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.	)	

EDWARD T. JOYCE & ASSOCIATES, P.C.'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SANCTIONS

I. INTRODUCTION

On March 31, 2010, this Court granted Defendants' motion for summary judgment on the basis of judicial estoppel -- a legal theory that Defendants had never advanced and the parties never briefed. In finding that Plaintiff is judicially estopped from taking positions here that are contrary to positions the judgment creditor -- Spehar Capital ("SC")/Gerry Spehar ("Spehar") -- took in the California lawsuit against CMGT, this Court held that (1) Spehar lied during the California lawsuit at the default prove-up hearing, (2) Spehar's plan to collect on SC's default judgment against CMGT through Plaintiff's lawsuit is an attack on the judicial system, and (3) Plaintiff, the Chapter 7 bankruptcy trustee for CMGT's bankruptcy estate, filed this lawsuit solely for the benefit of Spehar and not CMGT's other creditors.

Defendants now argue that Plaintiff and his attorney, Edward T. Joyce & Associates, P.C. ("Joyce"), should be sanctioned for their prosecution of this case.[1] Defendants argue that Joyce should be sanctioned because (1) there is no factual or legal basis for Plaintiff's claims, (2) Joyce reached the same factual and legal conclusions that this Court reached in its March 31, 2010 Memorandum Opinion and Order ("Opinion") before the Opinion was issued, but continued to prosecute this case anyway, or, alternatively, (3) Joyce acted recklessly by failing to reach the same factual and legal conclusions that this Court reached in its Opinion. Defendants' motion for sanctions should be denied because:

- Plaintiff's malpractice claims have a reasonable basis in fact and law. Thus, sanctions are not appropriate.
- Joyce respectfully disagrees with this Court's finding that Spehar lied during the California default prove-up hearing. While this Court may not agree with Joyce on that issue, Joyce's position is supported by reasonable interpretations of the evidence. Thus, sanctions are not appropriate.

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[1] Plaintiff and Joyce are responding to Defendants' motion for sanctions separately. The decision to respond separately is not and should not be construed as a concession that Joyce believes Defendants' motion has any merit as to Plaintiff.

- Joyce respectfully disagrees with this Court's finding that Plaintiff filed this case solely for Spehar's benefit. Again, while this Court may not agree with Joyce on that issue, Joyce's position is supported by reasonable interpretations of the facts and law. Thus, sanctions are not appropriate.

- This Court's findings in its Opinion regarding Joyce do not support an imposition of sanctions.

- Throughout this case, Joyce's responses to Defendants' "unclean hands" defense have had a reasonable basis in fact and law. Thus, sanctions are not appropriate.

II. PLAINTIFF'S CLAIMS HAVE A REASONABLE BASIS IN FACT

The facts which form the basis of Plaintiff's claims are supported by contemporaneous documents -- many of which were authored by Defendant Given -- that Plaintiff and/or Joyce obtained before the complaint was filed.[2] Thus, those claims were filed with a reasonable basis in fact.[3]

A. CMGT Hires Defendants

In July 1999, CMGT hired Defendants Mayer Brown Rowe & Maw, LLP ("MBRM") and Ronald Given ("Given") (together, "Defendants") as its attorneys. (*See* Ex 2, which is a chronology of key CMGT events that CMGT provided to potential investors at p. 1, column for "July 1999," bullet point #3, which states, "Based on prior personal and business relationships with Lou [Franco], Mayer Brown, et al., agrees to represent the Company [CMGT] as its legal counsel.") CMGT's President, Louis Franco ("Franco"), had a pre-existing relationship with Given. (*Id.*) CMGT and MBRM entered into a written engagement agreement on January 31,

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[2] Joyce filed an Appendix of Exhibits (three volumes) in support of Plaintiff's Responses to Defendants' Motion for Summary Judgment. Unless otherwise noted, the exhibits referred to herein are contained in that Appendix. Due to the size of the Appendix, Joyce did not re-file it. The Appendix includes an index that indicates the source from which Plaintiff obtained each Exhibit. Exhibit 1 in the Appendix is an affidavit by one of Plaintiff's attorneys verifying the accuracy and correctness of the index. (Ex. 1 at ¶ 3.)

[3] The contemporaneous documents authored by Given are not hearsay. *See* Fed. R. Evidence 801(d)(2). Moreover, even if those documents were hearsay, they could (and would) still form a reasonable factual basis for the claims alleged here – all of which arise out of Defendants' conflicts of interest. As discussed herein, those conflicts are revealed throughout the documents that defendants produced to Plaintiff before this case was filed.

2000. (Compl. at Ex. 1.) Payment of Defendants' hourly fees was contingent upon CMGT receiving at least $1,000,000 in funding. (*Id.* at p. 2.)

B. CMGT Hires SC

CMGT hired SC to assist it in obtaining financing. They entered into a written contract on October 1, 2001. (Ex. 97.) SC was entitled to a success fee of 6% of any Accepted Capital (e.g., cash, liquid assets, assets to be used as collateral, etc.) upon the closing of a transaction in which the investor was either: (a) someone introduced to CMGT by SC, or (b) someone with whom CMGT had approved SC to hold discussions regarding CMGT. (Ex 97 at p. 4 of the exhibit.) SC's October 1, 2001 contract attached a list called "Exhibit A," which identified the names of all parties who, as of October 1, 2001, met one of those two criteria. (Ex. 97 at pp. 5-7 of the contract.)

