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

DAVID GROCHOCINSKI, not individually but solely in his capacity as the Chapter 7 Trustee for the bankruptcy estate of CMGT, INC.,	)	
Plaintiff,	)	No. 06 C 5486
v.	)	Judge Virginia M. Kendall
MAYER BROWN ROWE & MAW LLP and RONALD B. GIVEN,	)	Magistrate Judge Morton Denlow
Defendants.	)	

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT BASED ON THEIR UNCLEAN HANDS DEFENSES

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Defendants, by their attorneys, Novack and Macey LLP, submit this Reply Memorandum, addressing the Response in Opposition to Defendants' Motion for Summary Judgment (the "Response" or "Resp. at ___") filed by the Plaintiff Trustee (the "Trustee").[1]

ARGUMENT

The Response devotes the bulk of its 30 pages arguing the merits of this case. But, Defendants did not move for summary judgment on the merits of the case. Instead, Defendants moved for summary judgment on their Unclean Hands Defenses, as to which the Response is almost totally silent. Relying in great part on the Seventh Circuit's decision in Maxwell, the Unclean Hands Motion made three central points:

- First, if this case were to succeed, it would lead to an absurd result and a fraud on the court. That is because the very party that wrongfully caused CMGT's Bankruptcy in the first place -- and who filed a case that would have to be found meritless for the Trustee to succeed in this malpractice case -- would get the lion's share of any recovery;

- Second, the Trustee made absolutely no effort to vacate the Default Judgment that is the basis for his alleged damages -- a motion practically invited by the California judge who entered the Default Judgment in the first place; and

- Third, as demonstrated by his own sworn testimony, the Trustee has no knowledge of even the most fundamental allegations of his contrived complaint and made absolutely no attempt to understand or investigate the facts before he filed this lawsuit.

In his Response, the Trustee basically ignored these three points, and submitted no affidavits or deposition testimony to contradict the facts that underlie them. Any one or more of these three

[1] Capitalized terms used in this Reply shall have the same meaning as in Defendants' opening memorandum (the "Opening Brief" or "Op. Br. at _____").

points requires the entry of summary judgment for Defendants on the basis of the Unclean Hands Defenses, and the Court need go no further than these three arguments to resolve the Motion.

Having no answer to those three points, the Trustee attempted to change the subject and lure Defendants and the Court into a hypothetical discussion of the purported merits of this case. Yet, these "merits" arguments have nothing to do with the Maxwell standard or the arguments upon which this Unclean Hands Motion is based, and the Court need not -- and should not -- address them. Nevertheless, to the extent the Court considers the Trustee's "merits" arguments, they will give the Court no pause in granting the Unclean Hands Motion. If anything, they further confirm the inadequacy of the Trustee's pre-litigation investigation and further establish that the Trustee did not exercise reasonable litigation judgment under Maxwell. Indeed, in support of his "merits" arguments, the Trustee still did not offer any real evidence. Instead, he made arguments based on unreasonable inferences from various snippets of documents (many of which are unauthenticated and/or contain inadmissible hearsay). The Trustee submitted no affidavits and no deposition testimony to demonstrate that his case has any merit.[2]

This Reply will proceed as follows. Defendants will first address (in Sections I, II and III) the three arguments on which the Unclean Hands Motion is based. That will conclusively show that the Motion should be granted, and the Court need not read further. For completeness, however, Section IV will then show that the Trustee's "merits" arguments not only do not defeat the Unclean Hands Motion, but, ironically, further support and confirm why it should be granted.

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[2] The Trustee submitted only two affidavits: (a) one from his counsel purporting to identify the source of certain documents, but not authenticating them; and (b) one from Gerald Spehar ("Gerry") that does nothing more than deny that Franco offered $250,000 to settle the claims of Spehar Capital ("Spehar"). (Resp. Exs. 1 & 33.) Moreover, the Trustee failed to cite his own deposition entirely, cited Gerry's deposition only once and cited Franco's Affidavit on four occasions. (See Plaintiff's Local Rule 56.1(b)(3)(C) Statement in Support of His Response to Defendants' Motion for Summary Judgment at ¶¶4, 6, 7, 27 & 43.)

I. IF SUCCESSFUL, THIS CASE WOULD YIELD AN ABSURD RESULT AND FRAUD ON THE COURT

Defendants' Opening Brief (at 8-11) showed that, if successful, this case would yield an absurd result or fraud on the Court. To prove malpractice, the Trustee would have to show that Spehar had no legitimate claim and that it would have lost the Spehar Lawsuit "but for" Defendants' alleged malpractice. Tri-G, Inc. v. Burke, Bosselman & Weaver, 856 N.E.2d 389, 395 (Ill. 2006) (a malpractice plaintiff "is required to prove that but for the attorney's negligence, the plaintiff would have been successful in [the] underlying action"); Merritt v. Goldenberg, 841 N.E.2d 1003, 1010 (Ill. App. Ct. 2005) ("plaintiff must establish that 'but for' the attorney's negligence, the client would not have suffered the damages alleged"). Yet, if the Trustee were able to do so, the lion's share of the recovery would go to Spehar, who would have just been shown not to have a legitimate claim. The result would be that the very entity who was not entitled to recovery and wrongfully caused CMGT's Bankruptcy would get the recovery.

In great part, Defendants' argument is based on Maxwell, in which the Seventh Circuit instructed judges to "be vigilant in policing the litigation judgment exercised by trustees in bankruptcy," because, among other things, a trustee is not constrained by the same risks or costs facing typical litigants. 520 F.3d at 718. For example, unlike a corporate litigant, a trustee has no concern about future relations with suppliers, customers or creditors. Id. Also, a trustee does not have to pay to pursue litigation -- the estate does. Thus, a trustee may choose to pursue unworthy litigation with nothing to lose by doing so. Yet, even a frivolous case costs money to defend, so the trustee may be able to score a quick "cost of defense" settlement -- and earn a fee to boot. The Seventh Circuit recognized that only the judges before whom such cases are filed can keep a trustee from pursuing such cynical litigation. Id.

