franco

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

**RESPONSE:** Plaintiff admits that Louis Franco (“Franco”) became CMGT’s President, Chairman and CEO sometime between October and December 2000. Plaintiff objects to Defendants’ assertion that Franco was CMGT’s President, Chairman and CEO until CMGT “ceased operations” as that statement is vague and ambiguous. Without waiving that objection, Plaintiff states that on September 19, 2003, Ronald Given (“Given”) sent CMGT’s shareholders and Gerry Spehar (“Spehar”) an email stating, among other things, that unless Spehar Capital, LLC’s (“SC”) temporary restraining order was immediately withdrawn, Franco would “reluctantly plan to leave his position with CMGT and pursue other opportunities.” (PX 68.) [References to the exhibits contained in Plaintiff’s Appendix of Exhibits are made as “(PX \_\_.)”] On April 13, 2004, Franco sent an email to CMGT’s shareholders that stated, “[a]s Ronald B. Given of Mayer Brown Rowe & Maw indicated to you in his e-mail dated September 19, 2003, I have resigned as President and CEO of CMGT, Inc. and no longer have any employment relationship with the company.” (PX 94.) Franco later testified during a citation deposition that he resigned on September 19, 2003. (PX 64 at p. 59) However, the contemporaneous documents show that Franco continued to act on behalf of CMGT after September 19, 2003. (*See e.g.*, PX 94 at p. 18 [memo from Franco to “Secured Parties” dated December 1, 2003, signed by Franco as CMGT’s President and CEO].)

The contemporaneous documents contradict Defendants’ assertion that Franco was CMGT’s sole officer. In a memorandum dated July 7, 2003, from Franco to a potential investor, Franco identified Robert Crandall and Bharat Saoji as officers of CMGT. (PX 95 at p. 2.) In addition, Mike Bowers was CMGT’s CFO from August 2000 through December 2001. (PX 2 at

pp. 2 and 4.)

With respect to Franco's control over CMGT's management and day-to-day affairs, CMGT's By-Laws state that the Chairman has "general and active management and control of the business and affairs of the corporation subject to the control of the Board of Directors," and that the President has "general and active management and control of the operations of the business and affairs of the corporation subject to the control of the Chairman." (PX 96 at §§ 5 & 6.)

### **CMGT Retains Mayer Brown**

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

**RESPONSE:** Plaintiff admits that on or about January 31, 2000 CMGT and MBRM entered into the engagement agreement that is attached to Plaintiff's Complaint as Exhibit 1. Plaintiff also admits that the partial quote in Paragraph 10 is from the January 31, 2000 engagement agreement and is accurately stated.

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

**RESPONSE:** Defendants' characterization is incomplete and therefore inaccurate. Defendants' engagement agreement states:

you [CMGT] may delay payment of our [Defendants'] invoices until the closing of your [CMGT's] initial capitalization [of at least \$1,000,000] provided, that (x) you agree to pay an amount equal to 125% of our regular hourly rates for all of your professional (lawyer and paralegal) services rendered to you from the date hereof until payment is received, and (y) we will have the unilateral right to terminate this engagement immediately if the balance of our unpaid fees and other charges incurred on your behalf (whether billed or unbilled) ever exceeds \$50,000 or you do not obtain your initial capitalization by May 1, 2000. In the event that your initial capitalization is never obtained, we understand that we will not be paid our legal fees but nonetheless you will reimburse us for out-of-pocket costs and other charges we incur on your behalf.

(Compl., Ex. 1 at p. 2.)

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

**RESPONSE:** Plaintiff admits that the January 31, 2000 engagement agreement does not say the word “litigation” anywhere. Plaintiff also admits that the engagement agreement states that the scope of Defendants’ representation may be expanded at any time by mutual consent. Finally, the engagement agreement states that “[a]ny change [to the agreement] must be made or confirmed in writing.” (Compl., Ex. 1.)

### **CMGT Retains Spehar**

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

**RESPONSE:** Admit.

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

**RESPONSE:** Admit.

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

**RESPONSE:** Plaintiff admits that in or around June 2001, CMGT retained SC to assist CMGT in its efforts to obtain financing. SC and CMGT memorialized their agreement in writing on October 1, 2001. Pursuant to that contract, SC was entitled to additional compensation if an investor who was within the scope of SC’s contract committed to provide CMGT with at least \$2,000,000 in “Accepted Capital.” (PX 97.) That threshold was later reduced to \$1,000,000. (PX 5 at p. 2.)

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

**RESPONSE:** Admit. SC’s contract was amended on September 30, 2002. (Pl. SOF at

¶3.)

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

**RESPONSE:** Plaintiff objects to Defendants’ characterization of SC’s contract. SC’s contract states that SC was entitled to a success fee of 6% of any “Accepted Capital” (i.e., cash, liquid assets, assets to be used as collateral, Letter of Credit or other form of capital acceptable to CMGT) upon a closing of a funding or transaction in which the investor supplying the “Accepted Capital” was either: (a) introduced to CMGT by SC, or (b) someone with whom CMGT had approved SC to hold discussions and exchange information regarding CMGT. (PX 5 at p. 3, ¶ 1(a).) 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. (PX 97.) When SC and CMGT revised SC’s contract in September 2002, they updated “Exhibit A.” (*See* PX 98 and PX 99.) After September 30, 2002, Franco and SC did not formally update Exhibit A even though additional investors were within the scope of SC’s contract. (*See e.g.*, Pl. SOF at ¶¶5 & 16.)

Plaintiff admits that if CMGT accepted a term sheet or other commitment for Accepted Capital of at least \$1,000,000, SC was to receive additional compensation, such as stock, investment banking rights, and a \$100,000 management fee. (PX 5 at pp. 3-5, ¶¶ 1(b)-2.)

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

**RESPONSE:** Admit.

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

**RESPONSE:** Admit.

20. One potential source of financing pursued by Spehar was Sealaska Corporation

(“Sealaska”). (Compl. ¶¶33-37.)

**RESPONSE:** Admit.

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

**RESPONSE:** Plaintiff admits that a potential financing deal with Sealaska failed on May 13, 2003. According to Spehar, it would have been difficult for a deal to be done with Sealaska after that time. (Gerry Dep. At 227-229.)

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

**RESPONSE:** Admit.

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

**RESPONSE:** Admit.

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

**RESPONSE:** Paragraph 24 presents an incomplete and, therefore, misleading recitation. When Plaintiff filed the Complaint, he had in his possession a contemporaneous document that stated the Washoe had signed a letter of intent. (PX 53 at p. 2.) During his deposition, Spehar stated that he thinks he may have told Plaintiff’s attorney after the complaint was filed that the allegation in paragraph 45 of Plaintiff’s Complaint regarding the existence of a signed Washoe LOI is wrong. (Gerry Dep. at pp. 278-280.) Because the mistake is not material to Plaintiff’s claim regarding the Washoe, Plaintiff has not yet moved to amend the complaint. Plaintiff will seek leave to amend the complaint at an appropriate time, at which time the mistaken allegation will be corrected.

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

**RESPONSE:** See Plaintiff's response to Paragraph 24.

**The Trautner Deal**

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

**RESPONSE:** Plaintiff admits that in or around May, 2003, Given and Trautner engaged in negotiations regarding the "Newco" financing deal that had previously been rejected by Franco. Plaintiff also admits that those negotiations resulted in Trautner's July 31, 2003 letter of intent (the "Trautner LOI"). (See Pl. SOF at ¶ 6.)

27. Pursuant to the terms of the Trautner LOI, "Newco" a new corporation to be formed would acquire all of CMGT's assets in exchange for, at CMGT's option, either: (a) 20% of Newco's stock; or (b) \$500,000 in cash. (Id. ¶41 & Ex. 3 at 2.)

**RESPONSE:** Admit.

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

**RESPONSE:** The Trautner LOI states that if CMGT elected to receive Newco stock, Trautner's investment group would be required to assure CMGT that Newco's initial capitalization would be at least \$2,500,000. Plaintiff disputes Defendants' conclusion that the value of 20% of Newco's stock was \$500,000. If the value of the stock was just \$500,000, then, logically, CMGT's shareholders would have elected to receive the \$500,000 cash payment. But, CMGT's shareholders unanimously voted to receive Newco's stock instead of the case. That unanimous election demonstrates that the value of the stock was greater than \$500,000.

