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

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

Plaintiff,

v.

MAYER BROWN ROWE & MAW LLP and RONALD B. GIVEN,

Defendants.

No. 06 C 5486

Judge Virginia M. Kendall

DEFENDANTS' RESPONSE IN OPPOSITION TO R. GERARD SPEHAR'S MOTION TO INTERVENE

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Defendants, by their attorneys, Novack and Macey LLP, submit this Response in Opposition to the Motion to Intervene filed by non-party R. Gerard Spehar ("Spehar").

BACKGROUND

On March 31, 2010, the Court: (1) issued a Memorandum Opinion granting Defendants' Motion for Summary Judgment (the "Memorandum Opinion" or "Mem. Op. at ___"); and (2) entered final judgment in favor of Defendants (the "Judgment"). Thereafter, on April 28, 2010, Spehar filed a motion to intervene (the "Intervention Motion") and -- without awaiting a ruling on the Intervention Motion -- a motion to alter or amend the Judgment pursuant to Rule 59(e) (the "Rule 59(e) Motion") (collectively, the "Post-Judgment Motions"). The Post-Judgment Motions seek to protect two purported interests -- Spehar's reputation (the "Reputation Interest") and Spehar's desire to collect money as a creditor of the bankrupt ("CMGT") if this malpractice case were successful (the "Economic Interest"). On April 29, 2010, Plaintiff David Grochocinski ("Grochocinski") timely filed his notice of appeal (the "Notice of Appeal") from the Judgment.

ARGUMENT

Reduced to its essence, the lengthy and convoluted Intervention Motion is based on two overarching points: (1) that this case implicates Spehar's alleged Reputation and Economic Interests; and (2) that Grochocinski allegedly cannot adequately represent those interests because he and Spehar are at odds on a number of other matters. Yet, even if both points are true, the Intervention Motion is doomed from the outset. That is because Spehar was fully aware of each of them for years before seeking intervention.

As to the Intervention Motion's first basis, Spehar knew of this lawsuit (and his alleged Economic Interest therein) from the get-go -- indeed, he persuaded Grochocinski to bring the suit in the first place. Spehar regularly followed the progress of this case, and also knew of his alleged

Reputation Interest early on. After all, Defendants raised their Unclean Hands Defenses as early as November 30, 2006, when they filed their original Motion to Dismiss, and they expressly re-raised those Defenses in their Motion for Reconsideration. Even though the Court denied both of those motions, on October 30, 2007, it stayed the prosecution of Grochocinski's case in favor of permitting discovery to proceed on the Unclean Hands Defenses to allow Defendants to later file a summary judgment motion based thereon, if appropriate. Then, on May 29, 2009, Defendants filed their Motion for Summary Judgment, which again expressly relied on the Unclean Hands Defenses. Spehar always knew that the Unclean Hands Defenses implicated his alleged Reputation Interest. Indeed, according to Spehar, once the Court "opened discovery" on the Unclean Hands Defenses, he notified the CFA Institute that his professional conduct was at issue in this case. (Intervention Motion at 3-4.)

As to the Intervention Motion's second basis, Spehar also has known for years of his alleged belief that Grochocinski supposedly cannot adequately represent his interests. According to Spehar, the reason for this belief is that he and Grochocinski are in litigation with each other and, therefore, it is "impossible for Grochocinski or his counsel to adequately represent the interests of a legal adversary." (Id. at 8.) Yet, according to the Intervention Motion (at 8), the litigation between Spehar and Grochocinski has been going on "over the past three years."

Thus, according to Spehar, he has known for over three years of his alleged Reputation and Economic Interests and of the alleged inadequacy of Grochocinski's representation. Yet, he sat back and waited until after the Judgment was entered before seeking to intervene. In short, Spehar hedged his bets to see how the Court ruled -- if favorable to him, he would do nothing; but, if adverse, he would then intervene for a "do over." Fortunately, the law does not allow that. Rather, for this and many other reasons, the Intervention Motion is fatally defective.

