

**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 LOCAL RULE 56.1(b)(3)(C) STATEMENT IN SUPPORT OF HIS
RESPONSE TO DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT**

Edward T. Joyce
Arthur W. Aufmann
Robert D. Carroll
EDWARD T. JOYCE & ASSOC., P.C.
11 South LaSalle Street, Ste., 1600
Chicago, Illinois 60603

CMGT Hires Defendants

1. In July 1999, CMGT, Inc. (“CMGT”) hired Defendants Mayer Brown Rowe & Maw LLP (“MBRM”) and Ronald Given (“Given”) (together, “Defendants”) as its attorneys because CMGT’s President, Lou Franco’s (“Franco”), had a pre-existing personal and business relationship with Given. (Ex. 2.)¹

CMGT and SC Revise SC’s Contract

2. In June 2002, Spehar Capital, LLC (“SC”) asked CMGT to revise its contract. SC’s owner, Gerry Spehar (“Spehar”), stated that the revisions were warranted because SC had made valuable contributions to CMGT. (*See e.g.*, Ex. 3 and Ex. 4.)

3. On September 30, 2002, CMGT and SC executed a revised contract. SC’s revised contract was to expire on October 1, 2003, but could be terminated earlier. (Ex. 5.)

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

4. On January 27, 2003, Franco asked Spehar to participate in a phone conference with Franco, Given and a CMGT shareholder, Charles Trautner (“Trautner”), to vet Trautner’s ideas for restructuring CMGT into an entity he referred to as “Newco.” Under Trautner’s proposal, CMGT’s shareholders would receive only about 20% of Newco’s stock and Newco would not be responsible for CMGT’s liabilities. Franco (on behalf of CMGT) rejected Trautner’s “Newco” ideal. (*See Exhibits 6 and 7; see also*, Mot. at Ex. B, Franco Aff., at ¶ 7.)

5. Also in January 2003, Franco approved SC/Spehar to have discussions with an individual introduced to CMGT by Trautner, Harlan Smith (“Smith.”) Although Smith was not formally

¹ The exhibits referenced herein are contained in Plaintiff’s Appendix of Exhibits. Plaintiff’s Appendix of Exhibits was filed contemporaneously with his Rule 56.1 Statement, his Response to Defendants’ Rule 56.1 Statement and his Response to Defendants’ Motion for Summary Judgment. Plaintiff’s Exhibit 1 is an affidavit by one of Plaintiff’s attorneys stating from whom the attached exhibits were produced.

added to Exhibit A of SC's Contract, Franco acknowledged in writing that SC was involved in discussions with him. (Ex. 8 at p. 2.)

6. In May, 2003, Given and Trautner revived discussions about Trautner's "Newco" proposal. (Ex. 7; *see also*, Compl. at ¶ 41 and Mot. at Ex. B, Franco Aff., at ¶8.) Given spearheaded those negotiations on behalf of CMGT. (Ex. 7.) Given's negotiations resulted in the July 31, 2003, letter of intent ("LOI") that later became the Trautner Deal. (*Id.*; *see also*, Compl. at Ex. 9.) Franco's involvement in the negotiations was very limited. (Ex. 7.)

CMGT Engages in Discussions with the Washoe

7. In July 2003, CMGT was pursuing discussions with the Washoe Tribe (the "Washoe") about a possible investment in CMGT. (*See* Ex. 9; *see also*, Mot. at Ex. B, Franco Aff., at ¶25.)

Franco Conditions the Trautner Deal on the Resolution Several "Lou Franco" Issues

8. On August 7, 2003, Franco asked Given to review a draft letter to Trautner regarding "Lou Franco" issues that Franco wanted resolved in the Trautner Deal -- e.g., negotiating future employment terms with Newco and resolving credit card debts, IRS obligations and personal loans. (Ex. 10.)

Franco Recommends the Given-Negotiated Trautner Deal to CMGT's Shareholders

9. On August 8, 2003, Franco sent CMGT's shareholders a letter recommending the Trautner Deal. He stated that there were "no alternatives." (Ex. 11.) Given helped prepare the August 8 letter. (Ex. 12.)

SC Asks CMGT to Acknowledge that the Trautner Deal is Within the Scope of Its Contract

10. After reviewing Franco's letter to CMGT's shareholders, Spehar asked Franco to add Trautner and another potential investor, FlexBen, to Exhibit A of SC's contract. Spehar reminded Franco of the conversations that Spehar had with Trautner at Franco's request. (Ex. 6.)