In June 2002, SC asked CMGT to revise its contract due to its valuable contributions to CMGT. (Exs. 3 at p. 2 and 4 at p. 2.) Around that same time, Franco acknowledged the need to update Exhibit A and to keep it up-to-date going forward. (Exs. 98 at p. 1 and 99 at p. 1.) On September 30, 2002, CMGT and SC executed a revised contract (the "SC Contract"), which contained a revised Exhibit A. (Ex. 5 at p 1 of the exhibit and pp. 7-19 of the SC Contract.) After September 30, 2002, Exhibit A was not formally updated even though CMGT approved SC to have discussions with potential investors who were not on that list. (*See e.g.*, Ex 19, where Franco confirms in an email that he approved SC to have discussions on behalf CMGT with FlexBen, who was not listed on Exhibit A.)

Pursuant to the SC Contract, if CMGT accepted a term sheet or other commitment for Accepted Capital of at least $1,000,000, SC was entitled to receive additional compensation, such as CMGT stock and investment banking rights. (Ex. 5 at pp. 4-5 of the exhibit, ¶¶1(b) and

2.) SC's Contract was to expire on October 1, 2003, but could be terminated earlier. (Ex. 5 at p. 3 of the exhibit.)

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

In January 2003, CMGT (through Franco) approved SC (Spehar) to have discussions with a CMGT shareholder, Charles Trautner ("Trautner"). (*See* Ex. 6, where Spehar summarizes his discussions with Trautner, and Ex. 7, where Given acknowledges Spehar's discussions with Trautner without disputing the truth of Spehar's summary of those discussions.) According to Spehar, his discussions with Trautner involved a proposal for restructuring CMGT through an asset sale into an entity he referred to as "Newco." (Ex. 6.)[4]

According to Given, he kept a "separate channel of communication" open with Trautner on behalf of CMGT, which led to the formulation of a July 31, 2003 letter of intent, which eventually became the "Trautner" or "Newco" Deal. (Ex. 7.) Given stated that Franco did not initiate or orchestrate the letter of intent and that Franco's input prior to the circulation of the letter of intent to CMGT's shareholders had been primarily to make sure that CMGT could continue to pursue SC's other prospects. (*Id.*) While Franco's involvement with negotiating the letter of intent may have been limited, he did condition the deal on Trautner's investment group agreeing to: (a) hire him to be Newco's President, and (b) assist him in resolving his credit card debts, IRS obligation and personal loans, which Trautner agreed to do. (Exs. 10, 20 and 25 at the bottom of p.1 through p. 2.) On August 8, 2003, Franco sent CMGT's shareholders, and SC, a letter (dated August 7) recommending the Trautner Deal. (Ex. 11.) He stated that there were "no alternatives." (Ex. 11.)

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[4] Franco also authorized Spehar to have discussions with an individual introduced to CMGT by Trautner, Harlan Smith ("Smith"). (Ex. 8 at p. 2.) Although Smith was not formally added to Exhibit A of SC's Contract, Franco acknowledged in writing that SC was involved in discussions with him. (*Id.*)

After reviewing Franco's August 7, 2003 letter, Spehar asked Franco (via email) to add Trautner and another potential investor, FlexBen, to Exhibit A of SC's Contract. (Ex. 6.) Spehar reminded Franco of the conversations that Spehar had with Trautner at Franco's request. (*Id.*) Franco did not reply to Spehar's email by disputing the accuracy of what Spehar said in his email. (Ex. 13.) Instead, Franco forwarded Spehar's email to Given. (Ex. 14.)

Given responded to Spehar by email. (Ex. 7.) Given stated that he and Franco were "big fans" of Spehar. (*Id.*) Given also acknowledged that Spehar had been involved in discussions with Trautner. (*Id.*) Significantly, Given did not dispute Spehar's summary of those discussions. (*Id.*) However, Given asserted that the Trautner Deal was not within the scope of SC's Contract because Spehar's conversations with Trautner were not discussed during Given's negotiations with him. (*Id.*) Given also stated that he was going to advise Franco to refer any future questions SC had regarding the Trautner letter of intent directly to him (Given.) (*Id.*)

Spehar responded to Given the next day. (Ex. 15.) Spehar explained his belief that SC's Contract entitled SC to compensation in any deal where the investor was either: (a) someone introduced to CMGT by SC, or (b) someone with whom CMGT had authorized SC to have discussions. (*Id.*) Spehar argued that the scope of his involvement in the Trautner/Newco negotiations was irrelevant. (*Id.*)

In response, Given did not address Spehar's interpretation of SC's contract. (Ex. 16.) Instead, he stated, "[t]here is nothing left to be said regarding the [Newco] LOI, in my view. If you wish to pursue it, you will be in an adversarial position and should deal with us through counsel." (*Id.*) When Spehar asked Franco (by email) what he thought about the contract dispute, Franco forwarded the email to Given and told him, "[o]f course, you and I are completely one voice on this matter." (Exs. 17 and 18.) On August 11, 2003, Franco

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

D. CMGT Sends the Washoe a Letter of Intent, Seeks Shareholder Approval of the Trautner Deal and Rejects SC's Settlement Attempts

On August 13, 2003, Franco told Given that, according to a contact, Andrea Davis, a potential investor group, the Washoe Tribe ("Washoe"), wanted to do a deal, that they would accelerate their due diligence on CMGT, and that they "can do deals quickly...i.e., in 30-60 days." (Ex. 21.) Franco stated, "I believe the interest is real," and he recommended sending the Washoe a letter of intent. (*Id.*) The next day, Given suggested sending the Washoe a copy of the Trautner LOI with the "20 percentage deleted." (Ex. 23 at p. 1.) Franco told Spehar that he did not want to "set the bar down as low as the Newco LOI" because he believed the Washoe wanted to do a "much better deal" with CMGT. (*Id.*) Later that day (August 14), Franco told SC to send the Washoe an LOI, which he had approved. (Ex. 24 at p. 1.) SC carried-out Franco's instruction. (Ex. 24 at p. 5 [PL 7093].)