In particular, and as will be set forth in more detail below, the Intervention Motion should be denied for any one of three independent reasons:

- The Notice of Appeal divested the Court of jurisdiction over the Intervention Motion;
- The Intervention Motion is untimely; and
- The Intervention Motion fails to satisfy the requirements for intervention.

I. The Court Lacks Jurisdiction Over The Intervention Motion

A notice of appeal divests the district court of jurisdiction over all matters except for "discreet" matters "ancillary" to the issues on appeal. As the Seventh Circuit has explained it:

> As a general matter, a notice of appeal "divests the district court of its control over those aspects of the case involved in the appeal." Under this rule, the district court retains jurisdiction to act only if the order being appealed or the proceeding before the district court is a discrete matter ancillary to the issues under consideration in the other court.

May v. Sheahan, 226 F.3d 876, 879 (7th Cir. 2000) (citations omitted).

Here, the Post-Judgment Motions are not discreet matters ancillary to the issues on appeal. To the contrary, the Rule 59(e) Motion attacks the very Judgment that is on appeal. The Intervention Motion has a similar purpose: it asks permission to intervene precisely so that Spehar can attack the Judgment through the Rule 59(e) Motion. Thus, both Post-Judgment Motions directly concern the "aspects of the case involved in the appeal," May, 226 F.3d at 879, and the Court lacks jurisdiction to decide them.

Although there is an exception to the rule that a notice of appeal divests a district court of jurisdiction, it does not apply here. Federal Rules of Appellate Procedure 4(a)(4)(A) and (B) expressly provide that the effectiveness of a notice of appeal is suspended "[i]f a party timely files [a motion]. . . to alter or amend the judgment under Rule 59." (Emphasis added.) This exception,

however, applies only when a "party" files such a motion. Thus, because Spehar is not a party, his Rule 59(e) Motion did not suspend the effectiveness of the Notice of Appeal, and the Court has no jurisdiction over the Intervention Motion.

Indeed, Seventh Circuit precedent mandates this result. Zbaraz v. Madigan, 572 F.3d 370 (7th Cir. 2009), is particularly instructive. There, after the entry of judgment, a party timely filed a notice of appeal. However, within 28 days of the entry of judgment, a non-party moved to intervene and filed a Rule 59(e) motion. The Seventh Circuit held that because the Rule 59(e) motion was filed by a non-party, it did not suspend the effectiveness of the notice of appeal and, accordingly, the district court did not have jurisdiction to decide it:

> [t]he district court properly ruled that it lacked jurisdiction to decide the Rule 59 motion, because the proposed intervenors were not before the court when they filed it. Rule 59 requires that the person or entity filing the motion to alter the judgment be a "party" before the court.

Id. at 377 (emphasis added). Similarly, Armstrong v. Board of School Directors of the City of Milwaukee, 616 F.2d 305, 327 (7th Cir. 1980), overruled on other grounds by Felzen v. Andreas, 134 F.3d 873, 875 (7th Cir. 1998), held that a district court does not have jurisdiction to rule on a motion to intervene filed simultaneously with a notice of appeal.

The fact that the Notice of Appeal here was filed after the Post-Judgment Motions does not change the analysis. The key is not when a timely Rule 59(e) motion is filed in relation to the Notice of Appeal, but rather whether it is filed by a party. Only a party has the right to suspend the effect of another party's notice of appeal until the district court has resolved the moving party's (timely) Rule 59(e) motion.

Indeed, this very point was made in Katz v. Berisford Int'l PLC, No. 96 CIV. 8695 (JGK), 2000 WL 1760965, at *1 (S.D.N.Y. Nov. 30, 2000) -- a case involving facts identical to this case.