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

**RESPONSE:** Plaintiff admits that the Trautner LOI states that Newco would not assume CMGT's liabilities. (Compl. at Ex 3, ¶ 3.) Plaintiff denies any further characterization of that



LOI.

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

**RESPONSE:** With respect to Defendants’ fees, the Trautner LOI states,

Because of Mayer, Brown, Rowe & Maw’s familiarity with Oldco [CMGT], Newco requires that they document the proposed transaction. Such work will be paid for by Newco on an hourly basis plus an agreement to also reimburse a certain percentage of legal fees that are currently unpaid, all as agreed to between Mayer, Brown, Rowe & Maw and Newco.

(Compl. at Ex 3, ¶ 4(c).)

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

**RESPONSE:** Plaintiff admits only that Franco told CMGT’s shareholders that “this [the Trautner Deal] is a deal we should and must do. There are no alternatives.” (Compl. at Ex. 5.) Further answering, Plaintiff states that the contemporaneous documents reveal that Franco actually believed that the Washoe’s interest in CMGT was “real,” that the Washoe wanted to do a deal quickly, “i.e., 30 to 60 days,” and that Franco believed the Washoe wanted to do a deal that was better for CMGT than the Trautner Deal. (PX 21 and PX 23.) Franco did not disclose those beliefs to CMGT’s shareholders. (*See* PX 11, PX 26 and PX 36.)

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

**RESPONSE:** Admit.

### **Spehar Claims A Right To Compensation As To The Trautner Deal**

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

**RESPONSE:** Admit. Further answering, Plaintiff states that Spehar asked CMGT to

add Trautner to Exhibit A of SC's contract, but CMGT refused to do so. CMGT's refusal to acknowledge that Trautner should be added to Exhibit A was the premise of SC's contract dispute. (Pl. SOF at ¶¶10-16.)

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

**RESPONSE:** Plaintiff disagrees with Defendants' assertion that the Trautner Deal did not constitute a "financing" transaction for CMGT and that it was not worth \$1,000,000. A "financing" transaction can be structured in many different ways. The fact that the Trautner Deal was structured as a sale of CMGT's assets to a newly formed company does not change the fact that CMGT's objective in the transaction was to obtain \$2.5 million in working capital to fund its business plan, pay its employees, and, eventually, provide a return on CMGT's shareholder's investment. Moreover, SC's revised contract specifically provided for SC to be compensated if CMGT consummated a deal that involved an asset purchase by a successor company. (PX 5 at p. 2, ¶ 5.)

Plaintiff admits that CMGT did not close the Trautner Deal. However, the contemporaneous documents reveal that Franco and Given proceeded with a deal with Trautner that was the "functional equivalent" of the Trautner Deal and that was designed to provide: (a) Franco with a high paying job and a resolution of his substantial personal debts, (b) Defendants with a \$100,000 payment from Trautner's investment group for MBRM's accrued legal fees, and (c) Trautner's investment group with all of CMGT's assets with having to pay anything to CMGT. (See Pl. SOF at ¶¶28-30, 46-51, 54-56, 60-61 & 66-69.)

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

**RESPONSE:** Paragraph 35 presents an incomplete and, therefore, misleading recitation. When Spehar learned about the Trautner Deal he asked Franco to add Trautner to Exhibit A of

SC's contract. In doing so, Spehar explained the basis for his belief that Trautner should be added to Exhibit A. Spehar did not claim that he was immediately entitled to compensation. In fact, he expressly stated that SC expected to be compensated "should CMGT consummate a deal with Chuck Trautner's 'Newco'." (PX 6.)

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

**RESPONSE:** Plaintiff incorporates his response to paragraph 35 and further states that CMGT refused to add Trautner to Exhibit A of SC's contract. Plaintiff admits that CMGT disputed SC's right to be compensated for the Trautner Deal. Finally, Plaintiff admits that SC and CMGT did not settle their dispute and that this failure was caused by Defendants' malpractice. (Pl. SOF at ¶¶12-14, 23-26, 28, 31, 34-35 & 48; *see also*, Resp. Br. at pp. 21-23 & 25-27.)

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

**RESPONSE:** Plaintiff agrees that Spehar testified during his deposition that the Trautner Deal had to close for SC to be entitled to its cash compensation.

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

**RESPONSE:** On September 9, 2003, SC filed a lawsuit seeking specific performance and other injunctive relief. (PX 100.) Plaintiff denies any other characterizations of SC's California lawsuit.

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

**RESPONSE:** Admit.

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

**RESPONSE:** Admit.

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

**RESPONSE:** Plaintiff admits that Given's September 17 e-mail contains those statements. Further answering, however, Plaintiff respectfully refers this Court to PX 62, which reveals that Given sent his September 17 email as part of his pre-planned and conflicted nine-point strategy for responding to a TRO.

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

**RESPONSE:** Admit.

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

**RESPONSE:** Admit. Further answering, the California court required SC to post a \$25,000 injunction bond. (PX 101.) On October 14, 2003, SC notified CMGT that it had posted the \$25,000 bond. (PX 102.) SC's bond limit was \$40,000. (Gerry Dep. at 104:17-105:5.) Given knew that SC was in a bad financial condition. (*Id.* at 274:4-275:1.)

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

**RESPONSE:** Admit.

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

**RESPONSE:** Plaintiff admits that SC's amended complaint was served on Franco on or about November 28, 2003. (PX 103.) Further answering, if CMGT would have appeared and defended SC's request for injunction relief, SC would not have pursued an action for monetary damages. (Gerry Dep. at 261:24-268:12.)

46. On February 26, 2004, there was a prove-up hearing with respect to CMGT's

default. (Transcript of Proceedings in the Spehar Lawsuit dated February 26, 2004 at 2-6, included in the Appendix as Exhibit F.)

**RESPONSE:** Admit.

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

**RESPONSE:** Plaintiff admits only that Spehar testified at the February 26, 2004 hearing. Plaintiff denies any characterizations or interpretations of that testimony.

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

**RESPONSE:** Admit.

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

THE COURT: Once you have the judgment, they’re going to come in and set aside the judgment, and the dance starts all over again.

(Appendix Ex. F at 5.)

**RESPONSE:** Admit.

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

**RESPONSE:** Admit.

### **Spehar Initiates CMGT’ s Involuntary Bankruptcy**

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

**RESPONSE:** Admit.

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

**RESPONSE:** Admit.

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

**RESPONSE:** Admit

**Spehar Approaches The Trustee About Filing A Malpractice Action**

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

**RESPONSE:** Admit.

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

**RESPONSE:** Admit.

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

**RESPONSE:** Deny. SC offered to loan the estate \$17,500 for the funding of expenses of administration of the estate (Trustee Dep. Ex. 10 at ¶ 6.) SC later agreed to split the costs of this case with Plaintiff's attorneys. (PX 104.) To date, SC has reimbursed Plaintiff's attorneys just \$6,669.02 in litigation costs. (PX 1.)

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

**RESPONSE:** Admit.

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

**RESPONSE:** Denied as stated. Plaintiff admits that as an unsecured claimant, SC holds approximately 80-90% of the unsecured claims. (Def. Ex. H at p. 31.) However, it is premature to state how much SC will receive out of a recovery because that decision will ultimately be made by the bankruptcy court. Furthermore, Defendants' reliance on Plaintiff's "sharing" agreement, i.e., PL 7421, is misleading. In that regard, before this case was filed, Plaintiff entered into a "sharing" agreement with SC (PL 7421) that explained how the proceeds of any

recovery would be distributed in the event that SC was found to be a secured creditor. (Def. Ex. D at Pl. 7421; *see also* PX 105, Trustee Dep. Tr. dated 10/30/08 at 23:13-25:2 & 96:7-97:22.) That agreement benefited CMGT's unsecured creditors because it required SC to "give up" a percentage of its share of the recovery in the event that the bankruptcy court found that SC was a secured creditor. (*Id.*) If the bankruptcy court determined that SC was unsecured, then the sharing agreement would be moot -- i.e., SC would receive its share of any recovery in the same manner as the other unsecured creditors. (*Id.*) On March 17, 2009, the Bankruptcy Court entered an Order finding that SC is an unsecured creditor. (Def. Ex. H. at p. 32.) Thus, the "sharing" agreement is moot.