In Maxwell, a trustee filed a malpractice action arising out of a KPMG audit. If successful, the principal beneficiary of the lawsuit would have been the former shareholders of "U.S. Web." However, it was U.S. Web that caused the debtor to fail in the first place because it failed, and dragged the debtor down with it. The Seventh Circuit held that such a result could not stand because "U.S. Web cannot be at once the cause of the bankruptcy and its principal beneficiary." Id. at 716. Substitute Spehar for U.S. Web and that is our case here. Indeed, our case makes the point even stronger, because Spehar intentionally caused CMGT's Bankruptcy.

The Response (at 18) tries to brush Maxwell aside, arguing that this part of the decision was *obiter dictum*, and may not have been fully considered. However, the Seventh Circuit itself raised this issue and criticized the litigants for not raising it themselves. Maxwell, 520 F.3d at 715. It also instructed judges to "be vigilant in policing the litigation judgment exercised by trustees in bankruptcy." Id. at 718. The Seventh Circuit would not raise an issue, criticize the parties for not raising it, and instruct judges to consider that issue in future litigation without fully considering it. And, even if the Seventh Circuit did not fully consider the issue, would the Trustee really have this Court ignore the express instruction of the Seventh Circuit?

The Response (at 18) next argues that Maxwell does not apply because there is a question of fact about whether the proximate cause of CMGT's insolvency was Spehar or Defendants. Yet, in Maxwell, the trustee's claim was that U.S. Web pulled the debtor into bankruptcy and KPMG was negligent in failing to prevent this. Id. at 715. That is the same claim the Trustee makes here -- i.e., that Spehar pulled CMGT into bankruptcy and Defendants were negligent in failing to stop Spehar from doing so. In both cases, the debtor would not have been in bankruptcy but for the acts of U.S. Web and Spehar, respectively.

Finally, based on two invalid arguments, the Response says there will be no absurd result here. First, the Response (at 19) claims that the Trustee does not have to prove that the Spehar Lawsuit was "meritless," but only that it was a "colorable" claim that should not have been ignored, or that "technical defenses" should have been raised to defeat it. Yet, that is all a matter of semantics. The relevant point is that, to succeed, the Trustee has to show that Spehar would not have gotten the Default Judgment but for Defendants' negligence. Tri-G, 856 N.E.2d at 395; Merritt, 841 N.E.2d at 1010. It does not matter if that is because Spehar's claim was "meritless," "colorable," or subject to "technical defenses." They all lead to the same result -- that Spehar should not have gotten the Default Judgment. But, if the Trustee were to prove this and recover, he would then have to turn around and hand the lion's share of the recovery to Spehar as a reward. So, in the end, the very party who should have gotten nothing gets almost everything.

Second, the Response (at 20) argues that there is nothing wrong with that result. In support, the Response relies solely on Brandon Apparel Group v. Kirkland and Ellis, 887 N.E.2d 748 (Ill. App. Ct. 2008). Yet, that case was not a federal or bankruptcy case, and it is irrelevant to this issue. Brandon Apparel simply applied principles of state law (the non-assignability of legal malpractice claims) not relevant to the Seventh Circuit's policy directive in Maxwell. In fact, Maxwell had been decided only a few weeks before Brandon Apparel was decided, and the Brandon Apparel court may not have been aware of it. And, even if it were, unlike this Court, the Illinois Appellate Court is not bound by the Seventh Circuit's ruling.

* * *

The bottom line on Defendants' absurd result/fraud on the court argument is this: Spehar filed its suit, obtained the Default Judgment and put CMGT into bankruptcy. In order for the Trustee to prevail on his malpractice claim, he must prove that Spehar would have lost if a

defense had been made. But, then, the entity that would get almost all of the recovery would be Spehar. The Court must ask itself: Would it allow such a result? Would it do so notwithstanding Maxwell? If the answers are "No" -- and they surely must be -- then the Court must grant Defendants' Unclean Hands Motion. Although this is enough in itself, there are still other separate grounds to which this Reply now turns.

II. THE TRUSTEE DID NOT EXERCISE REASONABLE LITIGATION JUDGMENT IN REFUSING TO MOVE TO VACATE THE DEFAULT JUDGMENT

Maxwell instructs District Courts to "be vigilant in policing the litigation judgment exercised by trustees in bankruptcy." 520 F.3d at 718. Here, the Trustee's malpractice case could not have been filed if the Default Judgment did not exist. So, the question that arises under Maxwell is: Did the Trustee exercise reasonable litigation judgment in choosing to make no effort to vacate the Default Judgment, and, instead, pursue this malpractice action? As will now be shown, the answer is a resounding no.

The Trustee admits that vacating the Default Judgment would have eliminated any possible damage to CMGT and been in CMGT's best interests. (See Resp. to Defs.' Local R. 56.1 Statement of Facts at ¶¶59-60, cited herein as "56.1 Resp. at ¶__.") It is also undisputed that the California judge as much as invited such a motion. (56.1 Resp. at ¶49.) Yet, as set forth in the Opening Brief (at 11-14), the Trustee made no effort to vacate the Default Judgment. He did no case law research, never consulted a California lawyer and his time sheets show that no real time was spent on this issue. The Response does not dispute this or present any evidence that the Trustee did try to vacate the Default Judgment. In fact, as to the Default Judgment, the Trustee did not exercise reasonable litigation judgment from beginning to end.