11. In response to Spehar, Franco stated: “[g]ot it. I’ll be back...” Franco did not dispute the accuracy of Spehar’s recitation of facts. (Ex. 13.)

12. Franco forwarded Spehar’s request to Given. (Ex 14.) On August 8, 2003, Given responded to Spehar on behalf of CMGT. In part, Given stated:

Chuck [Trautner] and I have never discussed any of the prior communications to which you refer (and some of which I also participated in)” and that “as to the proposed LOI transaction, to avoid distractions, I would ask Lou to simply refer any questions you [Spehar] might have to me.” Given also noted that he and Franco were “big fans” of SC’s services.

(Ex. 7.)

13. Spehar responded to Given the next day. He stated, in part, that:

The important and relevant question is: Did Chuck Trautner – at any point during the term of my contract – become a legitimate member of Exhibit A of that contract? The honest answer is: Yes he did. Once he legitimately became a member of Exhibit A, the Rubicon was crossed, so to speak, and Spehar Capital became entitled to be paid per its contract with CMGT.

(Ex. 15.)

14. Given responded to Spehar that same day (August 9, 2003). In part, Given stated:

There is nothing left to be said regarding the LOI, in my view. If you wish to pursue it, you will be in an adversarial position and should deal with us through counsel. You have the right to do that, of course, but if you do I believe all of your activities on behalf of CMGT should cease (as well as your MOIC involvement) -- ultimately, that is not my call, however.

(Ex. 16.)

15. Spehar forwarded Given’s email to Franco and asked Franco for his thoughts about the dispute. (Ex. 17.) Franco forwarded Spehar’s email to Given and told him, “[o]f course, you and I are completely one voice on this matter.” (Ex. 18.)

16. On August 11, 2003, Franco acknowledged in writing that FlexBen (but not Trautner) was within the scope of SC's contract even though FlexBen was not listed on Exhibit A. (Ex. 19.)

Given Advises Franco about the "Lou Franco" Issues

17. On August 12, 2003, Franco sent Given an email with a draft letter to Trautner attached. Franco's draft letter set forth a proposal for resolving the "Lou Franco" issues. The proposal included a \$36,000 signing bonus to resolve Franco's IRS issues, a \$100,900 loan to Franco so that he could immediately repay credit card obligations, and an initial salary of \$180,000, with the possibility of salary increases and year-end cash bonuses. (Ex. 20.)

CMGT Sends the Washoe an LOI

18. On August 13, 2003, Franco sent Given an e-mail stating that the Washoe wanted to do a deal and that they would accelerate their evaluation of CMGT because they "can do deals quickly...i.e., in 30-60 days." Franco stated, "I believe the interest is real and that we should provide Andrea with a suggested LOI format (a succinct version would be best) as she requested and see what develops." Franco attached a draft LOI that Spehar had prepared. (Ex. 21.)

19. The next day, August 14, 2003, Spehar sent Franco a revised LOI for the Washoe. Franco forwarded the draft LOI to Given for his review and comment. (Ex. 22.) Given suggested sending the Washoe the Trautner LOI with the "20 percentage [sic] deleted." Franco responded that he did not want to "set the bar down as low as the Newco LOI & encourage a similar offer...I sense the Tribe has an appetite for a much better deal for CMGT..." (Ex. 23.)

20. Later that day (August 14), Franco instructed SC to send the Washoe an LOI, which he had approved, that gave the Washoe until September 30, 2003 to complete due diligence. SC carried-out Franco's instruction. (Ex. 24; *see also*, Exs. 21 & 22.)

Trautner Approves Franco's Proposals for Resolving the "Lou Franco" Issues

21. On August 14, 2003, Franco sent Trautner a letter with Franco's proposals for resolving the "Lou Franco" issues. On August 15, 2003, Trautner agreed to Franco's proposals. (Ex. 25.)

CMGT Seeks Shareholder Approval of the Trautner Deal and Rejects SC's Settlement Attempts

22. On August 16, 2003, Franco sent CMGT's shareholders a letter (dated August 15) seeking their approval of the Trautner Deal. Franco did not disclose CMGT's negotiations with the Washoe, Franco's belief that the Washoe's interest was real, or Franco's belief that the Washoe wanted to consummate a deal that would be better for CMGT than the Trautner Deal. (Ex. 26.) Given helped prepare the August 15 letter. (Ex. 27.)