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

Meanwhile, Spehar kept trying to resolve SC's contract dispute regarding the Trautner Deal. (*See* Ex. 28.) On August 19, 2003, Spehar sent Franco and Given an email summarizing a recent conversation between them regarding the dispute. At the end of the email, Spehar stated:

> Ron [Given], in between your many epithets and derogatory comments, you were extremely dismissive today of my efforts to discuss a settlement based on honoring Spehar Capital's contract. You encouraged me to 'bring it on' and told

> me that you were 'not afraid' because whatever I do would not affect the [Trautner] deal. In your words: This deal will go forward!

(Ex. 28.)

Given disputed Spehar's summary of what was discussed, but he did not deny telling Spehar to "bring it on" or stating that Spehar could not do anything to affect the Trautner Deal. (Ex. 29.) In fact, consistent with Spehar's assertion of what Given said, Given told Spehar that he would tell Trautner that SC's claim was without merit and, in any event, against CMGT. (*Id.*) Given also stated:

> Lou and I need to focus on positive work and actually getting things done. From a legal point of view, we simply cannot play your game of throwing E-Mails back and forth. We have talked to you. We have listened to you. We have told you our view. I'm sorry, but we can do no more.

(Ex. 29.)

On August 21, 2003, Spehar sent an email to Franco summarizing their discussion with Given regarding the dispute. At the end of the email, Spehar told Franco:

> I remain agreeable to further legitimate attempts to resolve this dispute amicably. As stated on our call, however, your delays and the pace of events are quickly forcing my hand...Please seek a second legal opinion and reconsider -- you run CMGT, not Ron Given.

(Ex. 30 at p. 2 [PL 05952].) (Emphasis added.)

Franco forwarded Spehar's email to Given. (Ex. 31.) Franco disputed the accuracy of Spehar's recitation of facts and stated, "[m]y trust is in you and remains so." (*Id.*) In a response, Given stated that he had clearly "succeeded" in making himself the bad guy with Spehar and advised CMGT (Franco) to "[j]ust let it be." (Ex. 32 at the bottom of p. 1.) From this point forward (as discussed below), Given's representation of his client -- CMGT -- became tainted by his conflicts of interest.

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

The next day, on August 22, 2003, Given sent a memo to Trautner and Trautner's attorney, John Politan ("Politan"), that disclosed SC's contract dispute. (Ex. 34.) Given dismissed the seriousness of the dispute as Spehar just "rattling [his] sword a bit." (*Id.*) Given also provided his strategy for protecting Newco (Politan's client) in the event that SC was able to stop or unwind the Trautner Deal. (*Id.* at pp. 1-2.) In that regard, Given stated that the deal documents should have CMGT (Given's client): (a) indemnify Newco against third-party claims, (b) allow Newco to escrow the purchase price, and (c) grant Newco a "perpetual, nonexclusive license" covering CMGT's software and business methods. (*Id.*) Given also recommended that Newco enter into an employment agreement with Franco. (*Id.*) Given (CMGT's attorney) then stated:

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

(Ex. 34 at p. 2.) (Emphasis added.)

Given then proposed to Politan that Trautner/Newco pay Defendants: (a) $50,000 for MBRM's accrued legal fees immediately, (b) $50,000 for accrued fees when the Trautner Deal closed, and (c) the entire amount of Defendants' expenses and legal fees incurred from July 31, 2003 through closing. (Ex. 34 at p. 2.) Given threatened to stop working on the Trautner Deal if the payment issue was not promptly resolved. He also solicited future legal business from Newco. (*Id.*)

The next day (August 23), Franco addressed MBRM's legal fees with Given as follows: "Chuck [Trautner] wants to work something out with you [Given/MBRM] that will not 'look funny,' even if he [Trautner] has to personally 'take care of it.' I told him that you had sent a letter to him and that he should refer to it on this subject. He [Trautner] had not yet picked-up your letter from John Politan's office." (Ex. 35 at p. 1, ¶ 7.)

F. Given and Franco Tell CMGT's Shareholders about the SC Contract Dispute, and Given Again Advises CMGT (Franco) to "Ignore" that Dispute

On August 27, 2003, Franco sent CMGT's shareholders a letter (written by Given) regarding the Trautner Deal. (*See* Exs. 36 [the August 27, 2003 letter] & 37, where Franco thanks Given for drafting the August 27th shareholder letter.) The letter stated: (1) the shareholders had voted to approve the Trautner Deal, (2) SC had claimed entitlement to compensation as a result of the Trautner Deal, (3) CMGT and its legal counsel strongly disagreed with that contention, (4) SC's claim should not delay or hinder the proposed transaction, (5) the appropriate venue for the resolution of SC's claim would be in the winding up of CMGT, (6) as a result of SC's claim, Newco would require indemnification and an escrow of the shares, (7) to protect against any threat to break-up the transaction after it is consummated, Newco would require an independent license to CMGT's software that would survive a break-up, and (8) the only substantive effect of SC's claim would be additional documentation complexity and a delay in the winding up of CMGT until such time as the escrow was released. (Ex. 36.)

On August 31, 2003, Spehar sent Franco an email asserting that certain compensation provisions of SC's Contract with CMGT were trigged when CMGT's shareholders voted in favor of the Trautner Deal and chose to accept Newco stock. (Ex. 39.) Franco asked Given if he (CMGT) should respond in a "legal fashion." (Ex. 40.) Given advised CMGT/Franco to "ignore it." (Ex. 41 at p. 2.)