### **The Trustee Fails To Vacate The Default Judgment**

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

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

(Trustee Dep. Ex. 16 at ¶12.)

**RESPONSE:** Admit.

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

Q. Well, if-- if the default judgment was vacated, then the -- the estate wouldn't have a claim against it for \$17 million, correct?

A. I suppose that's true.

Q. So it would be in the interest of the estate to get rid of that claim so that other creditors could share in the -- whatever assets CMGT had, correct?

A. I suppose.

(*Id.* at 60.)

**RESPONSE:** Admit.

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

**RESPONSE:** Plaintiff did not look at case law, hornbooks or treatises on California law relating to whether the Default Judgment could be vacated in California, but he did review California Civil Code Section 473. (Trustee Dep. at 60:21-61:7 & 106:6-16; *see also*, Def. Ex. I at PL 007571, entry dated 11/29/04.)

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

**RESPONSE:** Plaintiff did not talk to a California attorney about how default judgments can be vacated in California, but he did review California Civil Code Section 473. (Trustee Dep. at 60:21-61:7 & 106:6-16; *see also*, Defs. Ex. I at PL 007571, entry dated 11/29/04.)

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

**RESPONSE:** Plaintiff did not contact anyone from CMGT or Defendants to determine if they could help vacate the Default Judgment because he developed the opinion, based on his review of the contemporaneous documents, that the Default Judgment could not be vacated under the California statute, *i.e.*, Cal. Civ. Code Procedure §473. (Trustee Dep. at 76:15-77:10 & 86:5-87:5.) Moreover, Defendants have denied that SC obtained its default judgment as a result of their negligence. (PX 106.) Thus, Plaintiff could not have obtained an affidavit from Defendants' confessing inexcusable neglect, and could not have vacated the default judgment.

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

**RESPONSE:** Plaintiff objects to Defendants' mischaracterization of his deposition testimony. On page 87 of his deposition, Plaintiff was asked, "[w]hen you were appointed the trustee of CMGT, did you ever order the Court transcript of the hearing at which the default judgment had been entered in California?" He answered, "[n]o." With that correction, Plaintiff



admits that he personally did not look at the transcript of the default judgment hearing that took place in California.

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

**RESPONSE:** Admit. Further answering, such a motion by the Trustee would have been futile under California law, regardless what the California court stated during the default judgment hearing seven months before the Trustee was even appointed. (*See* Plaintiff's response to paragraph 63 above; *see also*, Resp. Br. at pp. 29-30.)

66. The Trustee's time records contain no reference to any time the Trustee or anyone else in his office spent analyzing or determining whether a motion to vacate the Default Judgment was timely or possible or whether to file such a motion. (Appendix Ex. I.)

**RESPONSE:** Deny. Plaintiff's time records reflect that on November 29, 2004, Plaintiff reviewed the California statute regarding vacating judgments. (Def. Ex. I at PL 007571.)

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

On investigation, several factors persuaded me that even if the time for bringing such a motion had not run, I would not be able to vacate the default judgment. First, it was not economically feasible to retain an attorney in California, since the estate had no assets. Even assuming that the estate could find funds to bring a motion in the [Spehar Lawsuit], I concluded that such a motion would be futile. Under California law, a default judgment may be vacated upon an application supported by an attorney's sworn affidavit attesting the judgment was entered as a result of the attorney's "mistake, inadvertence, surprise or neglect.." *See* Cal. Civ. Proc. Code § 473(b). In my estimation, that issue would likely have to be resolved as part of the proposed malpractice litigation, since [Defendants] likely would not admit negligence on [their] own part.

(Trustee Dep. Ex.16 at ¶12.)

**RESPONSE:** Admit.

68. On December 16, 2004, in a letter responding to correspondence sent by Kim Quarles ("Quarles"), a CMGT shareholder, the Trustee stated: "It is likely that the time period to

vacate the [Default Judgment] has now expired.” (*Id.* Ex. 15.)

**RESPONSE:** Plaintiff admits that Defendants accurately quoted a sentence from a letter that he sent to Quarles. However, Plaintiff’s use of the word “likely” in that letter does not mean that he did not know whether the time to vacate the default judgment had expired. (Trustee Dep. at 76:1-7.) That is simply his style of writing. (*Id.*)

**The Trustee’s Lack of Knowledge Regarding This Malpractice Case**

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

**RESPONSE:** Plaintiff admits only that, during his deposition, he could not identify the factual basis for the allegation in paragraph 27 of his Complaint that Spehar and CMGT regularly agreed to oral modifications to the Spehar Agreement. Plaintiff does not admit that no such factual basis exists. Further answering, 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 (as reflected in the contemporaneous documents) support causes of action against Defendants. (Trustee Dep. at 43:15-22, 85:4-9, 86:5-18 & 123:4-124:24 & 253:9-20.)

Because this is a public filing and because Plaintiff is a practicing attorney and bankruptcy trustee in this state, he is providing an accurate statement of what actually happened here pre-filing. To be clear, 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. Instead, Plaintiff’s argument is based on (a) the non-privileged contemporaneous documents that he obtained before he filed

this case, and (b) relevant legal authorities, e.g., case law and statutes. (*See* Resp. Br. at pp. 17-30.)

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

**RESPONSE:** Plaintiff admits only that, during his deposition, he could not identify the factual basis for the allegation in paragraph 41 of his Complaint that, in May 2003, Ronald and Trautner revived the Trautner Deal on the same terms that Franco had rejected in January, 2003. Plaintiff does not admit that no such factual basis exists. Further answering, 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 SC's California lawsuit against CMGT; and to (b) rely on his special counsel's analysis of whether those occurrence facts (as reflected in the contemporaneous documents) support causes of action against Defendants. (Trustee Dep. at 43:15-22, 85:4-9, 86:5-18 & 123:4-124:24 & 253:9-20.)

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

**RESPONSE:** Plaintiff admits only that, during his deposition, he did not know whether CMGT's business took a downturn between January 2003 and May 2003. Further answering, 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 SC's California lawsuit against CMGT; and to (b) rely on his special counsel's analysis of whether those occurrence facts (as reflected in the contemporaneous documents) support causes of action against Defendants. (Trustee Dep. at 43:15-22, 85:4-9, 86:5-18 & 123:4-124:24 & 253:9-20.)

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

**RESPONSE:** Plaintiff admits only that, during his deposition, he did not know if the statement in paragraph 43 of his Complaint that Ronald pressured Franco to agree to the Trautner Deal is true. Plaintiff does not admit that the allegation is not true. Further answering, 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 SC's California lawsuit against CMGT; and to (b) rely on his special counsel's analysis of whether those occurrence facts (as reflected in the contemporaneous documents) support causes of action against Defendants. (Trustee Dep. at 43:15-22, 85:4-9, 86:5-18 & 123:4-124:24 & 253:9-20.)

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

**RESPONSE:** Plaintiff admits only that, during his deposition, he could not identify the factual basis for the allegation in paragraph 43 of his Complaint that Defendants failed to advise Franco that a better financing deal was available from Sealaska or other potential investors. Plaintiff does not admit that no such factual basis exists. Further answering, 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 SC's California lawsuit against CMGT; and to (b) rely on his special counsel's analysis of whether those occurrence facts (as reflected in the contemporaneous documents) support causes of action against Defendants. (Trustee Dep. at 43:15-22, 85:4-9, 86:5-18 & 123:4-124:24 & 253:9-20.)

74. The Trustee does not know the factual basis for the allegation in paragraph 37 of

his Complaint that CMGT and Sealaska were close to closing a financing deal. (Id. at 243.)

