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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.	)	

MOTION TO ALTER OR AMEND

Pursuant to Fed. R. Civ. P. 59(e), R. Gerard (Gerry) Spehar ("Spehar"), acting *pro se* and as an individual pursuant to his contemporaneously filed Motion to Intervene, hereby moves this Court to alter or amend its final Opinion and Order of March 31, 2010 ("2010 Opinion") granting Defendants' Motion for Summary Judgment and dismissing this case to protect the judicial system from an elaborate fraud orchestrated by Spehar, and in support of this Motion states as follows:

OPENING STATEMENT

I am not a lawyer, and I ask this Court to please bear that in mind as it considers this motion. I have also been wrongly branded, so please understand and excuse if a bit of anger seems to bleeds in. It is unintended; I mean no disrespect to this Court.

As a threshold matter, I understand the clean hands doctrine to be a rule of law holding that someone bringing a motion and asking the court for equitable relief must be innocent of wrongdoing or unfair conduct themselves relating to the subject matter at issue. In their May 29, 2009 Motion for Summary Judgment, Defendants come to this Court with unclean hands to claim that plaintiff David Grochocinski ("Grochocinski") and I have unclean hands. Grochocinski's July 13, 2009 Response ("Response") pled two key memos authored by Defendants themselves, taken from Defendants own records that were part of special counsel Edward T. Joyce and Assoc. ("Joyce") pre-complaint investigation. Those memos irrefutably prove Defendants conspired and colluded with a select group of CMGT, Inc. ("CMGT") and counterparty Newco insiders to misinform and disenfranchise the many non-insider minority shareholders of CMGT (their client), get paid $100,000 by Newco, and blame Spehar.[1] This Court did not exclude that evidence on Defendants Reply and Grochocinski's SurReply, nor should it. In addition, this motion supplements evidence in the Response regarding Newco investor Harlan Smith, proving that Defendants conspired with CMGT's President Lou Franco ("Franco") to intentionally misrepresent the merit of Spehar Capital, LLC's ("SC") 2003 contract claim to CMGT shareholders, to SC, and to this Court.[2] As a matter of law, Defendants affirmative unclean hands defense is barred by the clean hands doctrine.

Moreover, "unclean hands" is an affirmative defense which must be proved by Defendants. Here, there is no actual proof that I did anything wrong, or that Grochocinski and Joyce, as my "puppets" and "proxies," did anything wrong. Nor is there evidence

[1] Pltf. 56.1 Stmt., ¶¶ 28-34 and 46-73.

[2] *Id.*, at ¶5; Franco Aff., Def. 56.1 Stmt. Ex B at ¶¶ 7-16; Spehar Aff, Ex 1 hereto.

that they were my puppets and proxies.[3] There is only confusion, supposition, and conjecture; resulting in massive error. And at the end of the day, this is a material fact dispute that cannot be decided on summary judgment.

How could SC's 2004 $17 million default judgment ("Default Judgment") possibly be valid? Answer: A fully and properly informed California court, acting within its discretion, granted and entered it. How could SC be so destitute that it could not afford to post a large injunction bond or take its California litigation ("California Action") to trial in September 2003, yet only one year later be financially able to "come to Chicago"[4] to put CMGT, Inc. ("CMGT") into involuntary bankruptcy, enlist respected special counsel and assist in this action, and then, over the next few years, defend several legal actions v Grochocinski? Answer: SC obtained a $17 million Default Judgment in March 2004, and it was able to leverage that substantial asset to attract a contingency malpractice attorney and fund its subsequent activities. Is there anything wrong with that? **No.** Was any of it planned? **No.** Am I persistent and tenacious in seeking justice? **Yes.** Is there anything wrong with that? **No.**

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[3] In fact, there is abundant evidence to the contrary in the record of *In re CMGT, Inc.*, No. 09 C 2822, 2010 WL 432276, at *5 (N.D.Ill. Feb. 2, 2010) (Gettleman, J.), of which the 2010 Opinion takes judicial notice at 30. (*see* Rcrd. of Apl. Doc. 3-2, 148; Doc 3-3 at 1-3, 22-23, 32-33, 43-46, 50, 61-66, 79, 92; Grochocinski Aff. R3-7,104 ¶24.) This Court may consider such public records in dismissal actions. (Def. Mo. to Dismiss at 6, FN 2)

[4] MR. CARROLL: [W]e have not alleged that the claim that Spehar Capital had, the substance of it was meritless. **We have alleged that there were procedural defenses that would have prevented that judgment from being entered.** ... We've alleged ... equitable relief was inappropriate. [And] even if equitable relief was appropriate, Spehar should have been forced to post a TRO bond. And that bond would have been millions of dollars, **and we don't think Spehar would have been able to afford it** [and] been able to post it and the injunctive relief never would have been entered...

MR. NOVACK: But...if that claim was valid and we had gone out there [to California] and procedurally avoided it, if it's a valid claim...**this is a guy, Spehar, who has come to Chicago to put this company in bankruptcy. Surely he would have come to Chicago to assert his valid claim.**

(Transcript of Proceedings dated September 26, 2007) *Emphasis Added.*

Why didn't Defendants come to California and defend CMGT in 2003 *or* seek to vacate the Default Judgment in 2004? Answer: Because (a) it wasn't part of their conflicted "nine point plan" with CMGT and Newco insiders and "functional equivalent deal" to steal CMGT's business from its many non-insider shareholders and get paid $100,000,[5] and (b) unlike Illinois, California allows a non-client (SC) to sue a counter-party's lawyer for tortious breach of contract.[6] Did Defendants cause material harm to both their client CMGT and SC? **Yes.** Do CMGT's misinformed minority shareholders understand what Defendants did to them? **No.** Will they ever? **Only if this goes to trial.**

In short, there are a multitude of disputed facts that preclude summary judgment, and there are legitimate answers to all of these questions, and more, that merit discovery and trial will out. This Court got it right the first time in its June 28, 2007 Opinion substantially denying Defendant's Motion to Dismiss ("2007 Opinion"), at its September 26, 2007 hearing on Defendants Motion to Reconsider ("2007 Hearing")[7] and in its

[5] Pltf. 56.1 Stmt., ¶¶ 28-34 and 46-73; Pltf. Response Memo at 6-13.

[6] Defendants were named as DOES 1-100 in SC's California complaint. (SC Nov. 2003 Amd. Cplt.,U.S. Dist. Ct., N.D.Ill., Rcrd. of Apl. 09 cv 2822, Doc. 3-2, 25-66)

California has recognized two exceptions to the rule that attorneys cannot be held liable to non-clients. The relevant exception here is if an attorney engages in intentionally tortious conduct. "An attorney has a duty to refrain from engaging in intentional tortious conduct toward nonclients." Shafer, 131 Cal.Rptr.2d at 790 (quoting Cicone v. URS Corp., 227 Cal.Rptr. 887, 891 (Cal. App. 1986). And California has recognized that an attorney is liable for tortious acts to nonparties since one of the earliest articulations of the general non-liability rule: "exceptions to this general rule ... are where the attorney has been guilty of fraud or collusion, or of a malicious or tortious act Shafer at 791 (quoting Buckley v. Gray, 42 P. 900 (Cal. 1895) (emphasis added, reversed on other grounds in Biakanja v. Irving, 320 P.2d 16 (Cal. 1958)). Intentional interference with contractual relations and intentional interference with prospective economic advantage are, as their names suggest, intentional torts.

[7] MR. CARROLL: We are at the pleading stage. ... And there's no evidence anywhere that Spehar is a bad guy and did something wrong and that he thinks his claim has no merit and that he doesn't deserve to be paid as a valid judgment creditor. ... And there has been nothing proven about Spehar doing anything wrong, committing any fraud, lying to the California court. He went out to California and he got a judgment. He presented testimony that was accepted by the California court as to what his damages were. Now, maybe that would not have been accepted had Mayer Brown about been out there defending CMGT, but – ...

October 30, 2007 Reconsideration denial. Now this Court invokes the "nuclear option" of judicial estoppel to dismiss the entire two-count complaint, based only on a wrong opinion of me and SC's 2004 California judgment. What about Count I? On what basis does this Court conclude that CMGT was only a "start-up" and not worthy of lost profits damages under Illinois law? Has this Court considered CMGT's business History?[8] And what about CMGT's twelve to fourteen minority shareholders who were misinformed non-insiders throughout this entire process? (Pltf. 56.1 Stmt. Ex 26) What about their lost value and their rights to due process? Much is being made of SC's "lion's share" Sharing Agreement with CMGT's Chapter 7 bankruptcy estate ("Estate"). But that duly-noticed, court-ordered Sharing Agreement carves-out $1.6 million to the Estate from higher

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[I]t's not that absurd to think that a judgment creditor of an estate, that doesn't have that much in assets, would help fund litigation, when litigation is one of the assets of the estate to eventually get paid.

[T]hat's a valid judgment that was entered – you know what? If defendants had appeared at that prove-up hearing -- they could have challenged it and said it's speculative. That's what they should have done, and they didn't do that. That's why we're here today.

[T]hat agreement was approved by the bankruptcy Court. ... [And] until that $17 million judgment is proven by somebody in a court of law to be a fraud or to be somehow not proper, then it is...a valid judgment against CMGT. And until somebody proves otherwise, Spehar is a valid judgment creditor. ...

THE COURT: How could I possibly sit as a District Court and look at a state court judgment and say, Well, that sure is a goofy judgment. I should throw it out because equitably it results in a lion's share of recovery to Spehar. How can I do that? ...

[H]ow, at this stage, do I take the fact that the Mayer Brown attorneys did not attack what could be a valid judgment? And why isn't that just the reverse of your argument, that they are now being rewarded for their lack of their appropriate professional efforts...

[H]ow do I know at this stage whether it's just negligence alone? How do I know, before discovery, as to why they didn't show up? I have no idea why the lawyers didn't show up. I have no idea whether there were communications back and forth. I have a complaint and the allegations are taken as true...

[E]very day if people don't appear on cases, if they don't respond to complaints, default judgments are entered and proveups are entered.

[T]o suggest that I know better than...the state court judge that addressed the judgment, made the judgment, made the findings, I would be collaterally attacking that judgment.

(Transcript of Proceedings dated September 26, 2009) *Emphasis Added.*

[8] Pltf. 56.1 Stmt., Ex 2; *see also* Sealaska Apr. 2003 Due Diligence Report, Ex. 2 hereto.

recoveries, enough to make **whole** all of CMGT's legitimate creditors[9] and/or cover the **entire** $1.2 million that shareholders invested in CMGT. (*Id.*) I'm told Chapter 7 creditors normally consider themselves lucky to recover pennies on the dollar, and shareholders usually recover nothing. So, why is the Sharing Agreement not fair? And how is it fair to deprive CMGT's other legitimate creditors and shareholders of that $1.6 million recovery?

To meet the necessary conditions for judicial estoppel this Court finds: (a) double fraud (first, by me in the California Action and then by Grochocinski in this action; (b) mutuality of parties in those two distant and distinct actions (Grochocinski and, by implication, his counsel Joyce[10] are my "puppets" and "proxies"); (c) inconsistent positions taken by "mutual parties" SC and Grochocinski in those two actions; and (d) unfair advantage to SC and unfair detriment to Defendants. Each and every one of these findings is wrong, legally barred and/or involves contested facts that must be adjudicated to ascertain the truth.