A. No Effort To Determine Why The Default Judgment Was Entered

The Trustee's first step should have been to find out why the Default Judgment was entered in the first place. This information would have allowed the Trustee to make a reasonable and educated choice about whether he had a viable motion to vacate. Indeed, this information might have shown the Trustee that the lawyers did nothing wrong and that there was, therefore, no viable motion to vacate and no malpractice suit to file.

A reasonable trustee would have immediately contacted CMGT's former management to ask why CMGT did not appear in the Spehar Lawsuit. We now know, of course, that -- if only the Trustee had asked -- CMGT's key management and shareholders would have told him that CMGT made its own conscious business decision, for a variety of financial and/or other reasons, to go out of business, not to defend the Spehar Lawsuit and to allow an uncollectible and meaningless default judgment to be entered against it. (See Franco Aff., Appendix Ex. B, ¶¶42, 44; Baliga Aff., Appendix Ex. C, ¶¶8-9; Quarles Aff., Appendix Ex. D., ¶4; Wong Aff., Appendix Ex. E, ¶¶7, 9-10.)[3] Although that fact kills any possible malpractice case against Defendants, the Trustee simply closed his eyes and did not interview these key witnesses.

Actually, it is worse than that. The truth is that -- even without talking to CMGT's management -- the Trustee knew that the Default Judgment resulted from CMGT's lack of money to defend itself in the Spehar Lawsuit. As established in the Opening Brief (at 13, 19-21), the Trustee's own Bankruptcy Affidavit admitted as much, as did his draft letter to Spehar's counsel. (56.1 Resp. at ¶¶67, 137.) But, ignoring that, the Trustee still filed this case.

Yet, even if one were to give the Trustee the undeserved benefit of the doubt -- and assume that he truly believed that the Default Judgment resulted from Defendants' negligence --

[3] References to "Appendix" herein are made to Defendants' Appendix of Exhibits in Support of Their Motion for Summary Judgment Based on Their Unclean Hands Defenses.

that still would not excuse the Trustee's failure to move to vacate the Default Judgment. Although the Trustee has floated two excuses for not doing so, each fails, as will now be shown.

B. Excuse One -- Defendants Would Not Help The Trustee By Filing An Affidavit

The Trustee's first excuse is his argument that: (1) under California law a motion to vacate based on attorney error requires the attorney's affidavit of error; and (2) Defendants would not have given one. (Resp. at 29-30.) Both fail, as shown below.

1. California Law Regarding Attorney Affidavits

A motion to vacate based on attorney error that is supported by an attorney affidavit confessing error must be granted. Cal. Code Civ. Pro. §473. In cases where the attorney error alleged by the party involves a difficult or unsettled question of law, such a motion may be granted as a matter of discretion even absent an attorney affidavit confessing error. E.g., State Farm Fire & Casualty Co. v. Pietak, 109 Cal. Rptr. 2d 256, 263-64 (Cal. Ct. App. 2001).

2. The Trustee's Conduct

a. The Trustee Did Not Ask Defendants For An Affidavit

Faced with this California law -- and assuming *arguendo* that he really believed that Defendants had committed malpractice -- the Trustee should have confronted Defendants with his "evidence," explained his case and asked Defendants to sign an affidavit confessing error so that he could eliminate the Default Judgment -- which he admits would have been in the estate's interests. (56.1 Resp. at ¶60.) Had the Trustee done so, he may have learned there was no attorney negligence. Alternatively, if the Trustee were even arguably correct, Defendants may well have signed an affidavit. After all, that would have been in Defendants' best interest too since it would have guaranteed vacating the Default Judgment, thus eliminating any possible malpractice suit.

The Response (at 30) argues that Defendants would not have signed such an affidavit. In support, the Response cites to Defendants' denial of the Trustee's request to admit asking Defendants to admit both: (i) that they committed negligence (a doctrine that encompasses more than a mere mistake); and (ii) that such negligence caused the entry of the Default Judgment. The denial of that compound and overbroad request says nothing about whether Defendants would have simply admitted to a mistake if the Trustee had come forward with legitimate evidence of a mistake and asked Defendants to sign an affidavit. (See Resp. Ex. 106.)

b. The Trustee Could And Should Have Sought To Vacate The Default Judgment Even Without Defendants' Affidavit

Even without Defendants' affidavit, reasonable litigation judgment still required that the Trustee file a motion to vacate. The Trustee says that Defendants negligently advised CMGT not to appear because California had no personal jurisdiction. If the Trustee truly believed that, he surely could have shown that the issue -- i.e., whether California has jurisdiction over a Delaware corporation with an Illinois principal place of business, but who contracted with a California company and had several contacts with it -- was a difficult question of law. Indeed, as the California Appellate Court has explained it, "[t]he principles governing jurisdiction are simple to state but difficult to apply." Virtualmagic Asia, Inc. v. Fil-Cartoons, Inc., 121 Cal. Rptr. 2d 1, 7 (Cal. Ct. App. 2002) (internal quotation marks omitted); compare id. at 11-12 (finding personal jurisdiction over foreign corporation based on contract with California corporation) with Goehring v. Superior Court, 73 Cal. Rptr. 2d 105, 112-15 (Cal. Ct. App. 1998) (finding no personal jurisdiction over general partners of partnership based on contract with California corporation). If so, the California judge would have had the discretion to vacate the Default Judgment even without an affidavit from Defendants. State Farm, 109 Cal. Rptr. 2d at 262-64. And, since that very judge had already noted that the amount of the Default Judgment was based

on speculative testimony and invited a motion to vacate (Appendix Ex. F at 5, 7), there is every reason to believe that he would have granted the motion. Thus, no matter what, the Trustee's only reasonable response was to file a motion to vacate the Default Judgment. Yet, the undisputed fact is that he never even looked into the possibility of doing so.