**RESPONSE:** Plaintiff admits only that, during his deposition, he could not identify the factual basis for the allegation in paragraph 37 of his Complaint that CMGT and Sealaska were close to closing a financing deal. Plaintiff does not admit that no such factual basis exists. Further answering, 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 SC's California lawsuit against CMGT; and to (b) rely on his special counsel's analysis of whether those occurrence facts (as reflected in the contemporaneous documents) support causes of action against Defendants. (Trustee Dep. at 43:15-22, 85:4-9, 86:5-18 & 123:4-124:24 & 253:9-20.)

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

**RESPONSE:** Plaintiff admits only that, during his deposition, he could recall seeing a signed LOI from Sealaska. Plaintiff does not admit that no such LOI exists. Further answering, 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 SC's California lawsuit against CMGT; and to (b) rely on his special counsel's analysis of whether those occurrence facts (as reflected in the contemporaneous documents) support causes of action against Defendants. (Trustee Dep. at 43:15-22, 85:4-9, 86:5-18 & 123:4-124:24 & 253:9-20.)

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

**RESPONSE:** Admit.

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

279.)

**RESPONSE:** Plaintiff admits only that, during his deposition, he was not aware of any potential financing available to CMGT as of September 29, 2003, other than the Trautner Deal and the negotiations with the Washoe. Plaintiff does not admit that no other financing was available as of September 29, 2003. Further answering, 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 SC's California lawsuit against CMGT; and to (b) rely on his special counsel's analysis of whether those occurrence facts (as reflected in the contemporaneous documents) support causes of action against Defendants. (Trustee Dep. at 43:15-22, 85:4-9, 86:5-18 & 123:4-124:24 & 253:9-20.)

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

**RESPONSE:** Admit. Further answering, 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 SC's California lawsuit against CMGT; and to (b) rely on his special counsel's analysis of whether those occurrence facts (as reflected in the contemporaneous documents) support causes of action against Defendants. (Trustee Dep. at 43:15-22, 85:4-9, 86:5-18 & 123:4-124:24 & 253:9-20.)

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

**RESPONSE:** Plaintiff admits only that, during his deposition, he could not identify the factual basis for the allegation in paragraph 49 of his Complaint that SC was Defendants' client. Plaintiff does not admit that no such factual basis exists. Further answering, 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 SC's California lawsuit against CMGT; and to (b) rely on his special counsel's analysis of whether those occurrence facts (as reflected in the contemporaneous documents) support causes of action against Defendants. (Trustee Dep. at 43:15-22, 85:4-9, 86:5-18 & 123:4-124:24 & 253:9-20.)

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

**RESPONSE:** Plaintiff objects to Defendants' mischaracterization of paragraph 42 of his Complaint, which does not contain the word "all." Answering further, Plaintiff admits only that, during his deposition, he could not identify the factual basis for the allegation in paragraph 42 of his Complaint that Defendants' legal fees would have been paid if the Trautner Deal had closed. Plaintiff does not admit that no factual basis exists for the allegation that Defendants would be paid legal fees by Trautner's investment group. Further answering, 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 SC's California lawsuit against CMGT; and to (b) rely on his special counsel's analysis of whether those occurrence facts (as reflected in the contemporaneous documents) support causes of action against Defendants. (Trustee Dep. at 43:15-22, 85:4-9, 86:5-18 & 123:4-124:24 & 253:9-20.)

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

**RESPONSE:** Plaintiff admits only that, during his deposition, he did not know if Ronald recommended settlement to CMGT. Plaintiff does not admit that Ronald did, in fact, recommend settlement to CMGT. Further answering, 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 SC's California lawsuit against CMGT; and to (b) rely on his special counsel's analysis of whether those occurrence facts (as reflected in the contemporaneous documents) support causes of action against Defendants. (Trustee Dep. at 43:15-22, 85:4-9, 86:5-18 & 123:4-124:24 & 253:9-20.)

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

**RESPONSE:** Plaintiff admits only that, during his deposition, he did not know if CMGT's shareholders were interested in settling with SC. Plaintiff does not admit that CMGT's shareholders were not interested in settling with SC. Further answering, 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 SC's California lawsuit against CMGT; and to (b) rely on his special counsel's analysis of whether those occurrence facts (as reflected in the contemporaneous documents) support causes of action against Defendants. (Trustee Dep. at 43:15-22, 85:4-9, 86:5-18 & 123:4-124:24 & 253:9-20.)

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

**RESPONSE:** Plaintiff admits only that, during his deposition, he did not know whether SC would have settled for anything less than full adherence to every demand it made. Plaintiff does not admit that SC would have settled for nothing less than full adherence to every demand it made. Further answering, 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 SC's California lawsuit against CMGT; and to (b) rely on his special counsel's analysis of whether those occurrence facts (as reflected in the contemporaneous documents) support causes of action against Defendants. (Trustee Dep. at 43:15-22, 85:4-9, 86:5-



18 & 123:4-124:24 & 253:9-20.)

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

**RESPONSE:** Plaintiff admits only that, during his deposition, he did not know whether CMGT had any money or other assets to pay SC as part of any settlement. Plaintiff does not admit that CMGT did not have any money or other assets to pay SC as part of any settlement. Further answering, 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 SC's California lawsuit against CMGT; and to (b) rely on his special counsel's analysis of whether those occurrence facts (as reflected in the contemporaneous documents) support causes of action against Defendants. (Trustee Dep. at 43:15-22, 85:4-9, 86:5-18 & 123:4-124:24 & 253:9-20.)

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

**RESPONSE:** Plaintiff admits only that, during his deposition, he did not know if a settlement with SC was possible before the closing of the Trautner Deal. Plaintiff does not admit that a settlement with SC was not possible before the closing of the Trautner Deal. Further answering, 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 SC's California lawsuit against CMGT; and to (b) rely on his special counsel's analysis of whether those occurrence facts (as reflected in the contemporaneous documents) support causes of action against Defendants. (Trustee Dep. at 43:15-22, 85:4-9, 86:5-18 & 123:4-124:24 & 253:9-20.)

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

**RESPONSE:** Plaintiff admits only that, during his deposition, he did not know if CMGT had the financial resources to defend itself in SC's lawsuit. Plaintiff does not admit that CMGT did not have the financial resources to defend itself in SC's lawsuit. Further answering, 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 SC's California lawsuit against CMGT; and to (b) rely on his special counsel's analysis of whether those occurrence facts (as reflected in the contemporaneous documents) support causes of action against Defendants. (Trustee Dep. at 43:15-22, 85:4-9, 86:5-18 & 123:4-124:24 & 253:9-20.)

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

**RESPONSE:** Plaintiff admits only that he did not take any action to determine if Franco's letter stating that CMGT had no money to defend SC's lawsuit was true. Plaintiff does not admit that Franco's letter was true. Further answering, 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 SC's California lawsuit against CMGT; and to (b) rely on his special counsel's analysis of whether those occurrence facts (as reflected in the contemporaneous documents) support causes of action against Defendants. (Trustee Dep. at 43:15-22, 85:4-9, 86:5-18 & 123:4-124:24 & 253:9-20.)

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

**RESPONSE:** Plaintiff admits only that, during his deposition, he did not know whether the allegation in paragraph 58 of his Complaint that Defendants advised CMGT not to appear and defend CMGT in SC's lawsuit was true. Plaintiff does not admit that the allegations in

paragraph 58 of his Complaint are not true. Further answering, 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 SC's California lawsuit against CMGT; and to (b) rely on his special counsel's analysis of whether those occurrence facts (as reflected in the contemporaneous documents) support causes of action against Defendants. (Trustee Dep. at 43:15-22, 85:4-9, 86:5-18 & 123:4-124:24 & 253:9-20.)

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

**RESPONSE:** Plaintiff admits only that, during his deposition, he did not know why CMGT did not defend itself against SC's amended complaint. Further answering, 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 SC's California lawsuit against CMGT; and to (b) rely on his special counsel's analysis of whether those occurrence facts (as reflected in the contemporaneous documents) support causes of action against Defendants. (Trustee Dep. at 43:15-22, 85:4-9, 86:5-18 & 123:4-124:24 & 253:9-20.)