I. SPEHAR CAPITAL'S DISPUTE WITH CMGT

1. CMGT was not a startup. At the time of our August 2003 dispute, CMGT was a three-year-old company, operating in an established and growing industry (Absence

[9] The Sharing Agreement is Ex. A to the Sept. 2, 2005 Finance Order. The total amount of CMGT's legitimate unsecured creditors' claims, as agreed in the Sharing Agreement, is $1,072,500. That calculation overstates, since it includes $300,000 in fees owed to Defendants. *(see also* Def. 56.1 Stmt., Ex J-3, Doc. 138-11 at 13-27; for list of shareholders, *see Id.*, at 28-32)

All creditors and shareholders, including Defendants, were duly noticed of the July 12, 2005 Motion to Approve the Finance Order. Defendants did not object to entry of the Finance Order. (Finance Motion Ntc., U.S. Dist. Ct., N.D.Ill., Rcrd. of Apl. 09 cv 2822, Doc. 3-3 at 101-102; Finance Order, Def. Nov. 30, 2006 Dismissal Motion, Ex. D)

[10] Joyce is one of Illinois' most respected, experienced and successful commercial litigators, and has been selected to "Illinois Super Lawyers" from 2005 through 2010. Grochocinski has been a U.S. bankruptcy trustee and practicing bankruptcy attorney in Illinois for over 20 years.

Management) with a large established market (most U.S employers). CMGT had proven management, a proven product that was widely considered the industry gold standard (Marsh, Hartford, Jackson Lewis, Washington Business Group on Health), satisfied long-term customers (Ebay, Howard Hughes Medical Institute, Atlanta Gas & Light), ongoing revenue, and established key relationships with many of the largest industry players (Hartford, Cigna, Liberty Mutual, Marsh, Aon, Jackson Lewis, Integrated Benefits Institute).[11] That profile far exceeds the professional investment community's definition of a "startup."[12]

2. SC began working for CMGT in June 2001 upon the request and introduction of a mutual business associate, CMGT's then CFO Mike Bowers, to help CMGT raise around $3 million in expansion capital. SC and CMGT executed their first contract in October 2001 and their second contract in October 2002. Defendant Given was intimately involved in negotiating both contracts.[13]

3. Funding CMGT and a related $100 million Minority Owned Insurance Company ("MOIC") deal that included CMGT was essentially my entire focus during my two-year tenure with CMGT. In April of 2003, Franco and I formed Millennium Partnership together along with CMGT shareholders Wayne Baliga and Jim Wong to do the MOIC deal. Defendant Given was also our partnership counsel at Mayer Brown. (*Id.* and Spehar Aff., Ex 1)

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[11] Sealaska Apr. 2003 Due Diligence Report, Ex 2 hereto; CMGT History, Pltf. 56.1 Stmt., Ex 2, Doc 153-2 at 4-9; CMGT Projections, Ex 7 to Prove Up, Ex 4 hereto.

[12] That profile also meets the standard for "lost profits" damages under Illinois law:

> "[I]n the case before us, while the product is a new one, the evidence shows it to have an established market. Given that fact, together with Price's testimony, we conclude that the proof of lost profits was neither speculative nor the product of conjecture but was based upon a reasonable degree of certainty." Milex v Alra 237 Ill.App.3d 177, 603 N.E.2d 1226, 177 Ill.Dec.852. *Emphasis added.*

[13] SC Nov. 2003 Amd. Cplt.,U.S. Dist. Ct., N.D.Ill., Rcd. of Apl. 09 cv 2822, Doc. 3-2, 25-66.

4. Franco and I worked so closely together, speaking up to 10 times a day and exchanging many emails each day, (SC 2003 Amd. Cplt. at 7.b.) that he referred to me as his "brother" by the time or our dispute. (Pltf. 56.1 Stmt., Ex. 6) At the start of our dispute, Defendant Given also stated: "You obviously know that Lou [Franco] and I are big fans of what you bring to the table." (Id. at Ex 7)

5. Our dispute concerned SC's claim to compensation for CMGT shareholder Chuck Trautner's ("Trautner") proposed $2.5 million asset-purchase investment deal with CMGT called "Newco."

6. During Joyce's 2006 investigation of this malpractice action, Grochocinski gave me Defendants' Email Record to review. Upon reviewing that Email Record, I discovered, for the first time, evidence that Defendants and Franco both knew from the very outset of our Newco dispute that SC's contract with CMGT unquestionably covered the disputed Newco deal through Newco investor, Harlan Smith. (Spehar Aff., Ex 1)

7. Therefore, throughout our Newco dispute and ever since, both Defendants and Franco have intentionally misrepresented – to me, to CMGT shareholders, and to the courts – that my contractual claim to compensation for the disputed Newco deal was "meritless," had "absolutely no substantive basis" and was even "specious." (Pltf. 56.1 Stmt., Exs. 29, 36, 68; Spehar Aff.).

8. Throughout our Newco dispute, Defendant Given always adamantly refused to even discuss a settlement, even calling me a "Motherfucker" and a "Son of a bitch" who knew only "a bunch of Indians and Mexicans" at the mere mention of my contract during our one and only settlement "discussion." Defendant Given also threatened to "make you poor" if I continued to press the issue. (Pltf. 56.1 Stmt., Exs. 28-30; Spehar Aff.)

9. Franco asserts that the Trautner investment group was willing to pay SC "$250,000 or so" as a management consulting fee after CMGT and Trautner's investment group closed the Newco deal. (Franco Aff., Def. 56.1 Stmt., Ex. B at ¶15.)

10. I have no idea if this is true, but I would have gladly accepted that offer and let Newco close had it been made to me; it was not made to me and Franco's assertion is absurd. $250,000 would have been full cash compensation under SC's contract with CMGT.[14] With that cash in hand, I could have litigated the merit of SC's Stock Compensation and Investment Banking rights against CMGT's 20% of Newco through trial, if necessary, after Newco closed.

11. Grochocinski's July 13, 2009 Response to Defendants' Motion For Summary Judgment pleads two key 2003 memos ("Memos") from Defendants own records that were produced to Grochocinski and/or Joyce during their 2005-2006 investigation of this malpractice action. The Memos are from Given to Trautner and his attorney John Politan ("Politan"). The Memos detail Given's "nine point plan" to effect a conflicted "functional equivalent" deal with Trautner that benefited Defendants, Trautner, Franco and perhaps other CMGT insiders to the detriment of CMGT's many non-insider minority shareholders.

12. The first of the Memos, dated August 22, 2003, was sent while CMGT shareholders were in the midst of voting on the Newco deal. At that time, CMGT's shareholders did not know that SC had disputed the Newco deal, or about Harlan Smith's involvement with Newco. In it, Defendant Given 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

[14] Default Jdgmt., Def. 56.1 Stmt., Ex. A: showing $150,000 Cash Success Fee and $100,000 Management Consulting Fee.

> CMGT shareholder] was successful in disrupting the deal, you [Trautner] could walk away with the software and, most importantly, Lou Franco without making any payment to CMGT whatsoever." *Emphasis Added.*

Given also proposed that Trautner/Newco pay Defendants: (a) $50,000 for their 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, and also solicited future legal business from Newco. (Pltf. July 13, 2009 Response Memo at 6)

13. On August 23, 2003, Franco addressed Defendant's legal fees with Given as follows:

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

14. On August 27, 2003, Franco sent CMGT shareholders and SC a letter, authored by Given, notifying shareholders that they had approved the Newco deal. That same letter for the first time informed shareholders of the dispute with SC:

> "I am very pleased to report that the shareholders of CMGT, Inc. have responded to my August 15 letter with a decisive majority vote in favor of the Newco transaction to acquire assets of CMGT and "FOR" the 20% Newco stock purchase decision contemplated in the Letter of Intent. ...
>
> Regretfully, I must also advise you that I have received two specific objections to the proposed Newco transaction. First, Gerry Spehar/Spehar Capital has claimed that he is entitled to compensation as a result of the Newco transaction under a contract he has with CMGT, Inc. Your management and legal counsel strongly disagree with this contention. ...
>
> [B]ecause of the existence of these claims, Newco will require indemnification and an escrow of the shares to assure indemnification obligations can be satisfied. Also, to protect against any threat to break-up the transaction after it is consummated, Newco will require an independent

> license to CMGT, Inc.'s software that would survive any break-up of the transaction. ...
>
> I'm now putting my full efforts into the completion of definitive documentation and meeting our target closing date of September 30th."
>
> (Pltf. 56.1 Stmt. Ex. 37)

15. On September 9 and 11, 2003, SC notified Franco and Given that it was seeking a TRO to prevent the Trautner Deal from closing. (*Id.*, Group Ex. 59 and Group Ex. 60.) On September 12, 2003, SC obtained a TRO in California enjoining the Newco transaction.

16. The second of the Memos from Given to Politan, dated September 14, 2003, discussed the possibility of SC obtaining a pre-transaction TRO, and provided Trautner/Newco with a "nine-point plan" to effect a "functional equivalent" deal that would exclude CMGT's non-insider shareholders. In pertinent part, it states:

> 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. ...
>
> 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.
>
> 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. ...

> 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. ...
>
> 9. I believe the outsourcing alternative could be the **functional equivalent** of the transaction contemplated by the LOI.
>
> (Pltf. Response Memo at 10-12) *Emphasis Added.*

Given ended this Memo to Politan by stating he would not do any more work unless the legal fee issue was immediately resolved.

17. On September 21, 2003, Politan sent Given a letter he had requested in his September 14 memo (Pltf. 56.1 Stmt., 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.** (*Id.*, Ex. 74)

18. On September 22, 2003, Franco sent Given several "to do" lists that were prepared by Trautner's representative, Peter Bentz. Bentz's "to do" lists, which are dated September 20, 2003, reveal that Given and Franco were proceeding with Given's "functional equivalent" deal. (*Id.*, Ex. 75)

II. SPEHAR CAPITAL'S CALIFORNIA ACTION

A. SC's TRO

19. Defendants' hard-line refusal to discuss settlement forced SC to seek a TRO at the eleventh hour to prevent an inequity and as a last hope to force settlement talks.

20. In September 2003, SC and CMGT were both financially desperate. SC's lead and local counsels' combined retainers were only $7,000, SC could only obtain a $40,000 (maximum) preliminary injunction ("PI") bond to enjoin a $2.5 million deal, and SC could only afford to pay 36% of its counsels' billings for the default proceedings in Los Angeles.[15] (Spehar Aff.)