In Katz, within 28 days after judgment was entered, two non-parties filed motions to intervene and to alter or amend the judgment. Like here, the losing party thereafter filed a notice of appeal. The court held that it had no jurisdiction to decide the motion to intervene, stating that "the filing of a notice of appeal divests the district court of jurisdiction and transfers it to the Court of Appeals." Id. at *2.

Katz also held that the non-parties' motion to alter or amend judgment did not suspend the effectiveness of the losing party's notice of appeal under Appellate Rule 4:

> The Intervenors rely on Fed. R. App. P. 4(a)(4)(A)(iv) and 4(a)(4)(B)(i), which provide that if a "party" files a motion to alter or amend a judgment pursuant to Fed. R. Civ. P. 59 a subsequently filed notice of appeal only becomes effective after the Court disposes of the Rule 59 motion. This Rule, however, does not apply to this motion because the Intervenors are not yet "parties" to the case. For the Intervenors to file a Rule 59 motion, this Court would have to grant their Rule 24(a) motion, which it cannot do because it does not have jurisdiction to decide that motion.

Id. (citation omitted and emphasis added). Katz is on all fours with our case, and it confirms that this Court lacks jurisdiction over Spehar's Post-Judgment Motions.

* * *

The Court need read no further to deny the Intervention Motion. However, for the sake of completeness, we will discuss two other independent reasons why the Intervention Motion should be denied.

II. The Intervention Motion Is Untimely -- Whether It Is As Of Right Or Permissive

A motion to intervene, whether as of right or with the court's permission, must be timely. Sokaogon Chippewa Cmty. v. Babbitt, 214 F.3d 941, 949 (7th Cir. 2000). If a motion to intervene is untimely, the Court need not consider any other factor in denying the motion. Keith v. Daley,

764 F.2d 1265, 1268 (7th Cir. 1985) (failure to establish any element of test for intervention is fatal).

The standard for timeliness is straightforward: "[a] prospective intervenor must move promptly to intervene as soon as it knows or has reason to know that its interests might be adversely affected by the outcome of the litigation." Heartwood, Inc. v. U.S. Forest Serv., 316 F.3d 694, 701 (7th Cir. 2003); Sokaogon, 214 F.3d at 949. Accordingly, "[i]ntervention is unavailable to the litigant who 'dragged its heels' after learning of the lawsuit." People Who Care v. Rockford Bd. of Educ., 68 F.3d 172, 175 (7th Cir. 1995).

In evaluating timeliness, the Seventh Circuit considers four factors: (a) the length of time the intervenor knew or should have known of his interest in the case; (b) the prejudice caused to the original parties by the delay; (c) the prejudice to the intervenor if the motion is denied; and (d) any other unusual circumstances. Id. Here, all four factors weigh heavily against Spehar.

A. Spehar's Knowledge

As explained above, Spehar has known for over three years of his alleged Economic Interest, his alleged Reputation Interest and Grochocinski's supposed inability to adequately represent those interests. Despite this, Spehar was content to direct this case from the sidelines, and let Grochocinski and his counsel act as his proxy -- even when his deposition was taken and even when Defendants directly attacked his role in this case. It was only after this Court entered the Judgment that Spehar sought intervention. This delay alone defeats the Intervention Motion. Indeed, the Seventh Circuit has particularly discouraged such "eleventh hour" intervention measures. "The purpose of the [timeliness] requirement is to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal." Reid L. v. Ill. State Bd. of Educ., 289 F.3d 1009, 1018 (7th Cir. 2002) (alteration in original) (quoting Sokaogon, 214 F.3d at 949). An intervenor --

like Spehar -- who "knew about this litigation and [was] content to participate on the sidelines for a long period of time" cannot undo the proceedings just before they are over. Reid L., 289 F.3d at 1018.

B. Prejudice To The Original Parties

Defendants will be severely prejudiced if Spehar is allowed to intervene. Defendants obtained the Judgment after almost four years of costly and time-consuming litigation. Defendants participated in and incurred substantial cost and expense in connection with three potentially dispositive motions and a lengthy discovery process that included a significant work product dispute before the Magistrate Judge and this Court, depositions and document discovery. Now, Spehar seeks to undo the entire process and make Defendants go through a do-over. Particularly given that Spehar could have sought intervention years ago -- before all of this time and expense were incurred -- such prejudice should not be countenanced.