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

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

(Ex. 28.)

24. Given responded that same day. He stated, in part, that:

[f]rom a legal point of view, we simply cannot play your game of throwing E-Mails back and forth. We have talked to you. We have listened to you. We have told you our view. I'm sorry, but we can do no more...you have told us you have counsel. I will henceforth deal only with him or her, as is appropriate.

(Ex. 29.)

25. On August 21, 2003, Spehar sent an email to Franco, stating:

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

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

(Ex. 30.)

26. Franco forwarded Spehar's email to Given and stated, "[m]y trust is in you and remains so." (Ex. 31.) Given advised Franco to "[j]ust let it be." (Ex. 32.)

27. In Franco's affidavit, which is Exhibit B to Defendants' Motion, Franco stated that he discussed a settlement proposal with Spehar that involved Newco paying SC "\$250,000 or so" post-closing. (Mot. at Ex. B, Franco Aff., at ¶ 15.) None of the contemporaneous documents produced to Plaintiffs, including the documents produced by Defendants, make any reference to Franco's alleged settlement proposal. (*See generally*, Pl. App. of Exhibits.) Moreover, Spehar disputes that Franco ever told him about any such proposal. (Ex. 33.)

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

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

Interestingly enough, they [SC and Dick Ross] may have actually improved the deal from Newco's perspective. With the license, if either Gerry or Dick [a

shareholder who had a dispute with CMGT] was successful in disrupting the deal, you [Trautner] could walk away with the software and, most importantly, Lou Franco without making any payment to CMGT whatsoever.

(Ex. 34.) (Emphasis added.)

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

30. The next day (August 23), Franco addressed MBRM legal fee's with Given as follows:

Chuck [Trautner] wants to work something out with you [Given]/MBRM that will not 'look funny', even if he [Trautner] has to personally 'take care of it.' I told him that you had sent a letter to him and that he should refer to it on this subject. He had not yet picked-up your letter from John Politan's office.

(Ex. 35.)

Given and Franco Tell CMGT's Shareholders about the SC Dispute

31. On August 27, 2003, Franco sent CMGT's shareholders a letter regarding the Trautner Deal. (Ex. 36.) Given wrote that letter. (Ex. 37.) The letter stated: (a) SC has claimed that it is entitled to compensation as a result of the Trautner Deal, (b) CMGT and its legal counsel strongly disagree with that contention, (c) SC's claim should not delay or hinder the proposed transaction, (d) the appropriate venue for the resolution of SC's claim will be in the winding up of CMGT, (e) as a result of SC's claim, Newco will require indemnification and an escrow of the shares, (f) to protect against any threat to a break-up of the transaction after it is consummated, Newco will require an independent license to CMGT's software that would survive a break-up, and (g) the only substantive effect of SC's claim will be additional documentation complexity and a delay in the winding up of CMGT until such time as the escrow is released. (Ex. 36.)

The Washoe Commit to Deliver A Signed LOI By September 2

32. On August 29, 2003, the Washoe sent Spehar an email stating, “[w]e are very interested in this opportunity...I will commit to you to have a signed LOI on Tuesday September 2 if not sooner.” (Ex. 38.)

Given Advises Franco to “Ignore” SC’s Contract Dispute

33. On August 31, 2003, Spehar sent Franco an email asserting that certain compensation provisions of SC’s contract were triggered when CMGT’s shareholders voted in favor of the Trautner Deal and chose to accept Newco stock. (Ex. 39.)

34. Franco asked Given if he should respond to Spehar’s email in a “legal fashion.” (Ex. 40.) Franco advised Given to “ignore it.” (Ex. 41 at p. 2.)

35. On September 1, 2003, Franco sent Given a draft summary of CMGT’s potential corporate liabilities for his review. With respect to SC’s contract dispute, the summary stated, “[n]o legal action required,” “[l]ikelihood of settlement is high if legal action is taken against CMGT,” “MBR&M and Management agree there is no basis for a claim,” “G. Spehar has indicated he will take legal action to enforce his contract based on his previous introductions to/discussions with Chuck Trautner & various investors,” degree of risk is “high,” and no curative action is required. (Ex 42.)

36. On September 2, 2003, Franco sent a final version of that summary, which was unchanged with respect to SC’s contract dispute, to a representative of Trautner’s investment group, Peter Bentz (“Bentz”). (Ex. 43.)