On September 1, 2003, Franco sent Given a draft summary of CMGT's liabilities for his review. (Ex. 42.) With respect to SC's contract dispute, the summary stated, "[n]o legal action initiated," "[l]ikelihood of settlement is high if legal action is taken against CMGT," "MBR&M and Management agree there is no basis for a claim," "G. Spehar has indicated he will take legal action to enforce his contract based on his previous introductions to/discussions with Chuck Trautner & various investors," degree of risk is "high," and no curative action is required. (Ex. 42 at p. 2, "Issue 5" and p. 3 "Issue 2").) (Emphasis added.) On September 2, 2003, Franco sent a final version of that summary -- which was unchanged with respect to SC's contract dispute -- to a representative of Trautner's investment group, Peter Bentz ("Bentz"). (Ex. 43.)

G. The Washoe Reject a Given-Modified LOI

On September 2, 2003, the Washoe delivered an unsigned letter of intent to CMGT. (Ex. 44.) On September 3, Given sent revised copies of the Washoe letter of intent to SC and Franco. (Exs. 47 & 48.) Given shortened the due diligence deadline from September 30 to September 29, and included language that allowed CMGT to close a competing bid (*e.g.*, the Trautner Deal) prior to September 30. (Compl. Ex. 7.) Later that same day (September 3), Spehar sent Franco and Given a revised LOI that Spehar had prepared. (Ex. 49.) Spehar's revised LOI incorporated Given's September 29 due diligence deadline, but removed CMGT's ability to close a competing deal before the Washoe finished its due diligence. (Ex. 49.) Spehar asserts that Franco told him to send his revised LOI to the Washoe, which Spehar did on September 3. (Exs. 50 & 51.) Franco asserts that he did not authorize Spehar to send that revised LOI to the Washoe. (Ex. 51.)

On September 4, 2003, Spehar sent Franco a copy of the Washoe's September 2, 2003 letter of intent that was printed on the Washoe's letterhead. (Ex. 53 at p. 2) Franco forwarded

Spehar's email to Given. (Ex. 53 at p. 1.) In that email, Franco confirmed that he would support Given's revisions in order to protect the Trautner Deal:

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

(Ex. 53.)

Per Franco's instructions, Spehar told the Washoe about Given's additional revisions, e.g. that CMGT could close a competing deal prior to September 29. (*See* Ex. 52 at Spehar email to Franco.) As Spehar predicted, the Wahose walked away. (*Id.*) After learning that the Washoe had rejected the revised LOI, Franco asked Given whether he should suggest to the Washoe that they "step into" the Trautner investment group's position. (Ex. 54.) In response, Given arranged a phone call between himself and the Washoe. (Exs. 55-57.) However, because Given had shortened the due diligence deadline and would not guarantee that CMGT would not close a competing deal prior to the Washoe completing its due diligence, Given could not bring the Washoe back to the table. (Ex. 58.)

H. Defendants' Conflicts Persist -- Given Provides Trautner's Attorney with a Nine-Point Strategy For Responding to a Potential Temporary Restraining Order, and Given Demands a $50,000 Legal Fee Payment

After CMGT ignored (on Given's advice) SC's settlement overtures, on September 9 and 11, 2003, SC notified Given that it was seeking a TRO to prevent the Trautner Deal from closing. (Exs. 59-60.) On September 12, 2003, SC obtained a TRO. (Compl. Ex. 15.) A few days later, on September 14, Given sent a memo to Politan (Trautner's lawyer). (Ex. 62.) The first issue Given addressed was Defendants' unpaid legal fees for services to CMGT. (*Id.* at pp.

1-2.) He told Politan what needed to be put into a letter on Politan's letterhead regarding the Trautner group's payment of Defendants' fees. (*Id.*)

Given then explained to Politan that the work he (Given) needed to do (and be paid for) included "cleaning up Lou Franco's credit card situation." (*Id.* at p. 2.) Given next discussed timing issues. He stated that CMGT's shareholder approval of the Trautner Deal was going to expire on October 17, 2003. (*Id.*) Given also stated his understanding that Trautner's investment group might prefer a later closing date, but he cautioned Politan that pushing the date back was a bad idea because (a) a later closing date would require another CMGT shareholder solicitation, and (b) he did not think Franco could "hold out much longer." (*Id.*)

Because of Franco's credit card situation and the possibility of a TRO, which Given apparently did not yet know SC had already obtained, Given advised Politan to form Newco as soon as possible and to have it immediately enter into an employment agreement with Franco. (Ex. 62 at p. 2.) He stated, "this is the only way to get him [Franco] focused on building Newco's business instead of dealing with less productive things such as the Spehar TRO." (*Id.*)

Given then discussed the possibility of SC obtaining a pre-transaction TRO, and he provided Politan (Trautner's lawyer) with the following nine-point strategy that was <u>not</u> shared with unconflicted CMGT management:

> whether we are simply dealing with threats of a pre-transaction TRO, or an actual TRO, I think the following <u>strategy</u> makes sense:
>
> 1. We notify CMGT's shareholders of the threats of the TRO or send them a copy of the actual TRO if it is in fact issued.
>
> 2. Lou Franco and Newco [enter] into an employment agreement, which will confirm the arrangements to deal with Franco's debts and to move him to Phoenix.
>
> 3. I subsequently notify the shareholders (using the E-mail list that includes Spehar) that neither Franco nor Newco has any desire to

expend time or funds to engage in litigation, even if they firmly believe the Spehar litigation is frivolous. As a consequence of the Spehar TRO, I will announce that Lou intends to resign and that Newco intends to terminate the LOI. I also announce that I have not been retained to deal with the TRO. Lou's previous correspondence with the shareholders has made it clear that he is on the verge of financial collapse and will need to move on to other opportunities if a transaction cannot happen. Neither Newco nor any other third-party investor group could be expected to get bogged down in this type of litigation when they have many viable alternatives.