C. Excuse Two -- The Estate Had No Money To File A Motion To Vacate

The Trustee has argued that the estate had no money to fund a motion to vacate. As shown in the Opening Brief (at 13, 19-21), this brings us back to the undeniable fact -- discussed in Section II.A above -- that CMGT did not have the money to defend the Spehar Lawsuit and, thus, there could not possibly be any malpractice suit against Defendants. But, even giving the Trustee the undeserved benefit of the doubt once again, he could have easily prepared a motion to vacate the Default Judgment himself, mailed it to the California Court with a simple motion for leave to appear *pro hac vice*, and asked permission to argue both motions telephonically. Surely, the California state court judge would have accommodated a federal bankruptcy trustee -- particularly since that judge already as much as invited a motion to vacate. (56.1 Resp. at ¶49.)

D. The Trustee Did Not Exercise Reasonable Litigation Judgment

In the end, there is no reasonable explanation for why the Trustee did not even try to vacate the Default Judgment. The worst case scenario is that he would have lost the motion to vacate. But, if that had happened, he could still have filed his malpractice action.

Which leads to the next question: Why did the Trustee jump into this malpractice action without first trying to vacate the Default Judgment? The obvious answer is that, as Maxwell pointed out, there was no risk (or cost) to him in filing this case. So, at no risk or cost to himself, the Trustee put himself in a position to collect a fee if he could extract a settlement out of what he perceived to be Mayer Brown's "deep pockets." Conversely, vacating the Default Judgment would have nullified any potential malpractice claim and left the Trustee with a no asset

bankruptcy estate (56.1 Resp. at ¶138), and no ability to collect a meaningful fee. Ironically, the Trustee has attempted to project his own self-dealing and conflicted decision-making on Defendants. He has fooled no one.

Under Maxwell, this Court is required to scrutinize what the Trustee did here, and to determine if his litigation judgment was reasonable. The Trustee's unreasonable handling of the Default Judgment is one more dispositive reason why this is the exact type of case that Maxwell warned against. For this second and independent reason, the Unclean Hands Motion should be granted and this spectacle should come to an end. Once again, the Court may stop here. Nevertheless, we discuss still further independent grounds.

III. THE TRUSTEE DID NO PRE-FILING INVESTIGATION

The Opening Brief demonstrated that the Trustee's case was, as this Court itself noted, "very odd" -- and begged for a thorough pre-filing investigation. And, Maxwell requires district courts to act as gatekeepers and to prevent bankruptcy trustees from pursuing cases that do not have a reasonable basis. Here, this case screams out for the Court to exercise its gate-keeping function. The Trustee could not possibly have exercised reasonable litigation judgment, because he did no fact investigation before filing this case.

Indeed, to this day, the Trustee remains wholly ignorant of the factual basis for even the most fundamental allegations in his Complaint. The Trustee's response to Defendants Rule 56.1 Statement of Facts acts only to confirm this. Specifically, Defendants' Statement of Facts included 23 separate factual statements concerning the Trustee's lack of knowledge about his own malpractice complaint. The Trustee effectively provided the same stock response to each of those 23 factual statements. (See 56.1 Resp. at ¶¶69-90, 92.) For example:

> 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. ([Trustee Dep.] at 279.)
>
> **RESPONSE:** Plaintiff admits only that, during his deposition, he was not aware of 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. . . . (56.1 Resp. at ¶77.)

There are so many things wrong with that Response. For example, if the Trustee did not know this fact at his deposition, he surely did not know it when he filed suit. Also, it is not relevant that, on an unverified basis, the Trustee "does not admit that no other financing was available as of September 29, 2003 other than the Trautner Deal and the alleged deal with Washoe." The point is that nowhere (and certainly not under oath) does the Trustee deny that the only financing available as of September 29, 2003 was the Trautner Deal and the alleged deal with Washoe (a deal the Trustee now admits was never even offered to CMGT), even though his Complaint alleges that Defendants "negligently pushed" CMGT into accepting to the Trautner Deal when there were other better financing deals available to CMGT.

These responses are wholly inadequate to defeat summary judgment. They act only to reinforce the Trustee's lack of knowledge concerning the critical facts alleged in his Complaint. And, without such knowledge, it is impossible for the Trustee to have exercised any litigation judgment -- let alone the reasonable litigation judgment required by Maxwell.

In the end, the Response does not contest the Court's conclusion that this case is "very odd," nor deny that a fact investigation was needed. The Trustee submits no affidavit showing that he did any investigation, nor does he say that someone else did one for him -- to the

contrary, he disclaims any reliance on any investigation by counsel.[4] The Trustee cites no case stating that he has no responsibility for making sure his allegations are accurate. He does not explain why he did not interview any of the key witnesses or why all of them flatly refute his basic allegations. He does not explain why he testified that he does not know the factual basis for the major allegations of his Complaint. He does not explain why critical facts in his Complaint -- e.g., that Sealaska and the Washoe offered CMGT financing -- are flat-out wrong. (Compare Compl. ¶¶33, 45, with 56.1 Resp. at ¶¶23-25, 75-76.) He does not explain the communications he received from Spehar noting the lack of any investigation by the Trustee or his counsel and recommending that the Trustee "scare" witnesses so as to "extract real value" from them. (56.1 Resp. ¶¶140-47.) He does not explain why he then threatened Franco and Wong with litigation and forced them to sign tolling agreements in an (unsuccessful) effort to "scare" them into supporting the Trustee's suit against Defendants, just as Spehar suggested. (Id.) Instead, and quite incredibly, the Response says that the Trustee's failure to make a pre-filing investigation is "irrelevant" and states:

> as [Defendants] know, [the Trustee'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 ("Spehar's") California lawsuit against CMGT, Inc. ("CMGT"); and (b) rely on his special counsel's analysis of whether those occurrence facts support causes of action against Defendants. (Resp. at 1.)