21. Defendants and CMGT were fully aware of SC's desperate financial straights. (*Id.*)

22. Like CMGT itself, I expected that Byron Hollins ("Hollins"), a substantial CMGT investor/shareholder ($120,000) and Los Angeles area litigator,[16] would represent CMGT, perhaps *pro bono*, in California. I believed that through the good graces of its lead and local counsel (who knew me well) SC would be able to litigate its action against Hollins in California. (*Id.*)

23. Surprisingly,[17] Defendants and not Hollins represented CMGT. SC local counsel Ken Franklin's ("Franklin") October 24, 2007 sworn Declaration:

> "After speaking with Mr. Given, I believed that he and Mayer Brown were acting as CMGT's counsel regarding this matter. Mr. Given...informed me that CMGT intended to oppose enforcement of the [TRO] in Chicago. ...Given the Court's

[15] Of the $57,850 in attorneys fees listed in its Feb. 26, 2004 Prove Up, $37,101 remained unpaid as of the Prove Up Hearing. After obtaining its $17 million Default Judgment, SC was able to borrow funds to pay those fees. (Spehar Aff.)

[16] Def. 56.1 Stmt., Ex 4, Doc. 138-11 at 29.

[17] Pltf. 56.1 Stmt., Ex 66. "Mayer Brown has not been retained to deal with this matter. And we do not expect to be."

> issuance of the [TRO] and the nature and substance of my contacts with Mr. Given, I expected that a lawyer from Mayer Brown would appear at the October 3, 2003 Order to Show Cause hearing on [SC's] request for a [PI]. ... I was frankly surprised that no one appeared on behalf of CMGT to oppose either the [TRO] or the requested [PI]. ... [H]ad CMGT appeared and contested the injunctive relief...it could have requested and potentially obtained an order requiring [SC] to obtain a substantial bond, in the order of $1 million or more, as a condition of issuance of the requested [PI]. California Courts routinely require such bonds, if requested. ... Had Mr. Given informed me that neither he nor Mayer Brown represented [CMGT], I would have entirely stopped communicating with Mr. Given and his firm. I was never informed by [CMGT], or by Mr. Given or any other attorney at Mayer Brown that Mayer Brown did not represent CMGT in connection with the [SC] Litigation. To the contrary, based upon Mr. Given's representations, I believed that Mayer Brown had simply chosen an alternate forum and decided to contest in Chicago the [TRO], the [PI], and any other orders issued by the California Court.

(Franklin Decl., Ex J to Spehar Aff.) *Emphasis added.*

24. When Defendants represented CMGT instead of Hollins, and said CMGT would contest in Chicago, I knew SC would necessarily withdraw its action before trial. At that time, SC could not afford to pay counsel and the exorbitant costs of litigating against Mayer Brown, especially in Chicago.

25. On September 10, 2003 and again on September 12, 2003, Los Angeles County Superior Court Judge Michael S. Mink[18] presided at duly noticed hearings on SC's request for a temporary restraining order ("TRO") against CMGT, Inc. ("CMGT"). No one appeared for CMGT at either hearing, and on September 12, 2003 the Court granted SC's TRO. SC duly served both CMGT and Defendants with the TRO. SC domesticated the TRO in Illinois on September 18, 2003.

[18] After Judge Mink granted the TRO, Judge David M. Schacter them presided over the case from that point forward and granted SC's preliminary injunction and damages. The 2010 Opinion questions two separate California courts:

> "The Court finds it curious that the California court entertained SC's motion for a TRO and then a preliminary injunction when SC's case against CMGT was a contract claim for damages. A TRO is an equitable remedy that requires the movant to demonstrate as a threshold matter that no adequate remedy at law exists. While the Court is not seeking to collaterally attack the California judgment, it seems clear that SC had, and ultimately received, an adequate remedy at law. (2010 Op. at 30, FN 15)

26. The TRO states, in pertinent part:

> Upon reading the verified complaint of [Spehar], Spehar's ex parte application and accompanying memorandum of points and authorities and declarations, and it appearing to the satisfaction of the Court that this is a proper case for the granting of an order to show cause and [TRO], and that unless the [TRO] prayed for be granted against defendant [CMGT], CMGT will cause great and irreparable injury before the hearing on the order to show cause...
>
> IT IS FURTHER ORDERED that pending the hearing and determination on the order to show cause, CMGT, and its officers, agents, [etc.], shall be and are hereby restrained and enjoined from engaging in, [etc.], any and all of the following acts: ... (b) consummating, or taking any further steps toward consummating the asset- purchase transactions between CMGT and Newco, or any other transaction by CMGT whose terms do not comply with all terms of the CMGT-Spehar agreement;[19] *Emphasis added.* (Def. 56.1 Stmt., Ex. A, Doc. 138-2, at 50 – 52)

B. SC's Preliminary Injunction

27. On October 3, 2003, Los Angeles County Superior Court Judge David M. Schacter then presided at a duly noticed preliminary injunction hearing. Again, no one appeared for CMGT, and the Court granted SC a PI through the pendency of its California Action. SC duly served both CMGT and Defendants with the PI. SC domesticated the PI in Illinois on October 10, 2003.

28. The PI states, in pertinent part:

> The Court has read the verified complaint of [Spehar], Spehar's application for a [PI] and the accompanying memorandum of points and authorities. The Court accepted the Declarations...of Gerry Spehar, and took notice of the various proofs and declarations of service on file with this court, and is sufficiently advised of their premises. The Court has also held a hearing on

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[19] The 2010 Opinion states: "As Spehar knew at the time, he had blocked the infusion of capital into CMGT by obtaining the TRO of the infusion deal and no new deal was permitted under the wording of the TRO. ... The TRO that Spehar obtained even prohibited other entities from infusing capital into CMGT." (2010 Op. at 20 - 21 and 30, FN 14) (Continued)

But CMGT could actually close any deal by paying SC, and CMGT's Projections contemplate paying SC with no material detriment to its business. (Prove Up, Ex. 7) Moreover, Defendants admit: "The Spehar Lawsuit did not prohibit CMGT from getting financing. It prohibited CMGT only from closing the Newco Deal." (Def. Feb. 7, 2007 Reply at 9) *Emphasis added.*

Spehar's application. Being duly and sufficiently advised, the Court FINDS that:

1. CMGT was validly and properly served...

2. The Court has jurisdiction over CMGT...

3. CMGT did not file any timely opposition...or appear at the [PI] hearing...

4. Spehar has shown that it has a strong likelihood of prevailing on the merits of its claim[s]. The likelihood of succeeding on each of these claims... supports the issuance of a [PI].

5. Spehar will be irreparably harmed if a [PI] is not issued. The protective tagalong and exclusivity provisions of Spehar Capital's contract with CMGT will be rendered moot, CMGT's assets will be depleted, and Spehar will be left with difficult-to-value claims against CMGT's debt-ridden shell...

4. CMGT has not shown cause why this Court should not issue a [PI].

THEREFORE, the Court GRANTS Spehar's application and ORDERS that:

1. CMGT and its officers, agents, [etc.], ARE ENJOINED AND RESTRAINED during the pendency of this action from engaging in, [etc.], any and all of the following acts: ... (c) consummating, or taking any further steps toward consummating, the asset purchase transaction or any other financing transaction between CMGT and Newco, or any other transaction of any type by CMGT whose terms do not expressly acknowledge, incorporate and comply with all terms of the CMGT-Spehar agreement...[20]

3. Spehar shall post a bond of **$25,000.00**[21] within 5 days of this order.

Emphasis added. (Certified copy of the California Court's PI Nature of Proceedings Statement and Certified copy of SC's Oct. 3, 2003 PI , Ex 3 hereto.)

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[20] As with the TRO, CMGT could close any financing deal it wanted by simply paying SC, and CMGT's Projections contemplated paying SC with no material detriment to its business. (Prove Up, Ex. 7)

[21] SC's PI bond **limit** was only **$40,000** (Ex L to Spehar Aff.) and SC was enjoining a **$2..5 million** deal (Newco). The California Court would have granted at least a $1 million PI bond had Defendants appeared and requested it. (Franklin Decl., Ex J to Spehar Aff.) And Defendants admit: "[I]f CMGT had defended itself, it would have won the preliminary injunction hearing and would have closed the Newco Deal." (Def. Feb. 7, 2007 Reply at 19) *Emphasis added*

C. SC's Amended Complaint

29. On November 26, 2003, SC filed a First Amended Complaint in Los Angeles Superior Court that, for the first time, sought damages in the amount of $17,031,917 ("Amended Complaint"). The Default Judgment deems all allegations of the Amended Complaint confessed and incorporates them. On November 28, 2003, SC duly served CMGT with the Amended Complaint.

30. The Amended Complaint states, in pertinent part:

> 29. Unlike the "make whole" deal that CMGT had instructed Spehar Capital to pursue, the Newco deal did not make CMGT's existing investors or shareholders whole. It left CMGT saddled with approximately $700,000 in debt, and only one asset: Newco stock.
>
> 40. By mid-2002, CMGT, Spehar Capital and Mr. Trautner knew that CMGT might fail if it did not obtain new funding. Although it had an operating business, a real and useful product, and satisfied clients, CMGT's financial outlook was bleak.
>
> KILLING A "MAKE WHOLE" SAVIOR: REJECTING THE WASHOE DEAL
>
> 52. In addition to refusing to apply the Agreement to the Newco deal, CMGT also intentionally modified a competing Letter of Intent from [the Washoe Tribe], which CMGT received while the Newco deal was pending ...in a way that CMGT knew that they would reject.
>
> 61. CMGT was advised that the Washoe would reject these changes.
>
> 62. The Washoe rejected these changes and withdrew their LOI on September 4, 2003.
>
> 71. In addition, the success and management fees that the Agreement requires CMGT to pay Spehar Capital will be essentially worthless if the asset-purchase agreement does not make the Spehar Capital-CMGT Agreement an obligation of the purchaser. Instead of having claims against a newly-funded entity with cash available to pay damages, Spehar Capital will be left with claims against the empty and debt-ridden shell of CMGT.
>
> (Amd. Cplt. at 7.b., U.S. Dist. Ct., N.D.Ill., Rcd. of Apl. 09 cv 2822, Doc. 3-2 at 25-66.) *Emphasis added.*

D. CMGT's Default

31. CMGT did not respond to the Amended Complaint and on January 9, 2004 SC filed a Request for Entry of Default against CMGT, and CMGT was duly noticed. The Court duly entered default against CMGT for breach of contract with damages of $17,037,917 and scheduled a case management conference for January 27, 2004. CMGT was duly noticed and did not appear at that conference. The Court then scheduled a Default Damages Prove Up Hearing ("Prove Up Hearing") for February 26, 2004.

E. SC's Damages Prove Up

32. I am a Chartered Financial Analyst in good standing since 1993. With advice of lead counsel Steven A. Klenda ("Klenda"), I personally prepared a professional damages Prove Up ("Prove Up") for the Prove Up Hearing. The Prove Up consisted of fifteen exhibits that detailed, supported and (in very large-type) summarized each of the five elements of SC's damage request: Legal Expenses, Cash Success Fee, Management Consulting Fee, Stock Compensation and Investment Banking Fee. The Prove Up is incorporated by reference in the Default Judgment.

33. A full and complete copy of CMGT's October 3, 2003 Projections ("CMGT Projections") was Exhibit 7 to the Prove Up. The CMGT Projections show $612,500 in Existing Obligations and project a Net Loss of $1,495,178 for 2003, assuming a $2.5 million funding on October 3, 2003 (which did not occur). The CMGT Projections were the Default Judgment's express basis for $11,253,627 Stock Compensation damages and $5,483,290 Investment Banking Fee damages.