4. When I notify the shareholders that Lou Franco intends to resign, I will indicate that he will do all he can [to] make arrangements for the servicing of the existing contracts to avoid default and the consequent potential shareholder liability.

5. Spehar will have to return to court to make the TRO permanent. My notice to the shareholders (which includes at least one California lawyer) will give them an opportunity to take their own actions against Spehar. His TRO may simply be dissolved, or he may be convinced to give up his efforts to disrupt the transaction beforehand. In either case, the uncertainty and delay he will have caused will make it reasonable to ask the shareholders to extend the October 17 deadline.

6. If the Spehar situation does not resolve itself, I think Newco should simply start on its own with Lou Franco as its president and CEO. Newco would enter into a commercial transaction to service, in the name of CMGT, Inc., its existing four contracts. In effect, CMGT, Inc., will outsource the servicing of its existing book of business to Newco pursuant to arm's-length agreements. When these existing contracts expire, the clients would be free to roll over their accounts to Newco. For this service, Newco would be paid for its expenses. Any excess amounts could be returned to CMGT, but this would only be done after netting everything Newco has paid on CMGT, Inc.'s behalf (including legal fees and expenses). This outsourcing arrangement would require Newco to enter into a service arrangement with Rob Crandall and other Canadian employees, just like it would in the transaction contemplated by the [Trautner/Newco] LOI. I am very confident they would cooperate.

7. Depending on the actual language of the TRO, if it is issued, I think it would be reasonable for Newco to also be granted a license in the software. Again depending on the language of the TRO, we might structure this as an option to acquire a license in the software. I would like to note that if for whatever reason such a license is not deemed

appropriate or desirable, Lou Franco is comfortable that we can independently create appropriate software which will not infringe on anything belonging to CMGT, Inc.

8. If the outsourcing alternative is consummated, CMGT, Inc. will not receive any shares of Newco. Also, Newco will not have to be immediately capitalized at the $2.5 million level. CMGT, Inc. and Newco would, of course, be free to subsequently enter into a transaction like that contemplated by the LOI after the Spehar situation is clarified. It may be no longer in Newco's interests to do so, however, in which case all Spehar will have accomplished is to have deprived the CMGT, Inc. shareholder/stakeholder group of a 20% interest in Newco. This is not Newco's fault and is, frankly, beyond its control. I think everything that could be done to be fair to the CMGT, Inc. shareholder/stakeholder group has been done.

9. I believe the outsourcing alternative could be the functional equivalent of the transaction contemplated by the LOI. The only difference is that Newco would not be receiving exclusive rights in the software. As a practical matter, however, once Lou Franco leaves CMGT, Inc., there is no one left to do anything with the software anyway.

(Ex. 62 at pp. 2-4.) (Emphasis added.) (Hereafter, Given's strategy for consummating the Trautner Deal without any payment to CMGT is referred to as the "functional equivalent" deal.) Given ended his letter to Politan by stating he would not do any more work unless the legal fee issue was immediately resolved. (Ex. 62 at p. 4.)

I. Defendants' Conflicted Representation of CMGT Continues -- Given Receives Notice of SC's TRO and Implements His Nine-Point Strategy, Designed to Culminate in the "Functional Equivalent" Deal

On September 16, 2003, Given received notice of SC's TRO. (Ex. 65.) Given immediately began implementing his nine-point strategy for dealing with that TRO. First, on September 17, he sent an email to CMGT's shareholders and Spehar, attaching a copy of SC's TRO (point #1), and stating that Defendants had not been retained to "deal with this matter" (point #3) (Ex. 66.) Next, on September 19, Given implemented points 3 and 4 of his strategy -- i.e., he sent CMGT's shareholders and Spehar an email on behalf of CMGT, stating: (a) Franco

was going to resign, (b) Newco was going to terminate the LOI, (c) SC's claim was "absolutely spurious," its request for injunctive relief was "clearly inappropriate," and there was "obviously" no jurisdictional basis for the claim to be filed in California, (d) CMGT had no money to fight SC, and (e) Franco and Given were going to "work on" CMGT not breaching its client contracts. (Ex. 68.) Given invited CMGT's shareholders to call him with questions about SC's lawsuit, but he disclosed nothing about the "functional equivalent" deal he had proposed to Trautner's lawyer (Politan). (*Id.*)

On September 19, 2003, SC's attorney responded to Given's email, stating, "Spehar Capital was forced to rely on the legal process to preserve its rights because CMGT and its counsel refused to substantively address Spehar Capital's claims, even though it knew of Spehar Capital's position and the potential for legal action." (Ex. 69.) SC's attorney also stated that CMGT could have closed the Trautner Deal while protecting SC's rights, but decided to "just pull the plug." (*Id.*)

A CMGT shareholder, John Ross, sent an email to CMGT's other shareholders, stating:

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

(Ex. 70 at p. 3 of the exhibit.) Clearly, Ross was neither asked to contribute money to defend SC's TRO request nor told about (a) Given's conflicted nine-point strategy, or (b) Given's and Franco's implementation of that strategy.

On September 20, 2003, a CMGT shareholder, Wayne Baliga ("Baliga"), sent an email to Spehar, Franco and another CMGT shareholder, James Wong ("Wong"). Baliga encouraged

them to settle SC's dispute. (Ex. 71.) Spehar stated that he remained willing to talk about solutions. (Ex. 72.) Franco forwarded that email exchange to Given. (Ex. 73.)