The Trustee cites no legal authority for his limited "pre-filing role" or right to rely solely on counsel's analysis. And, then, in a footnote, the Trustee directly contradicts himself by stating:

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[4] As demonstrated in the Opening Brief (at 26-27), there is considerable evidence that the Trustee's counsel did no meaningful fact investigation either.

> To be clear, however, [the Trustee] is not asserting an advice of counsel defense to Defendants' Motion. As this Court will see, [the Trustee] does not make any arguments that are based on (a) privileged documents or communications or (b) advice of counsel.

(Id. at 1 n.2.)

What exactly is the Trustee trying to say? Did he or did he not rely on counsel? Does he seriously maintain that he has no responsibility to investigate the facts before he files a complaint? Does he contend that, so long as he gathers what he considers to be "contemporaneous" documents, he is free to draw any inferences from those documents that he pleases, however far-fetched, does not have to know whether there are any facts that support his inferences, and has no obligation to speak to any witnesses? And, even when it is so clear now that those witnesses would have told him that his inferences were wrong? Does he contend that he fulfils his duty to exercise "reasonable litigation judgment" when he has no idea what, if any, facts support the litigation that is brought in his name? Does he contend that he can "rely" on his counsel's "analysis" of the "occurrence facts" without knowing any of the facts himself and without putting his attorney's analysis at issue? Does that mean that he can keep the facts that allegedly support his case a secret so long as he does not know what they are and never asks his attorneys to disclose them to him? Perhaps most fundamentally, does the Trustee believe that a bankruptcy trustee is nothing more than a figurehead who can subcontract litigation out to contingency fee attorneys and have no responsibility for the allegations they make?

The Trustee cites no legal authority to support any of these far-fetched contentions -- and there is none. Instead, Maxwell plainly states that: (a) bankruptcy trustees must act responsibly before filing litigation; and (b) the district courts are required to supervise them. The facts clearly show the Trustee did not act responsibly. Instead, he deliberately cloaked himself in

ignorance and made wild, illogical accusations that he never investigated and had no evidence to support. Under Maxwell, this case should be dismissed.

In response, the Trustee argues that there are "issues of fact" arising from snippets of documents. Under Maxwell, the question is not whether the Trustee can raise issues of fact by reading parts of documents in isolation, but whether the Trustee exercised reasonable litigation judgment in bringing a case. Here, all the evidence shows that if the Trustee had done even a modest investigation, such as talking to CMGT's former management and shareholders, he would have realized that his tortured interpretation of the documents was wrong (and inconsistent with his own statements) and that his case has no reasonable basis.[5]

Finally, even after filing this case, the Trustee did virtually no discovery as to the Unclean Hands issue. So, just as he buried his head in the sand before filing this case, the Trustee did the same thing during this case. Although he relies on his own tortured interpretation of e-mails and letters, he chose not to depose their authors to find out if his interpretation was correct. From the cradle to the grave, the Trustee made a tactical decision to remain ignorant of key facts so that he can continue his refrain that one can interpret his documents (albeit in an inconsistent and illogical manner) to support his case.

Under Maxwell, the Trustee is required to conduct a factual investigation to ensure that his case is reasonable. His failure to do so is yet another, independent reason why this case

[5] The Trustee argues that this Court found that the documents attached to his Complaint "support" him. Not so. The Court simply denied Defendants' motion to dismiss and rejected their argument that the exhibits to the Trustee's Complaint refuted the Trustee's claims. (June 28, 2007 Mem. Op. & Order, d/e 49, at 14-18.) That preliminary ruling places no limits on the Court's ability to grant this summary judgment motion. Indeed, despite such exhibits (or maybe in part because of them), the Court found this case to be "very odd."

should be stopped. Once again, the Court need read no further because any (or all) of the three foregoing arguments is sufficient to grant the Unclean Hands Motion in its entirety.

IV. THE TRUSTEE'S "MERITS" ARGUMENTS ARE IRRELEVANT TO THIS MOTION; ALTERNATIVELY, THEY FURTHER DEMONSTRATE THAT THE TRUSTEE DID NOT MAKE AN ADEQUATE INVESTIGATION AND DID NOT EXERCISE REASONABLE LITIGATION JUDGMENT

As we said before, the Unclean Hands Motion is not a motion "on the merits." Yet, unable to deal with -- or create an issue of fact with respect to -- the real issues presented by the Unclean Hands Motion, and in an effort to distract the Court from those real issues, the Trustee spends almost the entire Response trying to convince the Court that the Trustee is right on the "merits." In doing so, the Trustee is trying to change the subject and avoid confronting Maxwell and its warnings. But, as with any other motion that seeks to avoid the plaintiff's claim at the outset -- such as motions based on statutes of limitations, governmental immunity or failure to exhaust administrative remedies -- the underlying "merits" of the claim and whether there is an issue of fact with respect thereto are simply irrelevant.

Indeed, the standard for deciding whether there is a question of fact relating to the "merits" is different than the Maxwell standard. For example, a trustee might file a case where the outcome-determinative fact is supported by the self-serving testimony of only one interested witness, but denied by ten disinterested witnesses. While such a case might technically present a disputed question of fact precluding summary judgment on the merits, that does not mean that it was reasonable or logical for the trustee to pursue that case in the face of such overwhelming evidence and odds. Indeed, the only party that would pursue such a case is one that -- like a trustee -- has nothing to lose, is not paying any costs and could get a fee if a settlement is somehow extracted. That is exactly the reason for the warnings in Maxwell.