(Certified copy of the California Court's Damages Prove Up Nature of Proceedings Statement and Certified copy of SC's Feb. 26, 2004 Prove Up, Ex. 4 hereto)

F. The Prove Up Hearing and Prove Up Transcript

32. On February 26, 2004, Judge Schacter presided at the Prove Up Hearing where Klenda presented the Prove Up to the Court and he and I testified. The Court followed the Prove Up as we testified, and questioned us about it. The Court entered the Prove Up into the case file, and our testimony is incorporated by reference in the Default Judgment. The Court Reporter's Transcript of the Prove Up Hearing ("Prove Up Transcript") states, in pertinent part:

> THE COURT: So what are the damages that are reflected in the documents of counsel? ... Number what? A through what?
>
> MR. KLENDA: Numbers 1 through 15, Your Honor.
>
> THE COURT: What kind of damages are they for what? Each one?
>
> MR. KLENDA: For legal expenses $5,863 for the cash.[22]
>
> THE COURT: Now is there something that allows for legal expenses?
>
> MR. KLENDA: Yes, there is.
>
> THE COURT: And the document says attorney's fees?
>
> MR. KLENDA: Yes, there's a fee shifting provision in the document.[23]
>
> THE COURT: What's the next one?
>
> THE WITNESS: Cash success fee which is what you were calling the finder's fee, and that's $150,000. That's 6 percent of the $2.5 million capital [raised].[24]

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[22] The 2010 Opinion notes: "There are some discrepancies between Spehar's testimony at the California default prove-up hearing and the California court's judgment ... Spehar's attorney [ ] stated that Spehar was entitled to $5,863 in legal fees, but the California court included $58,863 in legal fees in the judgment. (2010 Op. at 7, FN 4)

This is one of many typos in the Prove Up Transcript. In fact, while Klenda testified the Court followed the Prove Up exhibits, which clearly state (in very large type) $58,863 in legal fees (Prove Up, Ex. 3).

[23] Prove Up Exhibit 3.

[24] Prove Up Exhibit 5. The 2010 Opinion states: "Spehar claimed he was entitled to the finders fee even though the California TRO blocked the Trautner Deal." (2010 Op. at 5, FN 3)

THE COURT: And the next one?

THE WITNESS: There was a management consulting fee put in the contract on the second revision of the contract because I was doing much more than I was originally called for to do in consulting management, and that was $100,000.[25]

THE COURT: Okay. What else?

THE WITNESS: **Stock compensation**,[26] I was also when the contract, when the letter of intent was [submitted], I was owed 6 percent of CMGT as common stock. **The valuation of that [that] CMGT relied on and investors relied on was an IPO to be done in 2006.**[27] Current valuation of my 6 percent would be $11,253,627.

THE COURT: What's it worth now?

THE WITNESS: That's it. 11 million.[28]

But the Default Judgment expressly states: **"[A]ll allegations in [the Amended Complaint] are deemed to have been confessed. The Court incorporates these deemed admissions by reference herein as findings of fact."** (Jdgmt. at ¶5)

[25] Prove Up Exhibit 6.

[26] Prove Up Exhibits 8 - 11.

[27] The 2010 Opinion finds: "At the February 26, 2004 prove-up hearing on the default, Spehar testified that he would have eventually assisted CMGT in an IPO and, as a result, would have received $16.9 million in fees and stock." (2010 Op. at 26 - 27)

This materially misstates my testimony. In fact, I did not testify that I "would have eventually assisted CMGT in an IPO" from which I would receive compensation, and the California Court did not award damages on that basis. The Judgment's express basis for damages is the CMGT Projections that CMGT and its investors relied on, which the Court found to be "reasonably certain to **have been** realized **but for** CMGT's wrongful acts." (Jdgmt. at ¶¶ 7 and 8) That's how I testified, and that's what the California Court understood me to say.

[28] Here, the 2010 Opinion wrongly infers misrepresentation: "After telling the judge that the 'current valuation of my 6% would be $11,253,627,' the California judge asked Spehar, 'What's it worth now?' Spehar replied, 'That's it—$11 million.'" (2010 Op. at 6)

In fact, this testimony is correct - even conservative. Stock Compensation was based on the CMGT Projections (Prove Up, Ex. 7), which assume three IPO exit scenarios: December 2004, 2005 and 2006. The most realistic and conservative scenario (IPO in December 2006) was used for the Prove Up. The Prove Up calculates CMGT's December 2006 IPO Market Value as $377,465,693 (Prove Up, Ex. 10) using a Market Multiple of 25x CMGT's projected 2006 Operating Earnings (Prove Up, Ex. 11). That Market Value is then discounted at 25% back to an October 3, 2003 Valuation Date (the date of the CMGT Projections), resulting in a Net Present Value (NPV) of $187,560,453 for CMGT (Prove Up, Ex. 9) for damage purposes. The NPV or "current value" of SC's Stock Compensation is simply 6% of CMGT's NPV, or $11,253,627 (Prove Up, Ex. 8). This professionally recognized and accepted NPV process is standard for market pricing and damage purposes.

THE COURT: **Is CMGT in existence?**

THE WITNESS: Yes, it is. **Because I have called as late as last week in their call center operations, and they are answering the phones. Beyond that, I can get no information out of CMGT.**[29]

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.[30]

THE WITNESS: I stand by my representations.

THE COURT: I'm just saying this is what usually happens. It's like the first dance one person forgot to get up, and the second dance, everybody gets up.

THE WITNESS: Okay.

THE COURT: Okay. That's fine.

THE WITNESS: And there's one more provision. They, because I was the party who helped them raise the initial capital, I was given what were called investment banking rights for future deals. So I would be the party if they raised capital for any purposes ... I would be the party as a[n] investment banker that would be allowed to do that. There's a fee attached to that, of course. I valued the IPO fee in 2006. My portion of that would be worth today 5,400,000.[31]

In fact, $11,253,627 understates the "now" worth (on February 26, 2004) of SC's Stock Compensation. Discounting CMGT's IPO Market Value to February 26, 2004 instead of October 3, 2003 would make SC's Stock Compensation higher, not lower.

[29] Here, the 2010 Opinion misleadingly redacts my testimony to wrongly infer malintent: "...despite the fact that Spehar knew at the time that CMGT 'was in desperate financial condition.' When the court asked Spehar whether CMGT was in existence, Spehar answered, 'Yes, it is.'" (2010 Op. at 6)

Background: Through at least December 22, 2003, CMGT's Chairman, President and CEO, Louis J. Franco ("Franco") held himself out to be CMGT's Chairman, President and CEO: (a) in emails directed to Spehar as late as November 17, 2003; (b) by signing a key official CMGT document as CMGT's President and CEO on December 1, 2003; and (c) by passing out his CMGT business card as such to Spehar, Defendant Given, and several prospective partners and investors at a meeting in Defendants' Chicago offices on December 22, 2003. Moreover, CMGT was still in existence. CMGT in fact "ceased active operations as of April 30, 2004." (U.S. Dist. Ct., N.D.Ill., Rcrd. of Apl. 09 cv 2822, Doc. 3-2 at 18, 20, 129-130; Doc. 3-9 at 66-67.)

[30] The 2010 Opinion notes: "The judge stated that if a default judgment was issued, CMGT would come in and set it aside, and the case would start over again." (2010 Op. at 6)

But the judge then stated: "Then you can prepare [the Default Judgment] up. Okay so probably one of two things will happen. They will set it aside, walk away from the company or they will go bankrupt. It's one of those three things will happen." *Emphasis added.*

[31] Prove Up Exhibits 12 and 13.

THE COURT: **But that one is pretty hard because nothing has happened on that yet. You could have it in your judgment that you had the right to the fee, if it ever occurs, but this may never occur.**

THE WITNESS: **...CMGT in all of their presentations to investors relied upon an IPO as an [exit] strategy in 2006. They relied on that.**

THE COURT: **Okay.**[32]

THE WITNESS: And I had a right to do that.

THE COURT: Okay.

THE WITNESS: So my value of that fee today would be $5,438,290.00.[33]

THE COURT: What does CMGT do?

THE WITNESS: Own a business called absence management. And just to give you a perspective on what companies, how they value this service, **51 percent of the human resource directors in the United States according to a magazine by the name of HR Next that they subscribe to have said it's their biggest headache, absence management, under the family leave act under which a lot of the employees go out**, and they [CMGT] have a call center operation.[34]

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[32] Here, the 2010 Opinion states and finds: "The judge recognized that some of the damages were speculative. The judge stated that if a default judgment was issued, CMGT would come in and set it aside, and the case would start over again. Nevertheless, based on the misrepresentations Spehar made at the hearing, the judge entered the $17 million default judgment against CMGT." (2010 Op. at 6-7) *Emphasis added.*

This is speculation and substitute judgment. In fact, the California judge did not "recognize that some of the damages were speculative." Rather, being fully aware of CMGT's desperate financial condition from the prior pleadings and proceedings, and after noting "this may never occur" and hearing my **past tense projections-based** response, **the judge said "Okay."** And as the Prove Up and Default Judgment indisputably prove, the judge was "sufficiently advised" of the premises of damages and expressly and intentionally based damages on a **projected** IPO that CMGT and its investors **had** relied on, and which the Court found "reasonably certain to **have been** realized **but for** CMGT's wrongful acts." (Jdgmt. at 1 and ¶¶7 and 8) The California judge did not base damages on a future tense misrepresentation and resultant false expectation that an IPO would actually occur.

[33] The 2010 Opinion notes: "There are some discrepancies between Spehar's testimony at the California default prove-up hearing and the California court's judgment. Spehar testified that he was entitled to $5,438,290 in investment banking fees. The California court's judgment order includes $5,483,290 in investment banking fees." (2010 Op. at 7, FN 4) Again, this is a typo in the Prove Up Transcript. In fact, while I testified the Court followed the Prove Up exhibits, which clearly state, in very large type, a $5,483,290 Investment Banking Fee (Prove Up, Ex. 12).

[34] This is a material mistake. Based on an unintentional but very misleading redaction of my testimony, the 2010 Opinion mistakenly ascribes malintent to me *and* imputes misunderstanding to the California court:

"To further bolster his claims to the court, Spehar described the business of CMGT as follows:

When a client employs them [CMGT], a client has told all of the employees, "You will now when you're going to be absent call CMGT's call center." They have a piece of proprietary software that integrates.[35] CMGT has a proprietary piece of software they wrote which allows for the call center to over the internet integrate all of the employers' data bases on their employees and all of the disability carrier's data bases on that company with a call center. So that whenever anybody calls in that's sick, that's the funnel. That's the tip of the funnel from which all information flows out to all of those people.

THE COURT: All right. Do you have the judgment ready?

MR. KLENDA: Unfortunately, Your Honor, I do not.

THE COURT: Then you can prepare it up. Okay so probably one of two things will happen. **They will set it aside, walk away from the company or they will go bankrupt. It's one of those three things will happen.**[36]

'[CMGT] own[s] a business called absence management. And just to give you a perspective on what companies, how they value this service, **51% of human resources directors in the United States . . . have a call center operation**.'