J. Trautner's Investment Group Pays Defendants $50,000, and Given's "Functional Equivalent" Deal Moves Full Steam Ahead

On September 21, 2003, Politan sent Given the letter that Given had requested in his September 14 memo (*see* Ex. 62) regarding payment of Defendants' fees. (Ex. 74.) Politan (on behalf of Trautner) enclosed a $50,000 check payable to MBRM. (*Id.*) The next day, Franco sent Given several "to do" lists that were prepared by Trautner's representative, Bentz. (Ex. 75.) 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.*) The lists also reveal that Newco's name would become "First In Touch." (*Id.*) Finally, these lists reveal that Wong knew about and was participating in Given's "functional equivalent" deal. (*Id.*) (A typed copy of the "to-do" lists, which is easier to read, can be found at Ex. 79.)

On October 2, 2003, Given sent CMGT's shareholders and Spehar an email. (Ex. 77.) Pursuant to point #3 of his nine-point strategy, Given stated that because SC had not withdrawn its lawsuit, Trautner's investment group had terminated its letter of intent. (*Id.*) Given did not disclose that Trautner's investment group had just paid MBRM $50,000 or that Given was proceeding with the "functional equivalent" deal. (*Id.*) The next day, SC obtained a preliminary injunction. (Ex. 78.) CMGT did not appear for the preliminary injunction hearing. (*Id.* at p. 3 of the exhibit, ¶ 3.) That same day, SC's attorney told CMGT's shareholders that SC still wanted to salvage a deal that worked for all parties. (Ex. 78 at p. 1.)

Unaware of Given's "functional equivalent" deal with Trautner, Spehar asked Franco for the Trautner group's contact information so Spehar could try to (a) bring them back to the negotiating table, and (b) resolve SC's contract dispute. (Ex. 81.) Franco forwarded Spehar's

October 4, 2003 email to Bentz and stated, "Ron [Given] and I discussed this and we are not replying to Gerry's email as it is not necessary." (*Id.*) Given and Franco then kept pursuing the "functional equivalent" deal for Franco/Trautner. (Ex. 82-84.)

On or about October 6, 2003, Given, Franco, Bentz and Trautner discussed "the many issues" before them, including SC's preliminary injunction and TRO. (Ex. 82.) By October 2003, Given's "functional equivalent" deal for Franco/Trautner was in full-swing. Instead of Trautner's investment group forming and owning Newco/First In Touch, the plan was to have an existing company, Keenan & Associates ("Keenan"), with whom CMGT had a pre-existing relationship, form First In Touch as its subsidiary. (Ex. 83.) Keenan would then enter into an outsourcing agreement with CMGT to service CMGT's four existing clients. (*Id.* at ¶ 3.) That outsourcing work would be done by First In Touch, which would have an Arizona-based call center called the "Arizona Call Center." (*Id.* at ¶ 4.)

According to the draft documents for the "functional equivalent" deal, Trautner's investment group was to have funded CMGT's operating deficit from July 31, 2003 through the formation of First In Touch. (Ex. 83 at ¶¶1 & 7(a).) The draft documents gave Trautner's investment group an option to purchase an ownership interest in the Arizona Call Center. (*Id.* at ¶7.) The deal documents also contemplated that Franco would be the President of both First In Touch and the Arizona Call Center. (Ex. 83 at ¶¶5 & 8(d); *see also* Ex. 84.) Franco also had an opportunity to become an owner of the Arizona Call Center. (Ex. 83 at ¶8(a).)

K. Given Advises CMGT (Franco) About SC's Lawsuit and How to Respond to Shareholder Inquiries Regarding CMGT's Status

While working towards consummating the "functional equivalent" deal, Given repeatedly advised CMGT (Franco) regarding SC's lawsuit. (*See e.g.*, Exs. 67, 76, 85-91.) Moreover, in March 2004, Franco and Given began receiving emails from or on behalf of CMGT shareholders

inquiring about the status of CMGT. (Ex. 92.) One such email stated, "[i]s CMGT still active? We have heard nothing since being advised of the Spehar injunction...Please fulfill your obligation to respond." (*Id.* at pp. 4-5 of the exhibit.) Franco asked Given how to respond. (*Id.* at p. 2 of the exhibit.) Given told Franco to "send your note out to everyone regarding the LA lawsuit. I wouldn't bother with them [the CMGT shareholders] anymore than that. They can call Gerry [Spehar]." (Ex. 92 at p. 1.)

Shortly thereafter, Franco sent CMGT's shareholders an email which had been reviewed by Given. (Exs. 93-94.) The email stated that Franco had resigned as CMGT's President and CEO. (Ex. 94.) (Franco later testified, in a citation deposition, that he resigned on September 19, 2003.) (Ex. 64 at p. 59.) Franco's email did not disclose that he was negotiating to become First In Touch's President as part of Given's proposed deal that was the "functional equivalent" of the Trautner Deal. (Ex. 94.)

III. SUMMARY OF PLAINTIFF'S CLAIMS

Claim One: Defendants committed malpractice when they: (a) negligently advised CMGT to ignore SC's contract dispute, (b) failed to make a reasonable effort to settle that dispute to avoid litigation, and (c) devised a conflicted strategy for dealing with the SC dispute -- a strategy that protected Defendants' and Franco's interests, but was destructive to CMGT. As a result of Defendants' malpractice, SC filed its California lawsuit and obtained both injunctive relief and a $17 million default judgment. In addition, Defendants' malpractice caused CMGT to lose the Trautner Deal and be forced into involuntary bankruptcy. (Cmplt. at Count I.)