C. No Prejudice To Spehar

As this Court repeatedly found in its Memorandum Opinion, Spehar has controlled Grochocinski's prosecution of this case from the start. Indeed, the Court described Spehar as the puppet-master, with Grochocinski his puppet. (Mem. Op. at 24.) Accordingly, Spehar has already gotten his day in court, and it is not cognizable prejudice for him to be denied a second bite at the apple.

D. Special Circumstances

Finally, there are special circumstances here that warrant denying the Intervention Motion. As just mentioned, this Court specifically found that Spehar was directing this litigation from the outset -- indeed, that Spehar acted as the puppet-master and Grochocinski as his puppet, pursuing this case for Spehar's benefit. The Court also dismissed this case on grounds of judicial estoppel

because of the contradictory positions taken by Spehar in the California Litigation and Grochocinski here. Those contradictions were so gross that this Court applied judicial estoppel to prevent the "deliberate manipulation of the judicial system designed to benefit [Spehar]." (Mem. Op. at 31-32.) In these circumstances, there would be no justice in letting the puppet-master step out from behind his curtain and have a second chance to litigate the wasteful and meritless lawsuit that he imposed on Defendants and this Court in the first place.

III. Spehar Cannot Intervene As Of Right

In addition to the timeliness requirement (already discussed in Section II above), intervention as of right under Fed. R. Civ. P. 24(a) may be obtained only when the party seeking intervention establishes that: (a) it has an interest related to the subject matter of the action; (b) disposition of the action threatens to impair that interest; and (c) the existing parties fail to adequately represent that interest. The failure to establish any one of these elements is fatal. Keith, 764 F.2d at 1268. Here, Spehar fails to establish any of them.

A. Spehar Has No Adequate Interest

1. Spehar Asserts No Cognizable Claim

Rule 24(a)(2) requires a direct, significant, and legally protectable interest in the property or transaction subject to the action. Wade v. Goldschmidt, 673 F.2d 182, 185 (7th Cir. 1982). "An interest is protectable if it states a legally cognizable claim" or the intervenor would have a right to maintain a claim for the relief sought. Keith, 764 F.2d at 1268; Heyman v. Exch. Nat'l Bank of Chicago, 615 F.2d 1190, 1193 (7th Cir. 1980).

Here, Spehar has no legally cognizable claim. Indeed, Spehar is not moving to intervene so he can pursue a separate claim as contemplated by Rule 24, and the Intervention Motion was not "accompanied by a pleading that sets out the claim or defense for which intervention is sought," as

required by Rule 24(c). Instead, Spehar has presented the Court only with the Rule 59(e) Motion complaining that the Court's findings hurt his reputation and that his interests were not adequately protected by Grochocinski. As explained in greater detail in subsections 2 and 3 immediately below, neither of these complaints constitutes a cognizable claim.

2. Spehar's Reputation Interest Is Insufficient To Warrant Intervention

Spehar seeks to intervene to "protect his personal and professional reputation, CFA credential, and ability to earn a living." (Intervention Motion at 1.) However, such interests are insufficient to support intervention as of right. See Atlantic Mut. Ins. Co. v. N.W. Airlines, Inc., 24 F.3d 958, 961 (7th Cir. 1994) (affirming denial of intervention after judgment to correct a finding of fact made by the court because a judge's rationale does not constitute the "property or transaction" that is the subject matter at issue).