In order to get the $17 million judgment, Spehar described CMGT to the California judge as an on-going lucrative business involving the internet connection of human resource directors linked together through a state of the art computer program. ... [B]ased on the misrepresentations Spehar made at the hearing, the judge entered the $17 million default judgment against CMGT. ... Rather than being a lucrative call center coordinating America's HR directors as Spehar held it out to be, CMGT was forced to cease operations." (2010 Op. at 6, 20 and 7) *Emphasis added.*

It would be absurd to claim 51% of America's HR directors have call center operations. I have no idea that's true, I did not say that, and the California court did not hear that. **Linking HR directors was not CMGT's business model** (CMGT History and Franco Dep. Tr., Pltf. 56.1 Stmt., Exs 2 and 64), **and CMGT had only four remaining clients** (Prove Up, Ex 7). The phrase "and they have a call center operation" here actually refers to CMGT, not 51% of America's HR directors. Had this phrase begun the next paragraph in the Prove Up transcript, as it should have, its true intent and meaning might have been clear to this Court. But as I understand the law, the presumption must be that the California judge, who had reviewed the prior pleadings, presided at prior proceedings, and who could hear my vocal punctuation and inflections and observe my demeanor, correctly understood "they" in this phrase to mean CMGT, not 51% of America's HR directors.

Moreover, I did not describe CMGT as "an ongoing lucrative business." In fact, I testified CMGT was "in existence...**beyond that I can get no information out of CMGT.**" And when the court said "They will set it aside, **walk away from the company or they will go bankrupt,**" my counsel replied "**That is likely**."

[35] The 2010 Opinion also infers I misrepresented the value of CMGT's software: "[Spehar] further knew that CMGT was prevented from licensing the "valuable" software pursuant to the same TRO. ... Software rights that Grochocinski sold to Spehar for [$1,500] (2010 Op. at 6 and 22, FN 9)

Franco's May 7, 2004 sworn Citation Deposition testimony explains the **historically high** enterprise and market value of CMGT's software (ppg. 62-67, 83-85, 92-93) and that the software value had become **"de minimis"** by May 2004 (pg. 93). (Franco Dep. Tr.,Pltf. 56.1 Stmt., Ex. 64)

[36] Having presided over SC's California Action from preliminary injunction stage, Judge Schacter clearly understood that CMGT was in deep financial trouble and not "an ongoing lucrative business." Because

MR. KLENDA: **That is likely, Your Honor.**

THE COURT: Oh, yeah. Okay. Thank you very much.

MR. KLENDA: Can I tender the [Prove Up] exhibits to the court?

THE COURT: Yes, please. And we'll put them in the file. So the exhibits are to be in the file.

(Prove Up Transcript: Ex. B to Def. Nov. 30, 2006 Mo. to Dismiss) *Emphasis added.*

F. SC's Default Judgment

33. On March 18, 2004, the Court entered SC's Judgment and Permanent Injunction Against CMGT ("Default Judgment"). The Default Judgment states, in pertinent part:

> [D]uring [the Prove Up Hearing], [SC's] President, Gerry Spehar, testified and presented evidence regarding its damages from CMGT's breach of Spehar's contract. Having reviewed the pleadings and heard testimony and received evidence on Spehar's damages, and being sufficiently advised of their premises, the Court enters the following findings of fact and conclusions of law:
>
> 3. CMGT has not answered [the Amended Complaint], entered an appearance or responded in any way to any pleading in this case.
>
> 5. [A]ll allegations in [the Amended Complaint] are deemed to have been confessed. The Court incorporates these deemed admissions by reference herein as findings of fact.
>
> 6. Spehar has proven damages in the following amounts for the following items for which Spehar's contract with CMGT entitles Spehar to compensation:

a.	Legal Expenses	58,863.00
b.	Cash Success Fee	150,000.00
c.	Management Consulting Fee	100,000.00
d.	Stock Compensation	11,253,627.00
e.	Investment Banking Rights	5,483,290.00
	Total	17,045,780.00

CMGT did not appear, and because CMGT had represented its Projections as reasonably certain to be realized to investors, he decided to award damages on the basis expressed in the Default Judgment.

7. Spehar's damages are: (a) **based on** either specific dollar amounts that are set forth in its contract with CMGT, or on **facts, figures, projections and assumptions that are either the same as, or not materially different from, the facts, figures, projections and assumptions that CMGT presented to and that were relied on by both CMGT and potential investors**; and (b) otherwise supported by the evidence that Spehar presented.

8. Spehar Capital's damages are reasonably certain to **have been** realized **but for** CMGT's wrongful acts. (Jgmt. at 1, and ¶¶ 5, 7 and 8)

(Ex. A to Def. Nov. 30, 2006 Mo. to Dismiss) *Emphasis added.*

II. THE MALPRACTICE ACTION

A. Grochocinski's Dealings With SC

34. Grochocinski was not SC's puppet. From December 2004 through July 2005, Grochocinski and SC negotiated the Sharing Agreement and Finance Order. Those highly contentious negotiations are well documented in the record of *In re CMGT, Inc.*, No. 09 C2822, 2010 WL 432276, at *5 (N.D.Ill. Feb. 2, 2010). By way of example, on February 25, 2005, Grochocinski wrote to Klenda:

> "It appears that each time I send you a proposal you reply and add more requirements. If I didn't know better I would think that you do not want to reach an agreement at all so your client has another person to blame. ... If he wants to have the estate do something then I would think that he and you with the help of your local counsel should find a way to get it done. If we cannot agree at this time now then maybe he should take action with...his own bankruptcy attorneys. Obtain the information and let me know if a cause of action exists. At this point in time we are debating a matter and we do not even know whether an action exists and the extent of any damages. This was the purpose of hiring [special counsel]. Hire him on your own, pay his fees and costs and let me know. In the interim, I am going to prepare schedules and perhaps have Louis Franco designated as the representative of the debtor, set the matter for a meeting of creditors and unless there is some very good incentive for unsecured creditors I will file a no asset report and close my file. **I am not obligated to pursue assets that benefit secured creditors.**"[37]

[37] "[Grochocinski] accepted the funds, the lawyering, and Spehar's theory without question, without investigation, and without regard to his obligations to any other creditors or the estate." (2010 Op. at 20)

(U.S. Dist. Ct., N.D.Ill., Rcd. of Apl. 09 cv 2822, Doc. 3-3 at 43) *Emphasis Added.*

B. Defendants' Dismissal Motion

35. On November 30, 2006, Defendants filed a Motion to Dismiss ("Dismissal Motion"). The Prove Up Transcript was Ex. B. The Dismissal Motion alleged and stated, in pertinent part:

> The Default Judgment was based on the fictional and speculative theory that if CMGT had rejected the Newco Deal: (i) CMGT promptly would have obtained $2.5 million in financing from another source; (ii) within two years, CMGT would have been wildly successful and worth almost $200 million; and (iii) 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. **(Transcript of Proceedings dated February 26, 2004 at pp. 2-6, Exhibit B hereto.)** (Dismissal Motion at 6) *Emphasis added.*
>
> The exhibits attached to this Memorandum are public records from the Spehar Suit and the CMGT Bankruptcy. The Court may consider such public records in deciding this Motion to Dismiss. (*Id.* at 6, FN 2)
>
> **I. THE COMPLAINT SHOULD BE DISMISSED AS A FRAUD ON THE JUDICIAL SYSTEM**
>
> All federal courts have the inherent authority to sanction litigants for bad-faith or fraudulent conduct. This includes the power to impose the sanction of dismissal with prejudice. That sanction is appropriate here to defeat Spehar's attempt to perpetrate a fraud on three courts and the system of justice generally.
>
> As set forth above, Spehar's fraud began in California state court, where it filed the litigation against CMGT that it now concedes to have been meritless. There, knowing CMGT could not afford to defend itself, Spehar obtained an injunction preventing CMGT from getting the only financing that was available to it[38] and, later, obtained a bogus Default Judgment based upon farfetched speculative future damages. Spehar then shifted his fraud to our Bankruptcy Court, where, based on the Default Judgment, it filed a single-creditor involuntary bankruptcy proceeding. Next, Spehar orchestrated and funded the filing of this malpractice suit in Illinois state court. Through this fraud, if successful, Spehar stands to take the lion's share of any recovery

[38] Defendants' Feb. 7, 2007 Reply directly contradicts this statement. See below.

CMGT obtains. Yet, to be successful, Spehar's own claims would have to be proven to have been meritless in the first instance.

There is no other way to describe Spehar's use of three courts to attempt to parlay a meritless claim into a $17 million windfall -- it is a fraud on the courts and should not be tolerated. (*Id.* at 7)

C. Defendants' Reply

36. On February 7, 2007, Defendants filed a Reply to Grochocinski's Response ("Reply"). The Reply alleges and states, in pertinent part:

> The Response claims that the Lawyer Defendants have submitted no evidence that the Default Judgment was "bogus." Yet, no evidence is necessary, because the Complaint admits that the Spehar Lawsuit was meritless -- as it must be to have any chance of stating a valid malpractice claim. The transcript in the California court also shows that the $17 million figure had no basis, and this is confirmed by common sense. ... As the California transcript shows, the Default Judgment is based on nothing more than Spehar's self-serving speculation.
>
> The Response says that any problems with Count II are irrelevant to Count I, suggesting that Count I is insulated from the Lawyer Defendants' fraud-on-the-Court argument. Not so. Count I is also a fraud. All that Count I does is move the starting point of the fraud from Spehar's obtaining the meritless Default Judgment to Spehar's earlier out-of-court assertion of the meritless claim[39] on which the Judgment was based.
>
> The Court is not required to permit this fraudulent suit to continue, and it should use its inherent power and authority to dismiss the case with prejudice. As already explained, it is well within this Court's authority to dismiss this case as a sanction for fraudulent or bad faith conduct. (Reply at 2-3)
>
> **The Spehar Lawsuit did not prohibit CMGT from getting financing.** It prohibited CMGT only from closing the Newco Deal. (*Id.* at 9)[40] *Emphasis added.*
>
> **[A]side from mounting a defense, what options were there** other than to settle...or to cease operations...? (*Id.* at 18)

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[39] *See* Spehar Aff with respect to Harlan Smith.

[40] CMGT could close any deal, including Newco, by paying SC. CMGT contemplated paying SC for two years and its Projections showed paying SC would have no material effect on its business.

> [T]he Spehar Lawsuit was meritless,[41] and **CMGT would have won the case at any time if it had just defended itself. In fact, if CMGT had defended itself, it would have won the preliminary injunction hearing and would have closed the Newco Deal.** (*Id.* at 19) *Emphasis added.*

D. <u>The 2007 Opinion</u>

37. On June 28, 2007 this Court issued its 2007 Opinion, substantially denying the allegations in the Dismissal Motion. The 2007 Opinion described my testimony in the Prove Up Transcript as follows:

> [I]t appears to this Court that the majority of the $17 million award on Spehar's default judgment against CMGT is based upon nothing more than the speculation of Spehar's principle, Gerry Spehar. For example, **Spehar told the California court**[42] that he was entitled to 6 percent of CMGT's common stock under his agreement with CMGT. Spehar valued that 6 percent at $11,253,627.00, which valuation was based upon the projected value[43] – some two years in advance – of an initial public offering of CMGT that was to have taken place in 2006 but never materialized. (2007 Op. at 3, FN 1) *Emphasis added.*

38. The 2007 Opinion stated, found and ordered, in pertinent part:

> a) **"Of all possible sanctions, dismissal is considered 'draconian." In order to obtain a dismissal based upon an opposing party's bad faith or fraudulent conduct, a litigant must demonstrate such bad faith or fraudulent conduct by clear and convincing evidence.**
>
> The most obvious problem with the Lawyer Defendants' argument is that **Spehar – which is not a party to this action – is the entity that has allegedly orchestrated a "fraud on the judicial system."**[44] ... It would

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[41] *See* Spehar Aff with respect to Harlan Smith.