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

**RESPONSE:** Plaintiff admits only that, during his deposition, he did not know if CMGT made a deliberate decision not to appear for the Default Judgment prove-up hearing. Plaintiff does not admit CMGT made a deliberate decision not to appear for the Default Judgment prove-up hearing. Further answering, 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 SC's California lawsuit against CMGT; and to (b) rely on his special counsel's analysis of whether those occurrence facts (as

reflected in the contemporaneous documents) support causes of action against Defendants. (Trustee Dep. at 43:15-22, 85:4-9, 86:5-18 & 123:4-124:24 & 253:9-20.)

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

**RESPONSE:** Plaintiff admits only that he did not ask anyone at CMGT any questions about why CMGT did not attempt to vacate the Default Judgment. Further answering, 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 SC's California lawsuit against CMGT; and to (b) rely on his special counsel's analysis of whether those occurrence facts (as reflected in the contemporaneous documents) support causes of action against Defendants. (Trustee Dep. at 43:15-22, 85:4-9, 86:5-18 & 123:4-124:24 & 253:9-20.)

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

**RESPONSE:** Plaintiff admits only that, during his deposition, he did not know whether Franco and the other CMGT shareholders wanted to give up the business and let it disappear rather than appear and defend SC's lawsuit. Plaintiff admits that Franco abandoned CMGT to further his own personal interests when he pursued a deal, which was developed by Given, with Trautner on an individual basis that was the "functional equivalent" of the Trautner Deal. Plaintiff does not admit that all of CMGT's shareholders made a fully informed decision to give up the business and let it disappear rather than appear and defend SC's lawsuit. Further answering, 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 SC's California lawsuit against CMGT; and to (b) rely on his special

counsel's analysis of whether those occurrence facts (as reflected in the contemporaneous documents) support causes of action against Defendants. (Trustee Dep. at 43:15-22, 85:4-9, 86:5-18 & 123:4-124:24 & 253:9-20.)

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

**RESPONSE:** Admit.

### **The Trustee Made No Pre-Filing Investigation**

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

**RESPONSE:** Plaintiff admits that Wong was CMGT's accountant and a shareholder, and that he submitted an affidavit. Plaintiff objects to the phrase "major shareholder" on the basis that it is vague and ambiguous.

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

**RESPONSE:** Plaintiff testified that he thought Wong may have been CMGT's CFO or controller.

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

**RESPONSE:** Plaintiff objects to the phrase "major shareholder" on the basis that it is vague and ambiguous. Plaintiff also objects to Defendants' statement that Baliga was "involved in some of CMGT's decisions" on the basis that it is vague and ambiguous in that Defendants fail to identify what "decisions" Baliga was allegedly involved with or how he was involved with those decisions. Subject to and without waiving these objections, Plaintiff admits paragraph 96.

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

**RESPONSE:** Admit.

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

**RESPONSE:** Admit.

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

**RESPONSE:** Admit.

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

**RESPONSE:** Admit.

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

**RESPONSE:** Admit.

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

**RESPONSE:** Admit.

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

**RESPONSE:** Admit.

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

**RESPONSE:** Admit.

105. The Trustee never contacted anyone with Sealaska. (Id. at 129-173.)

**RESPONSE:** Admit.

106. The Trustee never spoke to anyone from the Washoe. (Id. at 129-172.)

**RESPONSE:** Admit.

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

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

**RESPONSE:** Plaintiff objects to this paragraph in that it does not state facts but merely states improper and unsupported lay opinions. Plaintiff also objects on the basis that the affiants' lay opinions about whether Defendants did anything "wrong" are irrelevant. Furthermore, Plaintiff disputes the affiants' assertions/opinions that "Defendants did nothing wrong." (*See generally* Pl. SOF; *see also*, Resp. Br. at pp. 17-30.) Finally, Plaintiff notes that the affiants did not address any of the contemporaneous documents that Plaintiff provided to this Court in his Appendix of Exhibits.

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

**RESPONSE:** Plaintiff objects to this paragraph in that it does not state facts but merely states improper and unsupported lay opinions. Plaintiff also objects on the basis that the affiants' lay opinions that Spehar caused CMGT to fail are irrelevant. Furthermore, Plaintiff disputes the affiants' assertions/opinions that "Spehar caused CMGT to fail." (*See generally* Pl. SOF; *see also*, Resp. Br. at pp. 17-30.) Finally, Plaintiff notes that the affiants did not address any of the contemporaneous documents that Plaintiff provided to this Court in his Appendix of Exhibits.

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

**RESPONSE:** Plaintiff admits only that Franco asserts he would have told Plaintiff that by May 2003, any potential Sealaska financing deal had completely and irrevocably fallen apart.

Plaintiff does not admit that Franco's assertion is true or correct.

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

**RESPONSE:** Plaintiff objects to this paragraph in that it does not state facts but merely states improper and unsupported lay opinions. Plaintiff further objects on the basis that Franco's lay opinion as to whether Defendants satisfied their fiduciary duties and provided non-negligent legal services is irrelevant. Further answering, the contemporaneous documents contain facts that are inconsistent with Franco's statement. (*See e.g.*, Pl. SOF at ¶¶ 18-19, 42-43 & 47; *see also*, Resp. Br. at pp 23-24.)

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

**RESPONSE:** Plaintiff admits that Franco asserts that he made a "business decision" not to pursue financing from the Washoe. However, the contemporaneous documents reveal that Franco: (a) believed the Washoe's interest in CMGT was "real" (Pl. SOF at ¶18), (b) believed that the Washoe wanted to do a deal with CMGT that was better for CMGT than the Trautner Deal (*Id.* at ¶19), (c) believed that the Washoe could complete due diligence quickly (*Id.* at ¶18), and (d) asked for Given's advice about whether to suggest to the Washoe that it step into the Trautner group's position. (*Id.* at ¶42.)

The documents also reveal that: (a) Given negotiated directly with the Washoe on behalf of CMGT (Pl. SOF at ¶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 (*Id.* at ¶43), (c) sometime before September 14, Given learned that Trautner's investors would accept a later closing date (*Id.* at ¶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. (*Id.* at ¶47; *see also*, PX 62.)

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

**RESPONSE:** Plaintiff admits that Franco asserts that he believed that there was no bona fide financing available to CMGT much less better financing at the time CMGT and its shareholders accepted the Trautner Deal. However, Franco's assertion is inconsistent with the contemporaneous documents that were provided to Plaintiff before he filed this case. (Pl. SOF at ¶¶ 18-19.)

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

**RESPONSE:** Plaintiff admits that Franco asserts that Defendants did not pressure him into recommending the Trautner Deal. However, the contemporaneous documents support Plaintiff's allegation that Given was pushing the Trautner Deal ahead of other potential deals, such as the Washoe, because he was putting MBRM's and Franco's interests ahead of CMGT's interests. (*See* Pl. SOF at ¶¶ 7, 9, 28-30, 32, 37-43, 46-50 & 60.)

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

**RESPONSE:** Plaintiffs admit that Franco asserts that he knew that the Trautner Deal had certain provisions concerning Defendants' unpaid legal fees and that he openly discussed this fact with Given, CMGT's shareholders and CMGT's other professional advisors. However, the contemporaneous documents reveal that Franco and Given did not disclose to all of CMGT's shareholders that on September 21, 2003, which was just two days after Given (as part of his

nine-point strategy as reflected in PX 62) told CMGT's shareholders that Franco was resigning and that the Trautner LOI was being terminated, Defendants received a (a) \$50,000 check from Trautner's attorney as partial payment of Defendants' accrued and unpaid legal fees, and (b) a commitment to pay another \$50,000, plus additional fees, in the future. (Pl. SOF at ¶¶54-56, 60 & 72-73.)

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

**RESPONSE:** Plaintiff admits that the affiants assert that CMGT did not hire Defendants to be CMGT's litigation counsel, and that they did not expect Defendants to defend CMGT in the Spehar Lawsuit. However, the contemporaneous documents that were provided to Plaintiff before he filed this case show that Defendants provided CMGT with legal advice regarding SC's lawsuit. (*See* PX 34 & PX 62 and Pl. SOF at ¶¶31, 35, 54-56, 60-62, 66, 67-69 62 & 70-71.)