The Washoe Deliver a Letter of Intent

37. On September 2, 2003, John Crishon (“Crishon”), a Siemens employee who was involved with the Washoe negotiations, told Franco and Spehar that they should be receiving

“the signed Non-Disclosure & LOI documents” from the Washoe shortly. Crishon also stated that the Washoe had hired both an attorney and several call center companies to review CMGT’s proposal. (Ex. 44.)

38. That same day, the Washoe delivered an unsigned letter of intent to Spehar on the Washoe’s letterhead. (Compl. Ex. 6.) Spehar e-mailed that LOI to Franco and Given. (Ex. 45; *see also*, Ex. 46.)

Given Modifies the Washoe LOI

39. On September 3, Given sent revised copies of the Washoe’s LOI to SC and Franco. (Ex. 47 and Ex. 48.) Given shortened the due diligence deadline from September 30 to September 29. (Compl. Ex. 7.) He also included language that allowed CMGT to close a competing bid (*e.g.*, the Trautner Deal) at any time prior to September 30. (*Id.*)

40. Later that day (September 3), Spehar sent Franco and Given a revised LOI that Spehar had prepared. Spehar’s revised LOI incorporated Given’s September 29 due diligence deadline, but removed CMGT’s ability to close a competing deal before the Washoe finished its due diligence. (Ex. 49.) Spehar asserts that Franco told him to send his revised LOI to the Washoe, which Spehar did on September 3. (Ex. 50 and Ex. 51.) Franco asserts that he did not authorize SC to send that LOI to the Washoe. (Ex. 51.)

The Washoe Reject the Revised LOI

41. On September 4, Franco instructed Spehar to tell the Washoe about Given’s additional revisions, *e.g.*, that CMGT could close a competing deal prior to September 29. Spehar warned Franco that the Washoe would not agree to that change, but Franco insisted that Spehar tell the Washoe about Given’s revisions. (Ex. 52.) Franco then sent Given an email, confirming that he would support Given’s terms to protect the Trautner Deal:

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

(Ex. 53.)

42. Spehar followed Franco’s instructions and told the Washoe about Given’s additional revisions. (Ex. 52.) The Washoe told Spehar that it would not agree to Given’s changes to the LOI. (*Id.*) After learning that the Washoe had rejected the revised LOI, Franco asked Given whether he should suggest to the Washoe that they “step into” the Trautner investment group’s position. (Ex. 54.)

43. In response, Given arranged a phone call between himself and the Washoe. (*See* Ex 55, Ex 56 and Ex. 57.) There were no discussions during that call about the Washoe “stepping into” the Trautner group position. (Spehar Dep. Tr. dated 1/21/09 at 63:4-64:10.) Because Given shortened the due diligence deadline and would not guarantee that CMGT would not close a competing deal prior to the Washoe completing due diligence, the Washoe terminated its negotiations with CMGT. (Ex. 58.)

SC Notifies CMGT and Defendants That it is Going to Court to Ask for a TRO

44. On September 9 and 11, 2003, SC notified Given that it was seeking a TRO to prevent the Trautner Deal from closing. (*See* Group Ex. 59 and Group Ex. 60.) SC obtained a TRO on September 12, 2003. (Def. SOF at ¶39.)

CMGT Receives \$20,000 From Trautner

45. On or about September 12, 2003, CMGT received \$20,000 from Trautner. (Ex. 61.)

Given Provides Trautner’s Attorney with a Nine-Point Strategy For Responding to a Potential TRO, and Given Demands a \$50,000 Legal Fee Payment

46. On September 14, 2003, Given sent a memo to Politan (Trautner's attorney). The first issue Given addressed was Defendants' fees. He told Politan what needed to be put into a letter on Politan's letterhead regarding the Trautner group's payment of Defendants' fees. (Ex. 62.)

47. Given then explained to Politan that the work he (Given) needed to do (and be paid for) included "cleaning up Lou Franco's credit card situation." Given next discussed timing issues. He stated that CMGT's shareholder approval of the Trautner Deal was going to expire on October 17, 2003. He also stated his understanding that Trautner's investment group might prefer a later closing date, but thought pushing the date back was a bad idea because (a) a later closing date would require another shareholder solicitation, and (b) he did not think Franco could "hold out much longer." (Ex. 62.)