[42] Here the Court refers to the Prove Up Transcript, which was Ex B to the Dismissal Motion. But the 2010 Opinion states:

> "In the Court's order granting in part and denying in part Defendants' Motion to Dismiss, the Court stated that Defendants had not established that Grochocinski was engaged in any type of fraud against the Court. <u>At that time, the only evidence before the Court was a facially valid default judgment entered by the California court</u>. After reviewing the evidence that is now in the record, however, it is clear that Grochocinski is representing the interests of SC, not CMGT's estate.

[43] Here, this Court seems to recognize that the CMGT Projections were the express basis for SC's damages in the Default Judgment, not the California court's false expectation that a 2006 IPO would actually occur.

[44] With the Prove Up Transcript already before it (see Ex. B to the Dismissal Motion), the Court did not find that Spehar committed a fraud.

be inappropriate to levy so harsh a sanction as dismissal upon the Trustee absent clear and convincing evidence that the Trustee – and not just Spehar – orchestrated a fraud on the judicial system. **At this point, the only evidence before this Court is a copy of the facially valid default judgment entered by the California court.**[45] Accordingly, the Lawyer Defendants' Motion to Dismiss this case – inasmuch as it is based upon a purported fraud on the judicial system – is denied. (*Id.* at 6 - 7) *Emphasis added.*

b) The Lawyer Defendants' Motion to Dismiss for lack of proximate cause must be denied because…there was no absolute right to relief from the default judgment available to the trustee for the asking. Under California law, relief from default under the circumstances of this case is not mandatory. (*Id.* at 10)

c) **[T]he default judgment against CMGT constitutes actual damages.** Accordingly, the Lawyer Defendants' Motion to Dismiss Count II for lack of damages is denied. (*Id.* at 12)

d) **That the Lawyer Defendants advised CMGT with respect to the dispute with Spehar … suggests that an attorney-client relationship arose between the Lawyer Defendants and CMGT with respect to the Spehar dispute and a concomitant duty of care on the part of the Lawyer Defendants.**[46] (*Id.* at 14)

e) [T]he Lawyer Defendants' Motion to Dismiss both counts of the Complaint to the extent that either count is based upon a failure to advise that CMGT could lose the Spehar suit is denied. (*Id.* at 15)

f) [T]he Lawyer Defendants' Motion to Dismiss both counts of the Complaint to the extent that either count is based upon a failure to advise that the Lawyer Defendants would not represent CMGT is denied. (*Id.* at 15)

g) [T]he Lawyer Defendants' Motion to Dismiss both counts of the Complaint to the extent that either count is based upon a failure to advise that the Spehar suit would preclude financing is denied. (*Id.* at 16)

h) [T]he Lawyer Defendants' Motion to Dismiss both counts of the Complaint to the extent that either count is based upon the allegation that

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[45] the Prove Up Transcript was Ex. B to the Dismissal Motion and also before the Court. In fact, the Court referred to the Prove Up Transcript in FN 1, stating: "Spehar told the California court…"

[46] *See* Franklin 2007 Decl., Ex J to Spehar Aff..

The 2010 Opinion now finds: "Grochocinski agreed to proceed with the action …**to accuse attorneys who were in no way involved in the action** to be held responsible for the artificially inflated judgment. " (2010 Op. at 22) *Emphasis added.*

the Lawyer Defendants advised CMGT not to defend the Spehar suit is denied. (*Id.* at 16)

i) {T]he Lawyer Defendants' Motion to Dismiss both counts of the Complaint to the extent that either count is based upon a failure to advise that CMGT settle the Spehar dispute is denied. (*Id.* at 17)

j) **[T]he Lawyer Defendants' Motion to Dismiss both counts of the Complaint to the extent that either count is based...upon MBRM placing its own interests ahead of CMGT's interests is denied.** (*Id.* at 18)

k) **Absent some allegation that the Lawyer Defendants owed CMGT's shareholders a duty of care arising out of circumstances other than their representation of CMGT,**[47] the Lawyer Defendants did not owe CMGT's shareholders a duty of care. *Emphasis added.* (*Id.* at 18 - 19)

39. On October 30, 2007, this Court denied Defendants Motion to Reconsider, stating: "I still believe that there are many fact disputes that need to be resolved and that it is not a situation where I can dismiss on a motion to dismiss."

ARGUMENT

1. I did not lie to the California Court. The California Court was properly informed, knew what it was doing, and acted within its discretion.

SC's Default Judgment was truthfully obtained. It is axiomatic that "black and white does not translate." The 2007 Opinion already considered the Prove Up Transcript without finding reliance or misrepresentation. Now, three years later, the 2010 Opinion revisits that same transcript, with no new evidence, and finds intentional

[47] There is now evidence that Defendants conspired with Franco to conceal Harlan Smith and SC's dispute from shareholders when they voted on Newco. And the Memos prove Defendants' conflicted "nine-point plan," in collusion with Franco and Trautner, to disenfranchise CMGT's minority shareholders. (Spehar Aff.; Pltf. 56.1 Stmt., ¶¶ 28-34 and 46-73)

misrepresentation on which the California court relied for damages. Why wasn't I lying in 2007? And how can this Court know what Judge Schacter was thinking six years ago?

The 2007 Opinion states:

> "Spehar told the California court that he was entitled to 6 percent of CMGT's common stock under his agreement with CMGT. Spehar valued that 6 percent at $11,253,627.00, which valuation was based upon the projected value...of an initial public offering of CMGT that was to have taken place in 2006 but never materialized." (2007 Opinion at 3, FN 1) *Emphasis added.*

Here, "Spehar told the California Court" refers to the Prove Up Transcript, which was Dismissal Motion Ex. B. That transcript ends with the California Court stating: "They will set it aside, walk away from the company or **they will go bankrupt**." To which counsel Klenda replies: "**That is likely**, Your Honor." The Court does not say "They will do an IPO in 2006."

The Default Judgment, which was Dismissal Motion Ex. A, expressly states that the Court was "sufficiently advised" of the premises of SC's damages and intentionally based damages on CMGT's Projections and an express finding of "reasonably certain **to have been** realized **but for** CMGT's wrongful acts."

Nothing has changed. What was abundantly clear in 2004 and 2007 is abundantly clear now: (a) The California Court had a correct understanding of CMGT's business status and financial condition at that time ("they will go bankrupt"); (b) The California Court expressly stated its basis for damages in the Default Judgment itself. In short, Judge Schacter knew what he was doing when he granted and entered damages.

The 2010 Opinion's findings regarding my 2004 California testimony reveal a deep confusion. This Court infers malintent from bad redactions, and this Court does not appreciate the thorough understanding of CMGT's financial condition and business status

that the California Court brought to the Prove Up hearing from its review of the prior pleadings and its participation in the prior proceedings. Nor does this Court recognize that SC's Prove Up and CMGT's Projections were before the California Court as it questioned me and took testimony. As a result, this Court materially misreads and misstates what I actually said and what the California Court actually heard and understood about CMGT and about damages.

All 2004 evidence was, or should have been, in front of this Court for its 2007 Opinion. How can this Court now suddenly find that "In order to get the $17 million judgment, Spehar described CMGT to the California judge as an on-going lucrative business..." (*Id.* at 20) and "...based on the misrepresentations Spehar made at the hearing, the judge entered the $17 million default judgment against CMGT" (*Id.* at 7) and then unfairly brand me with the conclusion: "No fraud is more odious than an attempt to subvert the administration of justice?" (*Id.* at 21.) These belated retrospective findings about the intent and substance of my 2004 testimony, and about the California Court's understanding of CMGT and basis for awarding damages, are unreasonable, improper and very damaging.

2. I did not encourage Grochocinski to file the lawsuit without investigation.

The 2010 Opinion adopts as truth Defendants' fallacious argument that "Spehar encouraged Grochocinski to file the lawsuit without investigation," based only on Defendants' misleading redaction of my July 28, 2006 email. This finding completely ignores my January 19, 2009 Deposition testimony about Joyce's hesitation and investigation in a similar contemporaneous email,[48] as well as other abundant evidence

[48] Spehar Dep. at 165-171, Def. 56.1 Stmt., Ex. K, Doc. 138-24:

MR. CISZEWSKI: I want to talk about the e-mail...from yourself to David Grochocinski and Mr. Todhunter, Monday, July 31, 2006, at 2:18 p.m.

A. Okay.

Q. The second sentence there of the second paragraph says, "It is my strong opinion that Mr. Joyce, should he attempt to terminate, has not complied with the 'reasonable investigation' requirement of the termination clause in his agreement with you and will not be able to do so before the statute of limitations expires on this case."

A. Okay.

Q. In what way do you think that Mr. Joyce had not complied with the reasonable investigation requirement in his agreement?

A. **First of all, I would read that with the "should he attempt to terminate." I think Joyce did a reasonable investigation.** From the outset of very early on after the initial meeting in Denver with me and the grilling that they did of me, I think everyone was fairly convinced, in fact very convinced that there w[as] merit here. And I was operating on that supposition all the way through here, that we were really only dealing with damage issues. So all these questions with regards to the other shareholders, I don't know what value there would eventually come out of that, because, like I said, they were all very biased against me. But should Joyce attempt to terminate, I would have wished that he would have done that, because if there was some question -- **I had understood at this point in time that we had kind of resolved or were getting close to resolving the damage issues; that there was really no issue about merit, and that's where these guys came in was merit. So, if there was now some issue in Joyce's mind about merit, I would have hoped that he would have investigated it further. I don't think there was.** ... So that's -- that's where we were at.

Q. And what additional investigation do you think Mr. Joyce would have been required to do had he attempted to terminate the agreement?

A. **That would depend on what he was going to terminate based on. If it was a determination based on merit, like I said, this should have been done then. I would have hoped he would have investigated a lot more people if he had serious questions about merit. It was my understanding he did not. But at this point in time, I wasn't really fully aware of the reasons for termination if it was going to happen; or if it was going to happen, I was just getting at that point in time some bad feelings about the potential for it.**

Q. When you had this meeting in Denver, the day long meeting, were you shown any documents during that meeting?

A. Was I shown any documents during that meeting? I can't recall. I know I was grilled. Art did a pretty good job of that.

Q. And did Mr. Joyce's office have all of the files at that point in time?

A. They should have. They should have had -- well, the trustee had them, I'll put it that way. I had sent -- my attorneys had sent to the trustee CMGT's documents, and I had sent Joyce and the trustee my own files.