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

**RESPONSE:** Plaintiff admits that Franco asserts that Defendants discussed the possibility of settling with Spehar before the Spehar Lawsuit was filed and that efforts were made to settle the dispute, but that they were not successful. However, Franco's assertion is inconsistent with the contemporaneous documents that were provided to Plaintiff before he filed this case. (*See* Pl. SOF at ¶¶12-14, 23-26, 28, 31, 34-35 & 48.)

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

**RESPONSE:** Plaintiff objects to this paragraph in that it does not state facts but merely states improper and unsupported lay opinions. Further answering, Plaintiff admits that Franco,

Baliga and Wong now assert that they believed Spehar's claim was without merit and that Spehar's settlement demands were unreasonable. However, Franco, Baliga and Wong did not address any of the contemporaneous documents that are inconsistent their assertions. (*See* Pl. SOF at ¶¶4-5, 12-14, 16, 23-26, 28, 31, 34-35 & 48.)

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

**RESPONSE:** Plaintiff admits that Franco asserts that: (a) "CMGT had no money to offer SC nor any line of credit or other resources that it could use to raise money for that purpose," (b) "CMGT's shareholders were unwilling to make any further capital investment(s) in CMGT," (c) "[t]he Trautner investor group was asked if it would allow for the payment of money in connection with their proposed transaction to settle the dispute with SC" and, (d) "Trautner said his group was willing to pay SC a substantial sum," but Spehar rejected the offer. (Franco Aff. at ¶¶ 14-15.) However, Franco's assertions in his affidavit are inconsistent with the contemporaneous documents that were provided to Plaintiff before he filed this case. (*See* Pl. SOF at ¶¶12-14, 23-26, 27-28, 31, 34-35 & 48; *see also*, Resp. Br. at pp. 21-23 & 25-30.)

Plaintiff admits that Baliga asserts that: (a) before SC filed its lawsuit, he was not willing to contribute money to CMGT to pay or settle SC's claims, (b) after SC filed its lawsuit, he was willing to contribute his pro rata share of the money needed to hire CMGT to hire counsel and put up a defense, but (c) Franco told him that the other shareholders were not interested in contributing funds for that purpose and that many of them had told him that they had written off their investment in CMGT. (Baliga Aff. At ¶6.)

However, the contemporaneous documents provided to Plaintiff before he filed this case reveal that: (a) after SC filed its lawsuit, Franco did not ask all of CMGT's shareholders whether

they were willing to contribute money to hire an attorney to defend SC's lawsuit (*e.g.*, PX 70 at p. 3 and PX 92); and, (b) one of the primary reasons -- if not the primary reason -- that many of CMGT's shareholders wrote-off their investment in CMGT after SC filed its lawsuit was because Given sent CMGT's shareholders an email that caused them to believe that (i) nothing could be done to protect them from SC's lawsuit, (ii) the Trautner Deal was not going to close, and (iii) Franco was resigning (PX 53, PX55 & PX92-94.) Given's email was sent as part of his pre-planned nine-point strategy for responding to an SC TRO. (PX 62.) That strategy protected Franco's, Defendants' and Trautner's interests, but it required Franco and Defendants to abandon CMGT. (*Id.*)

Plaintiff admits that Wong now asserts that: (a) SC was not entitled to any payment until a financing deal actually closed, (b) he thought that if the Trautner Deal closed, CMGT might be able to work out a settlement with SC, (c) CMGT had no funds to settle SC's claim, and (d) he was against a settlement because he believed SC's claim was without merit. Wong's assertions ignore the contemporaneous documents, which show that SC was not asking to be paid cash prior to closing and that it had a colorable claim against CMGT. (*See* PX 6 and PX 28.) Moreover, the contemporaneous documents prove that Wong was a participant in Given's conflicted and improper nine-point strategy. (PX 75; *see also*, PX 79.)

119. Franco would have told the Trustee that he knew that if Spehar filed suit, the Trautner Deal would be withdrawn, that any small chance CMGT had to find immediate financing would probably disappear and that CMGT would have to cease operations. (Franco Aff., Appendix Ex. B, ¶¶39-40.)

**RESPONSE:** Plaintiff admits that Franco asserts that he understood that if SC filed suit, the Trautner Deal would be withdrawn, CMGT would probably not obtain financing and that CMGT would cease to operate. However, Franco fails to disclose that the reason he knew that the Trautner Deal would be withdrawn, that CMGT would not obtain financing and that CMGT

would cease to operate is because he knew that Given had developed a nine-point strategy for responding to an SC lawsuit that involved: (a) Franco consummating a “functional equivalent” of the Trautner Deal at an individual level without any compensation to CMGT, and (b) CMGT giving-up financing efforts and ceasing to operate. (Pl. SOF at ¶¶46-51.)

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

**RESPONSE:** Plaintiff admits only that Franco asserts that he would have told Plaintiff that he discussed these issues with Ronald and that Defendants did not fail to advise CMGT that a lawsuit by Spehar would preclude CMGT from obtaining financing. Plaintiff does not admit that Franco’s assertion is true. Answering further, Franco does not address the contemporaneous documents that Plaintiff provided this Court in his Appendix of Exhibits. Franco also did not acknowledge or discuss Given’s conflicted nine-point strategy (*see* PX 62.)

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

**RESPONSE:** Plaintiff admits only that Franco asserts that he would have told Plaintiff that he knew that any lawsuit can be lost, and that if one fails to defend a lawsuit, a default judgment is almost certain to be awarded to the plaintiff. Plaintiff does not admit that Franco’s assertion is true. Answering further, Franco does not address the contemporaneous documents that Plaintiff provided this Court in his Appendix of Exhibits. Franco also did not acknowledge or discuss Given’s conflicted nine-point strategy (*see* PX 62.)

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

**RESPONSE:** Plaintiff admits only that Franco asserts that he would have told Plaintiff that Defendants did not fail to advise him that CMGT could lose SC’s lawsuit and that Ronald

informed him that, regardless of merits, lawsuits can be lost including SC's lawsuit. Plaintiff does not admit that Franco's assertion is true. Answering further, Franco does not address the contemporaneous documents that Plaintiff provided this Court in his Appendix of Exhibits. Franco also did not acknowledge or discuss Given's conflicted nine-point strategy (*see* PX 62.)

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

**RESPONSE:** Plaintiff admits only that Baliga asserts that he would have told Plaintiff that he knew that CMGT would go out of business if it did not mount a defense to SC's lawsuit. Answering further, Baliga does not address, and may not even know about, the contemporaneous documents that Plaintiff provided this Court in his Appendix of Exhibits.

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

**RESPONSE:** Plaintiff admits only that Franco asserts that he would have told Plaintiff that Defendants never advised CMGT not to defend or to ignore SC's lawsuit. Plaintiff does not admit that Franco's assertion is true. Answering further, Franco does not address the contemporaneous documents that Plaintiff provided this Court in his Appendix of Exhibits. Franco also did not acknowledge or discuss Given's conflicted nine-point strategy (*see* PX 62.)

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

**RESPONSE:** Plaintiff admits only that Franco, Baliga, Quarles and Wong assert that they would have told Plaintiff that CMGT did not defend itself in SC's lawsuit because it had no money to hire counsel to do so and CMGT's shareholders (other than Baliga and Wong) were not willing to contribute additional money to the company to fund a defense. Plaintiff does not admit that the affiants' assertions are true or correct. Answering further, the affiants do not

address the contemporaneous documents that Plaintiff provided this Court in his Appendix of Exhibits. Franco and Wong also fail to acknowledge or discuss Given's conflicted nine-point strategy (*see* PX 62.)

126. Franco, Baliga, Quarles and Wong would have told the Trustee that at different times after the Spehar Lawsuit was filed, Franco, Baliga and Wong contacted and in some cases interviewed attorneys in California and Chicago to represent CMGT in the Spehar Lawsuit, but that CMGT decided it could not afford to hire counsel. (Franco Aff., Appendix Ex. B, ¶¶42; Baliga Aff., Appendix Ex. C, ¶9; Quarles Aff., Appendix Ex. D, ¶4; Wong Aff., Appendix Ex. E, ¶¶9-10.)