48. As a consequence of Franco's credit card situation and the possibility of a pre-transaction SC TRO, Given advised Politan to form Newco as soon as possible and to have Newco immediately enter into an employment agreement with Franco. He stated, "this is the only way to get him [Franco] focused on building Newco's business instead of dealing with less productive things such as the Spehar TRO." (Ex. 62.)

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

The Spehar TRO may mandate the approach we should now take anyway...whether we are simply dealing with threats of a pre-transaction TRO, or an actual TRO, I think the following [nine-point] strategy makes sense:

1. We notify CMGT's shareholders of the threats of the TRO or send them a copy of the actual TRO if it is in fact issued.
2. Lou Franco and Newco [enter] into an employment agreement, which will confirm the arrangements to deal with Franco's debts and to move him to Phoenix.

3. I subsequently notify the shareholders (using the E-mail list that includes Spehar) that neither Franco nor Newco has any desire to expend time or funds to engage in litigation, even if they firmly believe the Spehar litigation is frivolous. As a consequence of the Spehar TRO, I will announce that Lou intends to resign and that Newco intends to terminate the LOI. I also announce that I have not been retained to deal with the TRO. Lou's previous correspondence with the shareholders has made it clear that he is on the verge of financial collapse and will need to move on to other opportunities if a transaction cannot happen. Neither Newco nor any other third-party investor group could be expected to get bogged down in this type of litigation when they have many viable alternatives.
4. When I notify the shareholders that Lou Franco intends to resign, I will indicate that he will do all he can [to] make arrangements for the servicing of the existing contracts to avoid default and the consequent potential shareholder liability.
5. Spehar will have to return to court to make the TRO permanent. My notice to the shareholders (which includes at least one California lawyer) will give them an opportunity to take their own actions against Spehar. His TRO may simply be dissolved, or he may be convinced to give up his efforts to disrupt the transaction beforehand. In either case, the uncertainty and delay he will have caused will make it reasonable to ask the shareholders to extend the October 17 deadline.
6. If the Spehar situation does not resolve itself, I think Newco should simply start on its own with Lou Franco as its president and CEO. Newco would enter into a commercial transaction to service, in the name of CMGT, Inc., its existing four contracts. In effect, CMGT, Inc., will outsource the servicing of its existing book of business to Newco pursuant to arm's-length agreements. When these existing contracts expire, the clients would be free to roll over their accounts to Newco. For this service, Newco would be paid for its expenses. Any excess amounts could be returned to CMGT, but this would only be done after netting everything Newco has paid on CMGT, Inc.'s behalf (**including legal fees and expenses**). This outsourcing arrangement would require Newco to enter into a service arrangement with Rob Crandall and other Canadian employees, just like it would in the transaction contemplated by the LOI. I am very confident they would cooperate.
7. Depending on the actual language of the TRO, if it is issued, I think it would be reasonable for Newco to also be granted a license in the software. Again depending on the language of the TRO, we might

structure this as an option to acquire a license in the software. I would like to note that if for whatever reason such a license is not deemed appropriate or desirable, Lou Franco is comfortable that we can independently create appropriate software which will not infringe on anything belonging to CMGT, Inc.

8. If the outsourcing alternative is consummated, CMGT, Inc. will not receive any shares of Newco. Also, Newco will not have to be immediately capitalized at the \$2.5 million level. CMGT, Inc. and Newco would, of course, be free to subsequently enter into a transaction like that contemplated by the LOI after the Spehar situation is clarified. It may be no longer in Newco's interests to do so, however, in which case all Spehar will have accomplished is to have deprived the CMGT, Inc. shareholder/stakeholder group of a 20% interest in Newco. This is not Newco's fault and is, frankly, beyond its control. I think everything that could be done to be fair to the CMGT, Inc. shareholder/stakeholder group has been done.
9. I believe the outsourcing alternative could be the **functional equivalent** of the transaction contemplated by the LOI. The only difference is that Newco would not be receiving exclusive rights in the software. As a practical matter, however, once Lou Franco leaves CMGT, Inc., there is no one left to do anything with the software anyway.

(Ex. 62.) (Emphasis added.) (Hereafter, Given's strategy for consummating the Trautner Deal without any payment to CMGT is referred to as the "functional equivalent" deal.)

50. Given ended his letter to Politan by stating, "I simply cannot proceed further unless an arrangement [for payment of Defendants' fees] along the lines proposed in this letter come about on an immediate basis." (Ex. 62.)