Q. And you don't recall Art or Rob or anybody putting a document in front of you and saying, "What does his mean"?

A. Well, they had some questions, very, very specific questions, I'll put it that way. It was obvious that they had read the documents, I'll put it that way.

Q. But you can't recall them actually showing you any of the documents?

A. No, I can't.

Q. Okay. And was it after that meeting that you thought the issue of liability was a done deal?

A. You mean merit?

that Joyce conducted a thorough and proper eight-month investigation before filing a sufficient complaint that this Court twice refused to dismiss.

In fact, I did not encourage Grochocinski to file the malpractice lawsuit without investigation. Rather, near the end of a grueling and thorough eight-month investigation by Joyce that had produced (a) strong evidence of Defendants' malpractice (even fraud), (b) Joyce's assessment that there are valid and actionable damages, and (c) Joyce's clear statement to me that it was fully satisfied as to merit and as to damage on at least one count, I asked Grochocinski to encourage Joyce, if Joyce had in fact decided to withdraw, to at least file a complaint based on the sufficiency of his prior investigation before the statute of limitations expired, so that new special could then do its own investigation, if it deemed further investigation necessary.[49]

I believe that was a proper and reasonable request and also believe that is how Grochocinski understood my email. Shortly after that email, Joyce informed both Grochocinski and me that he would file the malpractice complaint, and the contingent concerns expressed in that email became moot.

Q. Merit, yes.

A. No, it went on for some point after that. I mean, this is on the face of it a strange case, as the judge noted, so there's a lot to, I think, mostly get comfortable with me about. You know, it's how I react to questions, what the truth of what I'm saying is. To me that is an awful lot of this case. So this -- just the same sort of grilling that you're doing here I was getting from Joyce, and it took a little bit of that for them to get comfortable. I don't know exactly when I felt or when I was told that they were comfortable with the merit aspects of it, but it was sometime early on after a few months at least.

Q. Why do you think this is a strange case?

A. Why do I think it's a strange case? Because it appears to be strange to the judge. She has articulated that, that on the face of it it looks -- the types of accusation you're making here about, you know, your pleadings, those types of things, the appearance of -- that **you need to get beneath the surface of those things to really understand what's going on. That's what we are here to do.**

Q. Okay.

A. **Appearances can be deceiving.** *(Emphasis added).*

[49] See full copy of Spehar Jul. 28, 2006 email, Def. 56.1 Stmt., Ex. J, Doc. 138-18 at 34, stating: "Hopefully it won't come to this, but if it does..."

3. I did not take contrary positions in the California Action and the Malpractice Action.

The Opinion finds I directed my obedient puppets Grochocinski and, by implication his counsel Joyce, to take contrary positions in two different courts, and that these experienced and respected officers of the court, as my proxies and standing in my shoes, blindly followed my marching orders:

> "Grochocinski acted at all times as a proxy for the real party in this case, SC. ... Grochocinski merely took Spehar's orders and followed them. ... To frustrate matters more, Spehar's hand-selected attorney, Joyce, repeatedly obstructed the truth-seeking process... Spehar was the puppetmaster and Grochocinski his puppet. ... Grochocinski is really bringing SC's personal claim against Defendants. ... Had SC taken the position in the California litigation it takes now, there would be no $17 million judgment, SC would never have brought involuntary bankruptcy proceedings against CMGT, and this malpractice action never would have been filed." (2010 Op. at 19, 23, 24, 25 and 31)

This is very wrong on many levels. First, the 2010 Opinion notes a clear public record (*Id.* at 31)[50] showing the Spehar-Grochocinski relationship has always been extremely difficult and adversarial. To note and then ignore that overwhelming record to find that "Grochocinski merely took Spehar's orders and followed them, Spehar was the puppetmaster and Grochocinski his puppet, and Grochocinski...brought the suit to benefit solely Spehar," is extremely confusing to me. Please have a look at paragraph 34. herein and tell me how that fits with this Court's assessment of our relationship. There are many, many similar, consistent and well-documented examples throughout our relationship.

Similarly, the Opinion implies that Ed Joyce, one of Illinois' most respected and successful commercial litigators, an Illinois "Super Lawyer" from 2005 through 2010,

[50] U.S. Dist. Ct., N.D.Ill., Rcrd. of Apl. 09 cv 2822: *see* Amd. Desig. of Rcd, Doc. 1 at 20-29; *see also* Doc. 3-2, 148; Doc 3-3 at 1-3, 22-23, 32-33, 43-46, 50, 61-66, 79, 92; Grochocinski Aff. R3-7,104 ¶24.

and someone the Opinion itself calls to task for browbeating Defendants' counsel Marinello, is also my puppet.

Honestly, I don't know how to respond to this puppet and proxy finding about these two gentlemen except to say that it certainly does not comport with my experience with them, nor with the common professional experience and perception of others, nor with the facts in this case. It is simply very, very wrong and I am at a complete loss in trying to understand how this Court sees our relationships that way.

As to positions, in fact, Grochocinski and I have both consistently argued:

a) SC's 2003 California contract claim was either meritorious or "colorable" and its 2004 Default Judgment is valid,

b) Defendants caused SC's Newco dispute with CMGT, then wrongly advised CMGT about the Newco dispute, and then acted as CMGT's counsel for SC's California Action;[51]

c) In September 2003, SC was in as desperate financial shape as CMGT, but was forced to take legal action by Defendants adamant and unreasonable refusal to even discuss settlement. SC initially sought a TRO to prevent an inequity and hoping to cause settlement discussions;

d) When SC filed its California Action, like CMGT itself[52] SC expected CMGT shareholder Byron Hollins would represent CMGT, perhaps even *pro bono*, and SC believed it might be able to afford to litigate v Hollins in Los Angeles;[53]

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[51] Franklin 2007 Decl., Ex. J to Spehar Aff..

[52] Spehar Aff., Ex. I.

[53] Spehar Aff.

e) When Defendants instead represented CMGT and stated that CMGT would contest SC's litigation in Chicago,[54] SC knew it would have to withdraw its action before trial because it simply could not afford to litigate against one of the world's largest law firms, especially in a distant venue;

f) Defendants knew that SC could not afford to litigate against Mayer Brown, especially in Chicago;[55]

g) Grochocinski is not required to litigate the "case-within-a-case" because SC's financial inability to continue v Mayer Brown precluded a trial, not Defendants malpractice (*see* Inconsistent Positions below);

h) But for Defendants' failure to appear at the California TRO or PI hearings, CMGT would have avoided the Default Judgment and been fully funded, which Defendants admit,[56] and

i) Per CMGT's own Projections that were entered in the record at the February 26, 2004 Damages Prove Up Hearing,[57] at which Defendants had a duty to appear and contest damages,[58] CMGT would have become a highly successful and profitable company.

4. Inconsistent Positions

The 2010 Opinion finds that:

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[54] Franklin 2007 Decl.

[55] Spehar Aff..

[56] "The Spehar Lawsuit did not prohibit CMGT from getting financing. It prohibited CMGT only from closing the Newco Deal. ... CMGT would have won the case at any time if it had just defended itself. In fact, if CMGT had defended itself, it would have won the preliminary injunction hearing and would have closed the Newco Deal." (Def. Feb. 7, 2007 Reply at 9 and 19) *Emphasis added*

[57] CMGT Projections, Ex. 7 to SC Prove Up, Ex.4 to Spehar Mo. to Amd..

[58] There is a legitimate estoppel by silence argument to prove Count I lost profits damages based on Defendants' failure to appear at the Prove Up Hearing to contest CMGT's Projections.

> "SC urges an inconsistent interpretation to gain an additional advantage at Defendants' expense. ... Grochocinski is barred from arguing in this case that but for Defendant's negligence, CMGT would have succeeded in the California litigation. Without that argument, Grochocinski's malpractice action against Defendants fails as a matter of law." (2010 Op. at 30 -31)

First, even if correct, this reasoning applies only to SC's judgment (Count II), not CMGT's lost profits and its shareholders' lost investments (Count I). Count I argues that Defendants caused the loss of CMGT's financing and ultimately its business by causing the California Action, not the Default Judgment. Count I cannot be dismissed on this argument.

Second, as authority for this key finding, the 2010 Opinion cites *Tri-G v. Burke* and concludes:

> "'**If** the underlying action did not reach trial **because of the attorney's alleged negligence**, 'the plaintiff is required to prove that but for the attorney's negligence, the plaintiff would have been successful in that underlying action.' This results in the litigation of a 'case within a case.' ... [T]o win this case Grochocinski would...have to prove that but for Defendants' negligence, CMGT would have been successful in the California litigation. In other words, Grochocinski must prove that SC's contract claim against CMGT was baseless and that SC was not entitled to a judgment in that case. ... **[Thus] Grochocinski admits** that SC never should have obtained a judgment for damages in the California litigation. This position is clearly contrary to the position on which SC prevailed in the California litigation." (*Id.* at 27 - 28 and FN 13) *Emphasis added.*

First, this exact argument was presented on dismissal and on reconsideration, and this Court twice refused to dismiss on this argument in 2007. Nothing has changed; with respect to this argument, there is no new evidence from unclean hands discovery.

Second, respectfully, this Court's conclusion is wrong because *Tri-G* narrowly holds that "**If** the underlying action did not reach trial **because of the attorney's alleged negligence, [then]** 'the plaintiff is required to...litigate the case within a case.'" Here, SC did not expect to face Mayer Brown, one of the world's largest and most powerful

law firms with immense resources, when it filed the California Action. When Defendants instead of Hollins represented CMGT, SC knew, right then and there, that it would **necessarily** withdraw its litigation **before trial for financial reasons**. You can't kill something that is already dead.

Defendants argue there are "only two choices." In fact, there is a third: SC could not afford to go to trial against Defendants, and Defendants knew that. Accepting that proposition, there are again three choices: (a) Defendants appear in Chicago – result: no malpractice, no trial (SC can't afford it) no judgment; (b) Defendants appear in Los Angeles – result: no malpractice, no trial (SC can't afford it), no judgment; (c) Defendants do not appear – result: **malpractice**, no trial, **judgment**. In every instance there is no trial, so Defendants failure to appear did not prevent a trial. Therefore, *TriG*'s narrow holding does not apply, Grochocinski need not litigate the California Action, and Grochocinski's stated position that SC's claim was at least "colorable" (*Id.* at 28, FN 13) is entirely consistent with SC's position in the California Action.

Accepting the above proposition, Grochocinski must only prove that but for Defendants malpractice, CMGT would have successfully avoided the Default Judgment, **which Defendants admit**:

> "CMGT would have won the case at any time if it had just defended itself. In fact, if CMGT had defended itself, it would have won the preliminary injunction hearing and would have closed the Newco Deal." (Def. Feb. 7, 2007 Reply at 19) *Emphasis added*

Was SC financially unable to go to trial against Defendants? **Yes.** But if Defendants don't agree, then that is a material **fact** dispute that demands discovery and trial; this issue cannot be decided as a matter of law.