The irrelevance of the "merits" is further confirmed by the Trustee's actions in discovery on the Unclean Hands issue. A full 71 of the 109 exhibits cited in the Response (i.e., those without bates numbers) were neither received nor produced by the Trustee in discovery. (See Affidavit of LaVerne M. Dietch ¶3, attached hereto as Ex. A.) Those documents were obtained by the Trustee outside discovery, and the Trustee was required to produce them in discovery if requested by Defendants. This is so even if the Trustee thought Defendants had their own copies thereof. See Goss Int'l Americas, Inc. v. Graphic Mgmt. Assoc., Inc., No. 05 C 5622, 2007 WL 161684, at *2 n.4 (N.D. Ill. Jan. 11, 2007) (party must produce documents even though requesting party may already have them). Here, Defendants requested a broad range of documents that would encompass any documents relating to the Unclean Hands issue. (See Lawyer Defendants' First Set of Document Requests Regarding Unclean Hands Issue at 5-6, attached hereto as Exhibit B.) The fact that the Trustee did not produce these 71 documents in discovery confirms that he, too, agreed that the "merits" were not relevant to the Unclean Hands issue. That also shows that the Trustee's motive in raising his "merits" arguments is to cause confusion as to the Unclean Hands Motion in the hope of avoiding summary judgment thereon.

Because they are irrelevant, the Court should not consider the Trustee's "merits" arguments, and the Unclean Hands Motion should be granted for the reasons set forth previously. Alternatively, even if the Court were to consider those arguments, the Unclean Hands Motion should still be granted. Those arguments confirm what we already know -- that the Trustee did not do an adequate pre-filing investigation and did not exercise reasonable litigation judgment in pursuing this case. Accordingly, this Section will address the Trustee's three "merits" arguments, but only to show why they further confirm that which has already been demonstrated -- i.e., that the Trustee did not exercise reasonable litigation judgment, as required by Maxwell.

A. Claim One: Pre-Litigation Advice and Strategy

So-called "Claim One" focuses on Defendants' pre-Spehar Lawsuit conduct, alleging that Defendants negligently advised CMGT to "ignore" the Spehar dispute, made no "reasonable effort" to settle it, and "devised a conflicted strategy for dealing with [it]." (Resp. at 16.) Yet, the assertion that Defendants ignored the dispute and made no reasonable effort to settle it is defeated by Franco's uncontested testimony: (i) that Defendants did not tell him to ignore the case; (ii) that Defendants did advise him to settle it; and (iii) that he tried, but his efforts were unsuccessful because of Spehar's unreasonable demands, CMGT's limited assets, and the CMGT shareholders' unwillingness to raise funds or make concessions to Spehar, whose claims they regarded as meritless. (Defendants' Local Rule 56.1(a) Statement of Undisputed Facts in Support of Their Motion for Summary Judgment Based on Their Unclean Hands Defenses 56.1 ("SOF at ¶__") at ¶¶116-18.) The affidavits of Baliga, Quarles and Wong confirm that CMGT had no assets to settle with and that its shareholders were not willing to contribute funds for that purpose. (SOF at ¶¶116-18.) Indeed, CMGT's lack of assets was confirmed by the Trustee himself in his Bankruptcy Affidavit, his draft letter to Spehar's counsel, and his deposition testimony. (SOF at ¶¶67, 137-38.)

In seeking to raise an "issue of fact," the Trustee cites various emails and letters Defendant Ronald Given ("Ronald") sent to Franco, which, according to the Trustee, say that Spehar's claims were "meritless" and that Franco should "ignore" certain communications from Spehar. So what? It is not malpractice for a lawyer to express his judgment that claims against a client are meritless. Goldstein v. Lustig, 507 N.E.2d 164, 168 (Ill. App. Ct. 1987) ("Illinois adheres to the rule that an attorney is not liable to his client for errors in judgment."). Moreover, Franco, Baliga, Quarles and Wong have testified -- and at least four other CMGT shareholders

who wrote letters to the Trustee agree -- that they believed that Spehar's claims were meritless. (SOF at ¶¶117, 127-34.) In fact, the Trustee cannot win this case unless he proves that Spehar's claims would have lost. Tri-G, 856 N.E.2d at 395; Merritt, 841 N.E.2d at 1010. So, in the end, the Trustee is arguing -- without any supporting law -- that a lawyer is guilty of malpractice if, prior to litigation, he does not force his client to settle a meritless claim.

There is also no support for the Trustee's theory that Defendants had a duty to continue to press CMGT to settle after it became clear that Spehar's settlement demands were unreasonable, that CMGT had no assets with which to settle and that CMGT's shareholders would not pay money to settle them. (SOF at ¶¶117-118.) In light of these facts, there also was nothing wrong with Ronald suggesting that Franco "ignore" Spehar's continuing demands.

The Trustee admits CMGT had no money, but says Spehar did not demand a pre-closing payment, so Defendants should have pursued settlement. (Resp. at 21-22.) Again, CMGT did pursue settlement, but was unsuccessful. In all events, it is pure speculation -- unsupported by any evidence -- for the Trustee to argue that Spehar was not demanding a pre-closing payment, to imply that its demands were modest or to presume that the matter could have settled. Franco testified that he asked Spehar to wait until the Trautner Deal closed before filing suit and that Spehar refused. (Franco Aff., Appendix Ex. B, ¶15.) Moreover, although Gerry submits an (irrelevant) affidavit, he did not testify that he was not demanding a pre-closing payment, that he was making only a modest demand or that there was any basis on which he would have agreed to settle. Indeed, Spehar's pre-suit demand letters put the lie to any such suggestion. (Resp. Ex. 39; Resp. Ex. 28 at 1 ¶7; see also Compl. Ex. 8 at 2; Compl. Ex. 12 at 2.)