**RESPONSE:** Plaintiff admits only that Franco, Baliga, Quarles and Wong assert that they would have told Plaintiff that at different times after SC's lawsuit was filed, Franco, Baliga and Wong contacted and in some cases interviewed attorneys in California and Chicago to represent CMGT in SC's lawsuit, but that CMGT decided it could not afford to hire counsel. Plaintiff does not admit that CMGT could not have afforded to hire counsel if Given had not developed and implemented his conflicted nine-point strategy. (*See* PX 62 and Pl. SOF at ¶¶53-54, 56-73.) Answering further, the affiants do not address the contemporaneous documents that Plaintiff provided this Court in his Appendix of Exhibits. Franco and Wong also fail to acknowledge or discuss Given's conflicted nine-point strategy (*see* PX 62.)

### **The Trustee Ignored The Evidence Handed To Him**

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

**RESPONSE:** Plaintiff admits only that he received a copy of Mr. Carroll's letter dated December 1, 2004. Plaintiff does not admit that the assertions in Mr. Carroll's letter are correct or based on a full knowledge of all the relevant facts. Further answering, Plaintiff states that it is unlikely that Mr. Carroll knows that:

- (a) SC's claim was colorable (Resp. Br. at p. 19);

(b) Given repeatedly resisted efforts to settle the SC dispute (Pl. SOF at ¶¶12-14, 23-26, 28, 31, 34-35, 48 & 66);

(c) Given repeatedly advised Franco to ignore the SC dispute (Pl. SOF at ¶¶26, 34 & 66);

(d) Before SC filed its lawsuit, Given told Trautner and Trautner's lawyer that it would be better for Trautner's investment group if SC disrupted the deal because it would allow Trautner's investment group to acquire CMGT's assets without paying anything to CMGT (PX 34);

(e) Given developed a conflicted strategy for responding to an SC TRO that included: (i) lulling CMGT's shareholders and Spehar into believing that CMGT was dead, (ii) abandoning CMGT, and (iii) consummating a deal between Franco individually and Trautner's investment group that was, in Given's words, the "functional equivalent" of the Trautner Deal (PX 34 and PX 62);

(f) After SC obtained its TRO, Given, Franco and Wong implemented Given's strategy (Pl. SOF at ¶¶ ¶¶60-61, 65-69 & 72-73); and,

(g) Two days after Given told CMGT's shareholders that Trautner's investment group was going to terminate the LOI and that Franco was resigning, Trautner's investment group paid Defendants \$50,000 in accrued fees and promised to pay them more in the future. (PX 74.)

128. Wong wrote a letter to the Trustee dated December 8, 2004, which stated, in part: "To put it simply, [Spehar] initiated a lawsuit against CMGT without merit or sustaining damages, rendered CMGT unacceptable as an investment to any potential investor and caused its demise." The same letter stated: "[Spehar] and his counsel [] knew that CMGT was never funded and did not have the financial resources to defend itself." (*Id.* at PL 01389; Wong Aff., Appendix Ex. E, ¶12 & Ex. A.)

**RESPONSE:** Plaintiff admits only that he received a copy of Wong's December 8, 2004 letter. Plaintiff does not admit that Wong's assertions in that letter are true or correct. Further answering, the contemporaneous documents show that Wong knew about, participated in and



likely benefited from Given's conflicted and improper strategy. (PX 75; *see also*, PX 79.)

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

**RESPONSE:** Plaintiff admits only that he received a copy of Mr. Donwen's December 10, 2004 letter. Plaintiff does not admit that the assertions in Mr. Donwen's letter are correct or based on a full knowledge of all the relevant facts. Further answering, Plaintiff states that it is unlikely that Mr. Donwen knows that:

- (a) SC's claim was colorable (Resp. Br. at p.19);
- (b) Given repeatedly resisted efforts to settle the SC dispute (Pl. SOF at ¶¶12-14, 23-26, 28, 31, 34-35, 48 & 66);
- (c) Given repeatedly advised Franco to ignore the SC dispute (Pl. SOF at ¶¶26, 34 & 66);
- (d) Before SC filed its lawsuit, Given told Trautner and Trautner's lawyer that it would be better for Trautner's investment group if SC disrupted the deal because it would allow Trautner's investment group to acquire CMGT's assets without paying anything to CMGT (PX 34);
- (e) Given developed a conflicted strategy for responding to an SC TRO that included: (i) lulling CMGT's shareholders and Spehar into believing that CMGT was dead, (ii) abandoning CMGT, and (iii) consummating a deal between Franco individually and Trautner's investment group that was, in Given's words, the "functional equivalent" of the Trautner Deal (PX 34 and PX 62);
- (f) After SC obtained its TRO, Given, Franco and Wong implemented Given's strategy (Pl. SOF at ¶¶ ¶¶60-61, 65-69 & 72-73); and,
- (g) Two days after Given told CMGT's shareholders that Trautner's investment group

was going to terminate the LOI and that Franco was resigning, Trautner's investment group paid Defendants \$50,000 in accrued fees and promised to pay them more in the future. (PX 74.)

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

**RESPONSE:** Plaintiff admits only that he received a copy of Ms. Quarles December 15, 2004 letter. Plaintiff does not admit that the assertions in Ms. Quarles letter are correct or based on a full knowledge of all the relevant facts.

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

**RESPONSE:** Plaintiff admits only that he received a copy of Mr. Holman's December 17, 2004. Plaintiff does not admit that the assertions in Mr. Holman's letter are correct or based on a full knowledge of all the relevant facts. Further answering, Plaintiff states that it is unlikely that Mr. Holman knows that:

- (a) SC's claim was colorable (Resp. Br. at p. 19);
- (b) Given repeatedly resisted efforts to settle the SC dispute (Pl. SOF at ¶¶12-14, 23-26, 28, 31, 34-35, 48 & 66);
- (c) Given repeatedly advised Franco to ignore the SC dispute (Pl. SOF at ¶¶26, 34 & 66);
- (d) Before SC filed its lawsuit, Given told Trautner and Trautner's lawyer that it would be better for Trautner's investment group if SC disrupted the deal because it would allow Trautner's investment group to acquire CMGT's assets without paying anything to CMGT (PX 34);
- (e) Given developed a conflicted strategy for responding to an SC TRO that included: (i)

lulling CMGT's shareholders and Spehar into believing that CMGT was dead, (ii) abandoning CMGT, and (iii) consummating a deal between Franco individually and Trautner's investment group that was, in Given's words, the "functional equivalent" of the Trautner Deal (PX 34 and PX 62);

(f) After SC obtained its TRO, Given, Franco and Wong implemented Given's strategy (Pl. SOF at ¶¶ 60-61, 65-69 & 72-73); and,

(g) Two days after Given told CMGT's shareholders that Trautner's investment group was going to terminate the LOI and that Franco was resigning, Trautner's investment group paid Defendants \$50,000 in accrued fees and promised to pay them more in the future. (PX 74.)

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

**RESPONSE:** Plaintiff admits only that he received a copy of Mr. Rask's December 27, 2004 letter. Plaintiff does not admit that the assertions in Mr. Rask's letter are correct or based on a full knowledge of all the relevant facts. Further answering, Plaintiff states that it is unlikely that Mr. Rask knows that:

(a) SC's claim was colorable (Resp. Br. at p. 19);

(b) Given repeatedly resisted efforts to settle the SC dispute (Pl. SOF at ¶¶ 12-14, 23-26, 28, 31, 34-35, 48 & 66);

(c) Given repeatedly advised Franco to ignore the SC dispute (Pl. SOF at ¶¶ 26, 34 & 66);

(d) Before SC filed its lawsuit, Given told Trautner and Trautner's lawyer that it would be better for Trautner's investment group if SC disrupted the deal because it would allow Trautner's investment group to acquire CMGT's assets without paying anything to CMGT (PX 34);

(e) Given developed a conflicted strategy for responding to an SC TRO that included: (i) lulling CMGT's shareholders and Spehar into believing that CMGT was dead, (ii) abandoning CMGT, and (iii) consummating a deal between Franco individually and Trautner's investment group that was, in Given's words, the "functional equivalent" of the Trautner Deal (PX 34 and PX 62);

(f) After SC obtained its TRO, Given, Franco and Wong implemented Given's strategy (Pl. SOF at ¶¶ 60-61, 65-69 & 72-73); and,

(g) Two days after Given told CMGT's shareholders that Trautner's investment group was going to terminate the LOI and that Franco was resigning, Trautner's investment group paid Defendants \$50,000 in accrued fees and promised to pay them more in the future. (PX 74.)