Claim Two: Defendants committed malpractice when they advised CMGT to shorten the Washoe due diligence deadline from September 30 to September 29, and advised against giving the Washoe a guarantee that CMGT would not close a competing deal before the Washoe

finished its due diligence. Defendants did this even though they knew that the Trautner Deal might not close before October 16 and that Trautner's investment group would agree to a post-October 16 closing date. Moreover, even if Defendants did not learn that Trautner's investment group would agree to a later closing date until after September 4 (the date the Washoe walked away), Given (who had negotiated with both Trautner and the Washoe on CMGT's behalf) should have tried to resurrect the Washoe deal. Given did not do that because he was putting Defendants' interests (i.e., an immediate $50,000 payment, a deferred $50,000 payment and possible future business) and Franco's personal interests (i.e., resolving credit card collection actions and getting a job as First In Touch's President) ahead of CMGT's interests. As a result of this malpractice, CMGT lost a valuable financing opportunity. (Cmplt. at Count I.)

Claim Three: Defendants committed malpractice by failing to (a) try to settle with SC after it filed its lawsuit, (b) advise CMGT's unconflicted management about all of CMGT's legal options, including the likelihood of recovering legal fees from SC's injunction bond, (c) defend the SC lawsuit, or to (d) timely notify CMGT's unconflicted management that Defendants would not defend CMGT if SC filed a lawsuit. Instead of pursuing that course -- which would have been in CMGT's best interest -- Given developed and implemented his conflicted (and undisclosed) nine-point strategy (*see* Ex. 62.) As a result of Defendants' malpractice, SC obtained injunctive relief and a $17 million default judgment. Moreover, CMGT lost the Trautner Deal and was forced into involuntary bankruptcy. (Cmplt. at Count II.)

IV. LEGAL STANDARDS

Defendants argue that Joyce should be sanctioned pursuant to this Court's inherent authority to assess attorney's fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. "Because of their very potency, inherent powers must be exercised with

restraint and discretion." *Chambers v. Nasco, Inc.*, 501 U.S. 32, 44 (1991). In *Chambers*, the inherent authority was used to assess attorney's fees as a sanction where the party engaged in a systematic pattern of dishonest, fraudulent and contemptuous conduct. *Chambers*, 501 U.S. 32 at 35-40. The party in that case was warned by the District Court on several occasions that he was engaging in unethical behavior and was even held in civil contempt for disobeying a court order. *Id.* As shown below, Joyce's conduct in this case does not even come close to the bad faith and fraudulent standards necessary for an imposition of sanctions pursuant to this Court's inherent authority.

Defendants also argue that Joyce should be sanctioned pursuant to 28 U.S.C. §1927. "A court may impose section 1927 fees only to sanction needless delay by counsel." *Knorr Brake Corp. v. Harbil, Inc.*, 738 F. 2d 223, 226 (7th Cir. 1984). "The purpose of section 1927 is to penalize attorneys who engage in dilatory conduct." *Id.* "To be liable under section 1927, counsel must have engaged in serious and studied disregard for the orderly process of justice." *Id.* "Where counsel's alleged misconduct was the filing and arguing of a claim, it is not sufficient that the claim be found meritless; the claim must be without a plausible legal or factual basis and lacking in justification." *Id.* at 226-27. In the context of a motion to dismiss, "plausibility does not mean probability; a plaintiff must merely present enough facts to raise a reasonable expectation that discovery will reveal evidence that supports plaintiff's allegations." *Hemme v. Airbus, S.A.S.*, 2010 WL 1416468 at *3 (N.D.Ill. April 1, 2010). "The plausibility threshold is a low one; a well plead complaint may proceed even if it strikes a savvy judge that actual proof is improbable, and that a recovery is very remote and unlikely." *Id.* As shown by the facts at pp. 2-18 *supra*, Plaintiff's claims have both a plausible basis in fact and law, so section 1927 sanctions are not warranted.

V. ARGUMENT

A. Plaintiff's Claims Have a Plausible Basis in Fact and Law

Defendants assert that this Court held in its Opinion that Plaintiff's claims have no factual or legal basis and that he never should have filed them. (Mot. at p. 2.) But, tellingly, Defendants do not cite any page of the Opinion to support that assertion. (*Id.*) Defendants fail to provide a citation because this Court did not (and could not) make any such finding in its Opinion. In fact, Defendants specifically sought to exclude the merits of Plaintiff's claims from being decided on their motion for summary judgment. For example, throughout their response to Plaintiff's Rule 56.1 statement, Defendants consistently asserted the objection that Plaintiff's statement of facts was inappropriate because "the allegations therein all relate to the merits of the case, about which discovery has not been taken." (*See* Defendants' Reply to Plaintiff's Rule 56.1(b)(3)(C) Statement in Support of His Response to Defendants' Motion for Summary Judgment.)

The only time this Court addressed the factual and legal basis of Plaintiff's claims was in its June 28, 2008 Memorandum Opinion and Order (the "June 28th Opinion"), which denied the vast majority of Defendants' motion to dismiss. In the June 28th Opinion, this Court (a) agreed with Joyce's interpretation of case law regarding the elements of Plaintiff's malpractice claims, and (b) cited repeatedly to exhibits that were attached to Plaintiff's Complaint, including Given's September 19, 2003 email to CMGT's shareholders (Ex. 68). (*See* this Court's 6/28/07 Mem. Op. at pp. 11-18.)

As demonstrated at pp. 2-18 above, the contemporaneous documents establish at least a plausible factual basis for Plaintiff's claims.[5] Moreover, the legal arguments that Joyce made in

[5] In their reply in support of their motion for summary judgment, Defendants objected to Plaintiff's reliance on the contemporaneous documents on various evidentiary bases. In its Opinion, this Court stated that it would not consider statements of fact supported by documents that were unauthenticated, hearsay or otherwise inadmissible under the rules of evidence, but did not identify which documents it considered inadmissible. At this time, however,

this case were based on plausible interpretations of existing law. Indeed, this Court agreed with most of Joyce's legal arguments contained in Plaintiff's response to Defendants' motion to dismiss. Additionally, this Court never found (or even commented) that any of Joyce's legal arguments were unfounded, unreasonable or implausible. In fact, the primary legal basis on which this Court granted summary judgment for Defendants, i.e., judicial estoppel, was never addressed by Joyce because it was never raised by Defendants. Because Plaintiff's claims have at least a plausible factual and legal basis, Defendants' motion for sanctions should be denied.