How is it that SC could afford to "come to Chicago" one year later and do all it has done? A $17 million asset, even a highly contingent one, will do wonders if friends and family believe in you. I am fortunate in that respect; SC has borrowed against its judgment, and there's nothing wrong with that. The Default Judgment is legitimate and valid; a properly informed court of law, acting within its discretion, granted and entered it. Defendants had a duty and every opportunity to intervene and attempt to prevent or vacate the Default Judgment; they didn't. As this Court said:

> "THE COURT: [E]very day if people don't appear on cases, if they don't respond to complaints, default judgments are entered and proveups are entered. ...
>
> [T]o suggest that I know better than...the state court judge that addressed the judgment, made the judgment, made the findings, I would be collaterally attacking that judgment."
>
> (Trnscpt. of Pcdgs. dated Sept. 26, 2007)

5. SC Did Not Cause CMGT's insolvency.

The 2010 Opinion finds:

> "SC was arguably a significant cause of CMGT's insolvency ... As Spehar knew at the time, he had blocked the infusion of capital into CMGT by obtaining the TRO of the infusion deal and no new deal was permitted under the wording of the TRO" (2010 Op. at 30 and 20-21.).

But Defendants' Feb 7, 2007 Reply admits:

> "The Spehar Lawsuit did not prohibit CMGT from getting financing. It prohibited CMGT only from closing the Newco Deal. ... In fact, if CMGT had defended itself, it would have won the preliminary injunction hearing and would have closed the Newco Deal." (Reply at 9 and 19) *Emphasis added.*

First, because Defendants had a duty to defend CMGT at PI, this admits that but for Defendants' malpractice, CMGT would have been funded – a necessary element to prove Count I lost profits damages. Second, Defendants are right. The Spehar lawsuit did not prohibit CMGT from getting financing. CMGT sought financing for two years

anticipating paying SC, and CMGT's Projections (Prove Up Ex 7) represented to all prospective investors that SC's contract had no material adverse effect on its business or investors' expected returns. So CMGT itself held that SC's contract was not an impediment to financing, otherwise it was necessarily misrepresenting to investors. And if SC's contract was such an impediment, then why did Defendant Given help CMGT negotiate SC's second contract in 2002 – which paid SC even more? Why did Given state "You obviously know that Lou [Franco] and I are big fans of what you bring to the table?"[59] And why did Franco, Baliga and Wong enter into Millennium Partnership with me in April 2003 to raise $100 million, with Given as our counsel? (Spehar Aff)

Defendants' hard line refusal to negotiate with or pay SC caused CMGT's insolvency, not SC.

Summary

The 2010 Opinion is a gross miscarriage of justice; a trial without a trial. Wrongly positing misrepresentation and fraud, the 2010 Opinion now *de facto* collaterally attacks, six years after the fact, a California court's valid final judgment, after expressly stating it could not do that. The fact that this Court wishes that a different result had been entered in 2004 is not a valid basis for overturning another court's valid judgment. Nor does that wish give this Court the right to viciously and erroneously attack my good name and professional reputation. As the record clearly shows, not only the sum and substance of my California testimony, but my actual words themselves, comport in every respect, and are exactly consistent with, SC's prior pleadings, my

[59] Pltf. 56.1 Stmt, Ex 7.

professional Prove Up and the California Court's stated intent in granting and entering the Default Judgment.

Again, this Court had it right at the September 2007 Hearing:

> THE COURT: [T]o suggest that I know better than...the state court judge that addressed the judgment, made the judgment, made the findings, I would be collaterally attacking that judgment. ...
>
> [And] how do I get to that point unless we sit down and do some discovery...? It does not appear to me that at a motion to dismiss stage that can be so easily decided.
>
> (Transcript. of Proceedings dated Sept. 26, 2007)

Not finding fraud in California in the 2007 Opinion, I don't know how this Court can now revisit that same transcript as if it were new evidence to erroneously ascribe malintent. And how can this Court adopt Defendants' misleading redaction and spin of my July 28, 2006 email to Grochocinski as truth, to find I "encouraged Grochocinski to file the lawsuit without investigation" without going to trial?[60] That's a fact dispute that can't be decided on summary judgment.

Facing very strong "nine point plan" and "functional equivalent deal" evidence showing fraud by Defendants, I am perplexed by this Court's singular focus on me. What about Defendants' unclean hands? What about the clean hands doctrine?

And dismissing this case in its entirety? Granting, for arguments sake, all of the findings about me and SC's judgment, what about Count I? What about CMGT's lost profits and shareholders' lost value? Is there no equity and justice due CMGT's many non-insider shareholders and its legitimate small creditors who were defrauded and harmed by Defendants' "nine point plan" and who got nothing from their "functional

[60] 2010 Opinion at 11.

equivalent deal?" What about their lost lendings and investments and their lost business?[61] What about their due process?

Prayer For Relief

A full and fair reading of the full body of pleadings, proceedings and evidence considered by the California Court at its February 26, 2004 Damages Prove Up hearing, coupled with my unredacted testimony and the March 18, 2003 judgment itself, indisputably shows that I did not misrepresent to the California Court. The California Court was fully and correctly informed about CMGT, and sufficiently advised of the premises of SC's damages when it granted and entered the Default Judgment. I respectfully pray that this Court's finding that I misrepresented to the California Court be so altered or amended.

A full and fair reading of my July 28, 2006 email to Grochocinski coupled with my January 19, 2009 Deposition testimony shows that I did not encourage the filing of this action without investigation. I respectfully pray that this Court's finding that I encouraged Grochocinski to file this action without investigation be so altered or amended.

This Court took judicial notice of *In re CMGT, Inc.*, No. 09 C 2822, 2010 WL 432276, at *5 (N.D.Ill. Feb. 2, 2010). A full and fair reading of the record in that appeal shows beyond a shadow of a doubt that Grochocinski is anything but my puppet. And under the particular facts of this case, SC's position in the California litigation is entirely consistent with Grochocinski proving Defendants' malpractice. I respectfully pray that this Court's finding that Grochocinski, as my puppet and proxy, "admits that SC never

[61] "A claim is "personal" "if the claimant himself is harmed and no other claimant or creditor has an interest in the cause." (2010 Op. at 25)

should have obtained a judgment for damages in the California litigation" (2010 Op. at 28, FN 13) be so altered or amended.

As to fairness, SC's **duly-noticed court-ordered** "lion's share" Sharing Agreement carves out $1.6 million from SC's $17 million priority claim for CMGT's Chapter 7 Estate; enough to make legitimate unsecured creditors and shareholders **more than whole** on their investments and lending, when they would have received **nothing** without SC's efforts. Is that not fair? What about Defendants soliciting $100,000 from Newco (taking $50,000) to orchestrate a "functional equivalent" side-deal to benefit Franco and Trautner and exclude CMGT's non-insider shareholders? Was that fair? Was it fair for Defendants and Franco to conceal Harlan Smith's Newco involvement and then label SC's contract claim "meritless" and "spurious?" Was it fair for Defendants and Franco to then wait until **after** shareholders had voted on Newco to inform them that SC disputed Newco? If this Court is going to excoriate me, please also take a good look at Defendants' conduct as well. That would be fair.

In short, there is abundant material evidence that Defendants came to this Court with unclean hands to claim that Grochocinski and I have unclean hands. As a matter of law, Defendants Motion for Summary Judgment, and this Court's dismissal of this action on that motion, is barred by the clean hands doctrine; I pray that this Court so find.

Finally, I pray that this Court recognize that there are many material fact disputes that cannot be decided on summary judgment, and so order.

Conclusion

I am now 62 years old, a 17 year Chartered Financial Analyst and over 20 year veteran of the highly regulated Securities Industry. I have never in my entire professional

life had a complaint registered against me - written, verbal, or otherwise. Imagine my surprise, dismay and anger at the manifest error of the 2010 Opinion. This Court's very personal attacks ("odious," "unseemly," "puppetmaster") are wrong, unwarranted, and harmful. And its application of the "nuclear option" (judicial estoppel) to dismiss this case, after previously considering that exact same "fraud on the courts" argument and twice refusing to do so, is a grave miscarriage of justice. Fraud occurred here, but not by me, David Grochocinski or Ed Joyce.

I have been pursuing justice in this case for SC and, whether they know it or not, CMGT's defrauded non-insiders for almost seven years now. For this Court to brand this a "personal feud with Given and CMGT to collect a judgment obtained by misrepresentation"[62] is neither right nor fair. In the civil justice system, what recourse do we have besides seeking financial relief?

Here, the legal system is perverted by a gigantic law firm, not me. The California Action was my first time in a civil or criminal court in my entire life in any capacity: party, witness, advisor, juror, or observer. I believed in our justice system then; I believe in it now. Again, the 2010 Opinion is a gross miscarriage of justice. It unjustly immunizes the "bad guys" (Defendants), and it unjustly punishes the "good guys" (myself and CMGT's other non-insider shareholders and creditors). If justice be served, this Court will carefully and objectively consider the evidence, facts and argument presented in this motion and set this matter for trial. I have nothing to hide and I trust in the judgment of a jury of my peers. If Defendants have nothing to hide, they will join me in this request and trust. I doubt that they will.

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[62] 2010 Op. at 25.

To protect my good name, professional reputation, CFA credential, and ability to earn a living, I intervene to set the record straight and correct this Court's erroneous and injurious findings about me. I respectfully request an oral hearing so that this Court, and Defendants if they wish, can directly question me under oath. I would welcome that opportunity to defend my intent, conduct and merit before my accusers. I respectfully submit that equity, if not due process, demands that this Court grant me that opportunity to answer the vicious personal attacks in its 2010 Opinion before those outrageous and erroneous findings become final in the public record.

I respectfully pray that this Court reinstate this action, let justice run its course, and let a jury of our peers decide which of us has unclean hands. This Court will not regret that decision. Please reconsider; Let due process proceed; Set this matter for trial; Let the truth be discovered.

WHEREFORE, Spehar prays that this Court will grant this Motion to Alter or Amend its Final Opinion and Order.

Respectfully submitted,
Gerry Spehar, CFA

By 
Gerry Spehar, (Acting Pro Se)
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The parties to this action and the names, addresses, and telephone numbers of their respective attorneys are as follows:

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CERTIFICATE OF SERVICE

I, Gerry Spehar, certify that I caused a copy of the attached 1) *Motion to Intervene and (2) Motion to Alter or Amend* to be served on the parties listed above, by Chicago Messenger Service, prior to 6:00 p.m. this 28th day of April, 2010.

Spehar Motion to Alter or Amend

EXHIBIT 1

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.	)	

AFFIDAVIT OF ROBERT GERARD SPEHAR

I, Robert Gerard Spehar, swear and affirm under oath and intending to be bound that the following statements are true and correct:

1. I am a resident of the State of California and am over twenty-one (21) years of age. I have personal knowledge of the facts set forth in this Affidavit and, if called as a witness, could and would competently testify to the matters set forth herein.

2. I am the President of Spehar Capital, LLC ("SC") and have been so since June of 2001.

The Newco Dispute and Harlan Smith; The MOIC Partnership

3. During the course of the investigation for this malpractice action, I discovered for the first time that on July 30, 2003 when CMGT's President Louis J. Franco ("Franco") executed the LOI for the disputed Newco deal, both Defendants and Franco knew beyond doubt that SC's contract with CMGT covered Newco through a principle investor of the Trautner investment group, Harlan Smith ("Smith").