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

**RESPONSE:** Plaintiff admits only Franco wrote a letter to Ira Bodenstein dated July 21, 2005. Plaintiff does not admit that the assertions in Franco's letter are true. Further answering, Plaintiff states that he responded to Franco's letter and that no action was taken by the U.S. Trustee against Plaintiff. (PX 107.)

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

**RESPONSE:** Paragraph 134 mischaracterizes Plaintiff's testimony and is, therefore, inaccurate. Plaintiff admits that, during his deposition, he stated that he forwarded some of the letters that he received from CMGT's shareholders to SC's attorney, but that he cannot remember which ones he forwarded. He was not asked and did not testify about the reason that he forwarded the letters to SC's attorney.

**The Trustee Knew There Was a Reasonable Explanation Why CMGT Defaulted In the Spehar Lawsuit**

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

**RESPONSE:** Plaintiff admits only that Given sent CMGT's shareholders an email on September 19, 2003 that stated, among other things, that CMGT had no money to fight SC's lawsuit. Plaintiff does not admit that the assertions in Given's September 19 email are true. Further answering, Defendants fail to acknowledge that Given sent his September 19 email as part of his conflicted nine-point strategy for responding to a TRO. (Compare PX 62 with PX 68.)

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

**RESPONSE:** Admit. Further answering, the quoted statement by Plaintiff expresses his reasonable doubt that lack of money was the real reason why CMGT did not defend SC's lawsuit.

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

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

(Trustee Dep. Ex. 24.)

**RESPONSE:** Admit. Further answering, the contemporaneous documents reveal that: (a) after SC filed its lawsuit, Franco did not ask all of CMGT's shareholders whether they were willing to contribute money to hire an attorney to defend SC's lawsuit (*e.g.*, PX 70 at p. 3 and PX 92); and, (b) one of the primary reasons -- if not the primary reason -- that many of CMGT's

shareholders wrote-off their investment in CMGT after SC filed its lawsuit was because Given sent CMGT's shareholders an email that caused them to believe that (i) nothing could be done to protect them from SC's lawsuit, (ii) the Trautner Deal was not going to close, and (iii) Franco was resigning (PX 53, PX55 & PX92-94.) Given's email was sent as part of his pre-planned nine-point strategy for responding to an SC TRO. (PX 62.) That strategy protected Franco's, Defendants' and Trautner's interests, but it required Franco and Defendants to abandon CMGT. (*Id.*)

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

**RESPONSE:** Plaintiff testified that with the exclusion of this malpractice case, he is not aware of any assets other than the software, which was sold to SC for about \$1,500.

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

**RESPONSE:** Plaintiff admits only that, during his deposition, he (a) acknowledged that he was not aware of CMGT having any more assets when SC's lawsuit was filed than when CMGT went into bankruptcy, and (b) identified schedules that list CMGT's secured and unsecured creditors and agreed that those schedules list the amounts of most of CMGT's creditor's claims as "unknown."

### **Threats**

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

I know these potential witnesses [Franco, Wong and Baliga] ... great care must be taken in how we approach & depose these people if we are to extract maximum value and their cooperation....

We need real fear on our side in dealing with [Franco, Wong and Baliga] ... once we file and leave the door open to going after them, they will clearly know we are serious and it will be a different ball

game....

Once Ed [Joyce] receives and properly reviews the current subpoenas, issues additional subpoenas (e.g., Franco, Wong & Trautner's communications), and scares these gentlemen by filing the case ... then he'll be ready to extract some real value.

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

**RESPONSE:** Admit.

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

David [Grochocinski], I must reiterate, it is simply too late now to get all of this properly done by the filing deadline ... let alone investigate, depose & file before the filing deadline....

Once we get by the statute of limitations and Joyce conducts a proper investigation, he should become more comfortable.

(Id. at 2.)

**RESPONSE:** Admit.

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

**RESPONSE:** Plaintiff admits only that he sent a letter to Wong on August 22, 2006 with a proposed tolling agreement enclosed. Plaintiff denies any characterizations of that letter. Further answering, Plaintiff's letter to Wong stated that Plaintiff wanted to meet with Wong to discuss what he believes happened to CMGT. (PX 108.) Finally, although the tolling agreement has expired, the statute of limitations on a breach of fiduciary duty claim against Wong has not.

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

**RESPONSE:** Plaintiff admits only that, during his deposition, he testified that he did not investigate Wong's actions in connection with CMGT. Plaintiff does not admit that an investigation was not done. Further answering, 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 SC's California lawsuit against CMGT; and to (b) rely on his special counsel's analysis of whether those occurrence facts (as reflected in the contemporaneous documents) support causes of action against Defendants. (Trustee Dep. at 43:15-22, 85:4-9, 86:5-18 & 123:4-124:24 & 253:9-20.)

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

**RESPONSE:** Plaintiff admits only that, during his deposition, he testified that he is unaware of anything that Wong did wrong in connection with CMGT and that he has no intention of bringing a lawsuit against Wong. Plaintiff does not admit that Wong did nothing wrong in connection with CMGT or that he will never bring a lawsuit against Wong after merits discovery proceeds. Further answering, 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 SC's California lawsuit against CMGT; and to (b) rely on his special counsel's analysis of whether those occurrence facts (as reflected in the contemporaneous documents) support causes of action against Defendants. (Trustee Dep. at 43:15-22, 85:4-9, 86:5-18 & 123:4-124:24 & 253:9-20.)

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

**RESPONSE:** Plaintiff admits only that he sent a letter to Franco on August 21, 2006 with a proposed tolling agreement enclosed. Plaintiff denies any characterizations of that letter. Further answering, Plaintiff's letter to Franco stated that Plaintiff wanted to meet with Franco to discuss what he believes happened to CMGT. (PX 109.) Finally, although the tolling agreement has expired, the statute of limitations on a breach of fiduciary duty claim against Franco has not.



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

**RESPONSE:** Plaintiff admits only that, during his deposition, he testified that he did not investigate Franco's actions in connection with CMGT. Plaintiff does not admit that an investigation was not done. Further answering, 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 SC's California lawsuit against CMGT; and to (b) rely on his special counsel's analysis of whether those occurrence facts (as reflected in the contemporaneous documents) support causes of action against Defendants. (Trustee Dep. at 43:15-22, 85:4-9, 86:5-18 & 123:4-124:24 & 253:9-20.)

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

**RESPONSE:** Plaintiff admits only that, during his deposition, he testified that he is unaware of anything that Franco did wrong in connection with CMGT and that he has no intention of bringing a lawsuit against Franco. Plaintiff does not admit that Franco did nothing wrong in connection with CMGT or that he will never bring a lawsuit against Franco after merits discovery proceeds. Further answering, 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 SC's California lawsuit against CMGT; and to (b) rely on his special counsel's analysis of whether those occurrence facts (as reflected in the contemporaneous documents) support causes of action against Defendants. (Trustee Dep. at 43:15-22, 85:4-9, 86:5-18 & 123:4-124:24 & 253:9-20.)

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        
Plaintiff's attorneys

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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' Local Rule 56.1(a) Statement of Undisputed Facts In Support of Their Motion for Summary Judgment Based on Their Unclean Hands Defense** to be served upon

Stephen Novack  
Mitchell L. Marinello  
Steven J. Ciszewski  
Novack and Macey LLP  
100 N. Riverside Plaza  
Chicago, IL 60606

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

/s/ Edward T. Joyce \_\_\_\_\_