For example, in Bolte v. Home Insurance Co., the Seventh Circuit rejected an attempt by a party's lawyers to appeal from orders in which the district court found that they were guilty of misconduct. 744 F.2d 572, 572-73 (7th Cir. 1984). The lawyers complained, just like Spehar does here, that the findings injured their reputations and could subject them to disciplinary proceedings before the Minnesota bar. Id. at 572. The Seventh Circuit held that the lawyers could not appeal the district court's findings:

> [W]e do not think a finding in a district judge's opinion that someone engaged in wrongful conduct is an appealable final order. If it were, a breathtaking expansion in appellate jurisdiction would be presaged. Lawyers, witnesses, victorious parties, victims, bystanders-all who might be subject to critical comments by a district judge-could appeal their slight if they could show it might lead to a tangible consequence such as a loss of income.

Id. at 572-73; see also Seymour v. Hug, 485 F.3d 926, 929 (7th Cir. 2007) (attorney may not appeal from sanctions order that potentially harms attorney's reputation but does not impose monetary sanctions).

For the same reasons, Spehar cannot be allowed to intervene to protect his reputation, even if the Court's findings might lead to disciplinary proceedings related to Spehar's CFA credential. Indeed, if "[l]awyers, witnesses, victorious parties, victims, [or] bystanders" could intervene whenever "they could show it might lead to a tangible consequence such as a loss of income," judgments would never be safe from interlopers seeking to revisit findings by district courts regarding witnesses. Bolte, 744 F.2d at 573.

Similarly, courts hold that non-lawyer third parties' interests in their reputations are insufficient to justify intervention as of right. For example, in Mac Sales Inc. v. E.I. DuPont de Nemours, Civ. A. No. 89-4571, 1995 WL 581790, at *2-*3 (E.D. La. Sept. 29, 1995), a non-party expert witness sought to intervene for reasons similar to those asserted by Spehar. In particular, the court held in its post-trial order that the expert had falsified his data and perjured himself. Thereafter, the expert sought to intervene "to protect 'his economic and financial interests, his professional reputation and his ability to earn a living'" which he asserted were threatened as a result of the court opinion. Id. at *1. The court rejected his attempt to intervene, holding that an expert's reputation interest is insufficient to support intervention as a matter of right. Id. at 2-*3. The result should be no different here.

3. Spehar's Economic Interest Is Also Insufficient

Spehar also seeks to intervene because he is a creditor of CMGT and stands to collect money if this case were to succeed. This Economic Interest is insufficient to warrant intervention as of right. Indeed, the Seventh Circuit has repeatedly held that a purely economic interest is

insufficient to justify intervention. Meridian Homes Corp. v. Nicholas W. Prassas & Co., 683 F.2d 201, 204 (7th Cir. 1982); In re Kreisler, Nos. 07 C 4293, 02 B 21934, No. 07 A 180, 2007 WL 2948363, at *2 (N.D. Ill. Oct. 4, 2007).

For example, in Meridian Homes, two brothers who were beneficiaries of a trust holding an interest in a joint venture moved to intervene in a suit related to the potential dissolution of the joint venture. 683 F.2d at 203-04. In upholding the district court's denial of the motion to intervene, the Seventh Circuit held that the brothers' interest was merely indirect. Id. The court explained that the brothers had "no legal interest in the continuation or dissolution of the joint venture agreement which is at issue in [the] litigation. Rather, they have only an indirect interest to the extent that their rights to profits may be affected." Id. at 204; see also Kreisler, 2007 WL 2948363 at *2 (debtor's unsecured claim against partnership insufficient to justify intervention as of right because it was purely economic).

The same is true here. Spehar's interest in the malpractice claim is not direct because he is not the client or lawyer. His only interest is indirect, such that he may benefit if Grochocinski ultimately recovers. The same would be true of any creditor, and this is not enough to warrant intervention as of right.

B. Spehar's Interests Cannot Be Impaired

As already shown in Section III above, Spehar has no cognizable interest for purposes of intervention. Thus, there are no interests to be "impaired."