51. On September 15, 2003, Franco confirmed his receipt of Given's memo to Politan. Franco also stated that a process server had been to his house and that he would notify Given as soon as he was served. (Ex. 63.)

52. During his citation deposition, Franco stated, "[w]e could not set foot -- couldn't set foot in a California Court for legal reasons, and Ron can explain that..." (Ex. 64.)

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

53. On September 16, 2003, Given received notice of SC's TRO. (Ex. 65.)

54. The next day, September 17, Given sent SC's TRO to CMGT's shareholders and Spehar. Consistent with his nine-point strategy, Given stated "Mayer Brown has not been retained to deal with this matter, and we do not expect to be." (Ex. 66.)

55. On September 18, 2003, Franco told Given "I'll talk with you in the AM about [SC's TRO]." (Ex. 67.)

56. On September 19, 2003, Given implemented points one, three and four of his September 14 strategy. In that regard, Given sent CMGT's shareholders and Spehar an email, stating: (a) as a result of SC's TRO, Franco has advised Given that he must now plan to leave his position with CMGT and pursue other opportunities, (b) representatives of Newco have indicated that they intend to terminate the LOI in short order, (c) SC's claim is "absolutely spurious" and its request for injunctive relief is "clearly inappropriate," (d) CMGT has no money to fight this battle, and (e) Franco and Given are going to "work on" the issue of CMGT not breaching its client contracts. Given invited CMGT's shareholders to call him with questions about SC's lawsuit, but he said nothing about the "functional equivalent" deal. (Ex. 68.)

57. SC's attorney responded to Given's September 19 email that same day. He stated, "Spehar Capital was forced to rely on the legal process to preserve its rights because CMGT and its counsel refused to substantively address Spehar Capital's claims, even though it knew of Spehar Capital's position and the potential for legal action." He also stated that there were many ways that CMGT could still close the Trautner Deal while protecting SC's rights, but that instead of pursuing those options, CMGT decided to "just pull the plug." (Ex. 69.)

58. On September 19, 2003, Franco sent Given copies of two shareholder emails that he had received from an employee. (Ex. 70.) The shareholders expressed concern about the status of CMGT. One of those shareholders, John Ross (“Ross”), stated:

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

(*Id.* at p. 3.) Clearly, Ross was neither asked to contribute money to defend SC’s TRO request nor told about Given’s nine-point strategy and the fact that Given and Franco were implementing that strategy.

59. On September 20, 2003, Baliga sent an email to Spehar, Franco and James Wong (“Wong”). Baliga encouraged them to settle SC’s dispute. (Ex. 71.) Spehar stated that he remained willing to talk about solutions. (Ex. 72.) Franco forwarded that email exchange to Given. (Ex. 73.)

Trautner’s Investment Group Pays Defendants \$50,000, and Given’s “Functional Equivalent” Deal Moves Full Steam Ahead

60. On September 21, 2003, Politan sent Given the letter that he had requested in his September 14 memo (*see* Ex. 62) regarding payment of Defendants’ fees. Politan’s letter did not say anything about the Trautner LOI being terminated. Politan enclosed a \$50,000 check payable to Defendants. (Ex. 74.)

61. The next day, September 22, Franco sent Given several “to do” lists that were prepared by Trautner’s representative, Bentz. Bentz’s lists, which are dated September 20, 2003, reveal Given and Franco moving forward with Given’s “functional equivalent” deal. They also reveal that Newco’s name would be “First In Touch.” Finally, these lists reveal that Wong knew about and was participating in Given’s “functional equivalent” deal. (Ex. 75.)

62. On October 1, 2003, Franco sent Given a fax attaching a notice from the DuPage County Clerk that a decree/judgment had been entered against CMGT and in favor of SC. Franco asked Given, “[d]o we need/want to do anything in DuPage County?” (Ex. 76.)

63. On October 2, 2003, Given sent CMGT’s shareholders and Spehar an email. He stated that because SC had not withdrawn its lawsuit, Newco had terminated their LOI. (Ex. 77.)

64. On October 3, 2003, SC’s attorney responded to Given’s email. He stated that SC disagreed with many of Given’s statements, but that instead of dwelling on such differences, SC would rather join CMGT’s investors in trying to salvage a deal that worked for all parties. (Ex. 78.)