The Response (at 21 & Ex. 28) also says that Ronald told Spehar to "bring it on." There is no affidavit or deposition testimony stating that Ronald made this statement. It is merely an

allegation in an unauthenticated, double hearsay email that Spehar wrote. See Schindler v. Seiler, 474 F.3d 1008, 1010 (7th Cir. 2007) (hearsay evidence may not be used to defeat summary judgment). It is also irrelevant, because, as even the Response agrees (at 20), Franco (CMGT's President) was "of one voice" with Ronald. Further, any such statement was intended to get Spehar to back off and was a matter of strategy or judgment, which is not actionable whether it worked or not. E.g., Goldstein, 507 N.E.2d at 168. Indeed, courts do not sit as micro-managers who pass judgment on every statement a lawyer makes to his client's adversary.

In all events, no statement by Ronald caused CMGT any damages. There is no evidence that Spehar filed suit because of Ronald's statement as opposed to its own belief that it was entitled to a commission for the Trautner Deal. Moreover, even if Ronald's alleged statement did cause Spehar to file suit, CMGT could have avoided the Default Judgment and any other alleged damages from the Spehar Lawsuit simply by defending itself. Ronald is not responsible for CMGT's inability to raise funds for a defense. In short, Claim One is precisely the sort of illogical claim that no reasonable trustee should bring. See Maxwell, 520 F.3d at 718.

B. Claim Two: The Washoe Negotiations

So-called "Claim Two" is that Defendants are guilty of malpractice because, by decreasing the Washoe's due diligence period by one day, Defendants prevented CMGT from getting financing from the Washoe. As a preliminary matter, it is uncontested that Franco, CMGT's President, approved reducing the Washoe's due diligence period by one day. (Resp. Exs. 52-53.) It is not legal malpractice for an attorney to follow the client's wishes.

Also, the Court should not give any credibility whatsoever to the so-called "Washoe" claim. The Trustee's Complaint stated that the Washoe had signed a letter of intent to loan CMGT money, that a signed copy thereof was attached to the Complaint as Exhibit 6, and that

Defendants ignored this signed letter of intent because Trautner (as opposed to the Washoe) promised to pay their fees. (Compl. ¶45.) Yet, Exhibit 6 is not signed, and it is undisputed that there never was any signed letter of intent from the Washoe. (56.1 Resp. at ¶23.) The Trustee never even asked to see a signed letter of intent before alleging there was one. (Id. at ¶78.) To the contrary, Spehar told the Trustee's counsel that the Complaint was wrong on this point (id. at ¶24), but, now three years later, the Trustee still has not corrected it. (Id. at ¶25).

On a related point, Defendants' written retention agreement with CMGT states that Defendants' fees will be paid when CMGT gets financing, regardless of who provides it. (56.1 Resp. at ¶11.) Thus, Defendants would not care who provided the financing -- the Washoe, Trautner or anyone else -- and the Trustee's assertion that Defendants favored the Trautner Deal (as opposed to a deal with the Washoe) because only the Trautner Deal got them paid is illogical. Indeed, Ronald made it clear that he was willing to work on the Trautner Deal or any other deal for CMGT. (Resp. Ex. 16 at 1 ¶1.) In fact, if the Washoe were truly interested in providing CMGT with financing, then Defendants should have preferred a deal with the Washoe over the Trautner Deal. After all, the Trautner Deal, as approved by CMGT's shareholders, would not have put so much as one dollar into CMGT's pockets -- all it offered was a 20% interest in Newco and, at most, a promise from Trautner to work something out as to payment for some of Defendants' fees. (56.1 Resp. at ¶¶27, 30.) In contrast, if real, the Washoe deal would have put millions of dollars into CMGT's pockets, thus enabling CMGT to pay Defendants the full amount of their fees. (Compl. Ex. 6 at 1.)

Still further, Franco testified that Defendants did everything that he asked of them with respect to the Washoe. (SOF at ¶110.) Franco also explained that he made a business decision that CMGT would not delay matters and/or risk losing the Trautner Deal just to see if the

Washoe eventually would sign a letter of intent (id. at ¶¶111-12) -- which, by its own terms, would have been non-binding, subject to further due diligence and self-terminating without recourse if the deal did not close (Compl. Ex. 6). And, CMGT's other shareholders agreed with Franco's decision. For example, Baliga and Wong testified that they and shareholders they spoke with agreed. (See Baliga Aff., Appendix Ex. C, ¶¶3, 5; Wong Aff., Appendix Ex. E, ¶¶3, 4.) Who can blame them? As Wong testified, Spehar had been promising CMGT financing for three years with no results -- why should this time be any different? (Id.)

Despite this uncontested evidence, the Trustee says that documents show that Defendants violated their duties to CMGT. However, the Trustee's documents do not offer any support for his theory. For example, the Trustee relies on one e-mail in which Franco said that -- as of August 13, 2003 -- he thought the Washoe's interest in financing CMGT was "real." (Resp. Ex. 21 at 2.) No matter. Apart from being inadmissible hearsay, Franco's statement does not mean: (1) that the Washoe's interest actually was or remained "real;" (2) that Franco could never re-evaluate his belief; or (3) that Franco could not later decide not to pursue financing from the Washoe because: (a) CMGT's and his own financial condition worsened; (b) Spehar disobeyed Franco's instructions in dealing with the Washoe; and (c) the Washoe said that they were "not in the business of investing in companies like CMGT." (See Franco Aff., Appendix Ex. B, ¶¶34.)