C. Adequate Representation

An intervenor challenging the adequacy of a bankruptcy trustee's representation bears a "heavy burden." Heyman, 615 F.2d at 1194 (debtor bears a "heavy burden" to show inadequate representation by bankruptcy trustee). Spehar has not overcome this heavy burden. Indeed, this

Court specifically found that Spehar directed this litigation; if Spehar did not adequately protect his own interests, Spehar has no one but himself to blame.

Moreover, "[w]here it is established that the parties have the same ultimate objective in the underlying action, the intervenors must demonstrate, at the very least, that some conflict exists." Meridian Homes, 683 F.2d at 205; see also Shea v. Angulo, 19 F.3d 343, 348 (7th Cir. 1994). Here, Grochocinski and Spehar "have the same objective in this litigation: the maximization of a financial recovery from [Defendants]" from the malpractice claim. Id. at 347.

It is not enough to allege a conflict or adversity in other proceedings. Instead, the presumption of adequate representation still applies where the proposed intervenor is adverse in another setting to the party purportedly protecting its interest. Meridian Homes is again instructive. There, the proposed intervenors had the same objective as one of the parties in the federal case, but were adverse to that same party in separate state court litigation. The Seventh Circuit held that this was not enough of a conflict to warrant intervention as of right. Indeed, where there is an identity of litigation objectives, the Rule 24 requirement of inadequate representation is not met unless there is collusion, potential strategic differences, or other substantial divergence of interests. Meridian Homes, 683 F.2d at 205. Here, this Court has already found that Grochocinski acted in Spehar's interests (and not the estate's interests).

In all events, even if the litigation between Grochocinski and Spehar prevents Grochocinski from adequately representing Spehar's interests herein, Spehar was well aware of that over three years ago. Spehar should not be allowed to sit back and await the outcome of the case before seeking a remedy.

IV. Spehar Should Not Be Allowed Permissive Intervention

In addition to the timeliness requirement (already discussed in Section II above), "[t]o justify [permissive] intervention under Rule 24(b)(2), the proposed intervenor must show (1) that there is a common question of law or fact[;] and (2) that there is independent basis of jurisdiction over the intervenor's claim or defense." EEOC v. Ill. Dept. of Employment Sec., 6 F. Supp. 2d 784, 789 (N.D. Ill. 1998). Moreover, in exercising its discretion to allow permissive intervention, "the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Southmark Corp. v. Cagan, 950 F.2d 416, 419 (7th Cir. 1991).

Here, the first two requirements are not applicable. That is because, as already shown in Section III.A above, the Intervention Motion did not attach any pleading, let alone a pleading containing any proposed claim by Spehar, and Spehar has no such claims.

The third factor, however, does apply. It weighs heavily against Spehar. That is because allowing intervention at this time would severely prejudice Defendants. As explained in greater detail in Section II.B above, Defendants have already spent almost four years of time and money litigating this case to conclusion. They would be greatly prejudiced if they would have to do it all over again.

Finally, all of the reasons why this Court should deny the Intervention Motion as of right (see Section III above) apply equally to the Intervention Motion even if it were measured under permissive intervention standards. Permissive intervention should be denied for those reasons as well. See Reid L., 289 F.3d at 1020 (affirming district court which denied permissive intervention for the same reasons it denied intervention as of right).

CONCLUSION

For all of these reasons, this Court should deny the Intervention Motion and grant Defendants such other and further relief as is appropriate.

Respectfully submitted,

MAYER BROWN LLP and RONALD B. GIVEN

By: /s/ Stephen Novack
One Of Their Attorneys

CERTIFICATE OF SERVICE

~~Stephen Novack~~, an ~~attorney~~, hereby certifies that he caused a true and correct copy of the foregoing Defendants' Response In Opposition To R. Gerard Spehar's Motion To Intervene to be served ~~through the ECF system upon the following:~~ by Federal Express overnight service, upon the following.

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and by Federal Express overnight service, upon the following:

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on this 27th day of May, 2010.

/s/ ~~Stephen Novack~~