65. On October 3, 2003, Franco sent Given a typed version of Bentz’s September 2, 2003 “to do” lists. (Ex. 79.)

66. Unaware of Given’s “functional equivalent” deal with Trautner, Spehar sent an email to Franco, Given and Baliga regarding SC’s continued efforts to resolve SC’s contract dispute. Spehar asked Franco for the Trautner investment group’s representative’s contact information so that he could try to (a) bring them back to the table, and (b) resolve SC’s contract dispute. (Ex. 80.) Franco forwarded Spehar’s October 4, 2003 email to Bentz and stated, “Ron and I discussed this and we are not replying to Gerry’s email as it is not necessary.” (Ex. 81.)

67. On or about October 6, 2003, Given, Franco, Bentz and Trautner had a conference call to discuss “the many issues” before them, including SC’s preliminary injunction and TRO. (Ex. 82.)

68. By October 2003, the structure of Given’s “functional equivalent” deal was in full swing. Instead of Trautner’s investment group forming and owning Newco/First In Touch, the plan was to have an existing company, Keenan & Associates (“Keenan”), with whom CMGT had a pre-

existing relationship, form First In Touch as its subsidiary. (*See* Ex. 83.) Keenan would then enter into an outsourcing agreement with CMGT to service CMGT's four existing clients. (*Id.* at ¶ 3.) That work would be done by First In Touch, which would have an Arizona-based call center called the "Arizona Call Center." (*Id.* at ¶ 4.)

69. According to the draft deal documents, Trautner's investment group was to have funded CMGT's operating deficit from July 31, 2003 through the formation of First In Touch. (Ex. 83 at ¶ 1 & 7(a).) The draft documents gave Trautner's Arizona investment group an option to purchase an ownership interest in the Arizona Call Center. (*Id.* at ¶ 7.) The formula for the purchase price was based on the difference between (a) the amount spent by Keenan with respect to First In Touch, and (b) the amount paid by Trautner's investment group to fund CMGT's operating deficit. (*Id.*) The deal documents also contemplated that Franco would be the President of both First In Touch and the Arizona Call Center. (*Id.* at ¶¶ 5 & 8(d); *see also*, Ex. 84.) Franco also had an opportunity to become an owner of the Arizona Call Center. (Ex. 83 at ¶ 8(a).)

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

70. On November 28, 2003, Franco sent Given an email regarding SC's lawsuit. Franco attached a copy of SC's amended complaint. He told Given that he wanted to discuss the amended complaint and "what Gerry & his lawyers are up to." (Ex. 85.) Given responded the next day. He stated, "I have it. We'll talk later." (Ex. 86.) On November 30, 2003, Franco sent additional documents relating to SC's lawsuit to Given so that they could discuss them. (Ex. 87.)

71. On January 12, 2004, Franco sent Given and Wong an email regarding SC's request for a default judgment. (Ex. 88.) Franco stated that he would call Given to discuss SC's request. (*Id.*) Given told Franco to call anytime after noon on January 15. (Ex. 89.) On January 30,

2004, Franco sent Given an email regarding the status of SC's lawsuit. (Ex. 90.) Franco continued to seek Given's advice regarding SC's lawsuit even after SC obtained its default judgment. (E.g., Ex. 91.)

72. In March, 2004, Franco and Given began receiving emails from or on behalf of CMGT shareholders inquiring about the status of CMGT. (Ex. 92.) One such email stated, "[i]s CMGT still active? We have heard nothing since being advised of the Spehar injunction...Please fulfill your obligation to respond." (*Id.* at p. 4.) Franco asked Given how to respond. (*Id.* at p. 2.) Given told Franco to "send your note out to everyone regarding the LA lawsuit. I wouldn't bother with them [the CMGT shareholders] anymore than that." (*Id.* at p. 1.)

73. Pursuant to that advice, Franco sent CMGT's shareholders an email, which was pre-approved by Given. In part, that email 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." (Ex. 93 and Ex. 94.) Franco later testified, in a citation deposition, that he officially resigned on September 19, 2003. (Ex. 64 at p. 59.)

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

Edward T. Joyce
Arthur W. Aufmann
Robert D. Carroll
EDWARD T. JOYCE & ASSOC., P.C. - Atty No. 32513
11 South LaSalle Street, Ste., 1600
Chicago, Illinois 60603

CERTIFICATE OF SERVICE

The undersigned attorney, certifies that on July 13, 2009, he caused the attached **Plaintiff's Local Rule 56.1(b)(3)(C) Statement in Support of His Response to Defendants' Motion for Summary Judgment** 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