Once again, the Trustee has submitted no evidence to support this far-fetched claim. In particular, he did not talk to Franco to learn why he did not give the Washoe more time, did not ask Ronald what the Washoe told him, did not submit any testimony from the Washoe stating that they terminated financing negotiations because they wanted a due diligence period that was one day longer, and did not submit testimony from any member of the Trautner Group stating that they were willing to wait until the Washoe made up their minds. In short, the Trustee's

arguments are unsupported, implausible, and contradicted by all the known evidence. The Trustee has not exercised reasonable litigation judgment by bringing such a factually bereft claim.

C. Claim Three: Defendants Should Have Advised CMGT To Defend Itself

So-called "Claim Three" is little more than a repeat of Claim One. Instead of saying that Defendants should have advised CMGT to settle with Spehar before Spehar filed suit, Claim Three says Defendants should have given that advice after Spehar filed suit. (Resp. at 25.)

Yet, again, Franco testified that Defendants did advise him to settle with Spehar and that he tried to settle and failed for the reasons explained earlier. Franco also testified that CMGT's shareholders were not willing to contribute money to settle or litigate with Spehar. (SOF at ¶118.) Franco's testimony is supported by affidavits from three additional CMGT officers and/or shareholders, and there is no evidence to the contrary. (Id.) All that is left of the Trustee's third claim is his argument that Defendants should have advised CMGT to encourage "Trautner's investment group to contribute to a defense fund." (Resp. at 25.) Again, this is not legal advice. Defendants do not have a duty to tell CMGT where to get money to defend itself.

In all events, there is no evidence -- or reason to believe -- that CMGT and Trautner's investment group did not already know that Trautner's group was a potential source of financing to defend the Spehar Litigation. It is also pure speculation that the Trautner group would have advanced defense costs even if asked. To the contrary, they did not do so on their own, even though they knew that not defending could kill their deal. This claim, too, is not the product of reasonable litigation judgment.

D. The So-Called Nine-Point Memo

The Trustee's final argument (advanced as part of Claims One and Three) is that Ronald's so-called "Nine-Point Memo" (the "Memo") somehow evidenced a conflict of interest.

But, whether that is so or not (and it is not), a conflict of interest alone does not constitute legal malpractice. Rather, all of the elements of legal malpractice -- including causation and damages -- must be present. Owens v. McDermott Will & Emery, 736 N.E.2d 145, 156-57 (Ill. App. Ct. 2000). Here, there could be no such causation or damages.

Indeed, the Memo merely presented a possible strategy in light of Spehar's threatened lawsuit and TRO. Yet, setting forth a possible strategy is not actionable, particularly where, as here, there is no evidence that the strategy was ever carried out. Among other things, there is no evidence that Newco was ever created, that Ronald ever did any legal work for Newco, or that Franco ever went to work for the Trautner group. Likewise, there is no evidence that CMGT or Trautner's group would have done anything differently if the Memo did not exist. The Trustee's reference to the Memo wrongly attempts to create a malpractice claim out of whole cloth -- without explaining the theory behind the claim or identifying any authority that supports it.

There was also nothing wrong with Ronald asking to be paid. By this time, Mayer Brown had already incurred unpaid fees well in excess of the cap agreed to in the engagement letter. (Compare Compl. Ex. 1 at 2 ($50,000 cap) with Resp. Ex. 62 (over $200,000 in fees accrued).) Before embarking on a new project -- i.e., trying to keep the Trautner Deal alive despite Spehar's threatened Lawsuit -- Ronald simply wanted to make sure he was not getting involved in more free work. A lawyer is not required to take on each successive new project from the client *ad infinitum* despite the fact that the lawyer has never been paid and has already exceeded the amount of fees the lawyer agreed to accrue before being paid.

In all events, neither the Default Judgment nor CMGT's going out of business was the result of Defendants' conduct. They were the result of: (1) a business that lost all its money; (2) a financial advisor who never found it any additional money; (3) a lawsuit that chased away

Trautner -- CMGT's last chance; and (4) the very sensible decision of CMGT and its shareholders not to throw more good money after bad -- either by paying Spehar when they thought it deserved nothing or by engaging in pointless litigation in California -- but, instead, simply to have CMGT, a corporation with limited liability, go out of business. The Trustee had the option to close this case as a no-asset bankruptcy. (Trustee Dep. at 118.) Instead, he ignored the evidence, did no investigation, refused to vacate the Default Judgment and subcontracted the case to Spehar and contingency fee counsel who engineered this illogical and baseless lawsuit.

* * *

Having addressed the Trustee's "merits" arguments, Defendants hasten to repeat that they did not need to do so, and that this Court should ignore the "merits" arguments as irrelevant to the Unclean Hands Motion. Instead, the Court should focus on -- and grant the Unclean Hands Motion -- for any one or more of the three separate and independent reasons set forth in Sections I, II and III above. Of course, should the Court nevertheless entertain the "merits" arguments, that should only further confirm those three reasons and that the Unclean Hands Motion should be granted.

Respectfully submitted by,

MAYER BROWN LLP and RONALD B. GIVEN

By: /s/ Stephen Novack
One Of Their Attorneys

CERTIFICATE OF SERVICE

Stephen Novack, an attorney, hereby certifies that he caused a true and correct copy of the foregoing Reply Memorandum in Support of Their Motion for Summary Judgment on Their Unclean Hands Defenses to be served through the ECF system upon the following:

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on this 19th day of August, 2009.

/s/ Stephen Novack