B. Joyce Respectfully Disagrees with This Court's Finding that Spehar Lied During the California Default Prove-Up Hearing

This Court found that Spehar lied to the California court during the default prove-up hearing when he opined on the value of the stock portion of SC's damages. (Op. at p. 21.) Defendants argue that Joyce should be sanctioned because it either knew about or recklessly failed to discover Spehar's so-called fraud. Defendants are not entitled to sanctions on this basis for two reasons. First, respectfully, Joyce disagrees with this Court's conclusion that Spehar committed a fraud on the California court. Second, Joyce's disagreement with this Court is based on a reasonable interpretation of Spehar's testimony. Therefore, it was not reckless for Joyce to fail to reach the same conclusion as this Court.

The transcript of the default prove-up hearing shows that the California judge understood that (1) Spehar valued the stock and investment banking rights aspect of SC's damages by performing a valuation analysis, and (2) Spehar's analysis assumed that an initial public offering ("IPO") would take place in three years. (Ex. A hereto at p. 4.) The transcript also reveals that the California court knew that such an IPO may never occur. (*Id.* at p. 5) Spehar explained his

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Joyce need not rely solely on admissible evidence to establish the existence of a plausible basis for Plaintiff's claims. *See Hemme, supra*, distinguishing between (a) "facts" establishing plausibility, and (b) discovery to obtain "evidence" that supports a claim. Thus, this Court can and should consider all of the contemporaneous documents in ruling on Defendants' Motion for Sanctions.

reliance on the IPO assumption by stating that CMGT had relied on the same assumption in its presentations to potential investors. (*Id.* at pp. 4 and 6.) Defendants have never even suggested that Spehar's statement was false, much less proved that it was false.

When the California court asked Spehar if CMGT was still in existence, Spehar answered, "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." (*Id.* at pp. 4-5.) (Emphasis added.) Nothing in that answer has been proven untrue. Furthermore, because the California court entered SC's request for injunctive relief, it knew the legal hurdles that CMGT would have to overcome to obtain financing. Additionally, the California court stated that the default judgment would likely cause CMGT to go into bankruptcy, so it understood that CMGT did not have the financial ability to pay the default judgment. (*Id.* at p. 7.)

Thus, the default prove-up transcript reveals that Spehar did not lie, the California court knew what was happening and it was not deceived. Moreover, even if this Court disagrees with Joyce's interpretation of that transcript, Joyce's interpretation does not constitute bad faith, fraudulent or reckless conduct. Indeed, when Defendants previously submitted and relied on the default prove-up transcript in support of their 2006 motion to dismiss, this Court did not find that Spehar had lied to the California court. Because Joyce's interpretation of the default prove-up transcript is reasonable, sanctions are not warranted.

C. Joyce Respectfully Disagrees with This Court's Finding that Plaintiff is Representing the Interests of Only SC -- Not CMGT's Estate

At the heart of this Court's Opinion was its finding that Plaintiff filed this case solely to benefit SC and not CMGT's other creditors. (Op. at p. 18, n. 7 and p. 25.) Defendants argue that Joyce should be sanctioned because it either knew this "fact" and prosecuted the case anyway, or

was reckless in failing to reach that conclusion. Defendants' motion for sanctions should be denied because, respectfully, Joyce disagrees with this Court's conclusion and has a reasonable basis for that disagreement.

Before this case was filed, Plaintiff entered into a letter agreement (the "Letter Agreement") with Spehar concerning post-petition financing issues, such as funding this legal malpractice case. (A copy of the Letter Agreement is attached hereto as Ex. B.) Shortly thereafter, Plaintiff filed an application in the bankruptcy court to enter into post-petition secured financing (the "Financing Motion.") (*See* Memorandum Opinion and Order of Judge John H. Squires dated 3/17/09 at pp. 4-5, attached hereto as Ex. C.) The Financing Motion informed the bankruptcy court that SC was providing post-petition financing for a potential malpractice action against MBRM. (*Id.*) As part of the agreement, SC was to share with CMGT's estate in any recovery made in the malpractice action. (*Id.*) After an uncontested hearing on the Financing Motion, the bankruptcy court entered a "Financing Order," which included a chart explaining how any recovery in the malpractice action would be split between SC (assuming it was a valid secured creditor) and the rest of CMGT's estate. (*Id.*; *see also*, Defendants 11/30/2006 Memorandum in Support of Motion to Dismiss at Ex. D, which is a copy of the Financing Order.)

During a deposition that Plaintiff gave on October 30, 2008 in an adversary proceeding (in the bankruptcy court) with Spehar, Plaintiff explained that he entered into the Letter Agreement because:

> ...in the event he [Spehar] was determined to be secured, then there would be no reason for the estate to proceed if the only thing we were going to get was trustee's fees. That made no sense to me. Why would I -- I'm not going to do this just for the benefit of Mr. Spehar. There has to be something else for the estate. And so, my desire was that in the event he was deemed to be secured, that

> we would have some kind of a sharing of whatever the dollars were so that the unsecured creditors would be able to share.

(Pl. Appendix of Exhibits (Vol. 3) submitted in Support of His Response to Defendants' Motion for Summary Judgment at Ex. 105, pp. 95-97.)

Plaintiff's Letter Agreement with Spehar and his explanation of why he believed that the Letter Agreement was necessary to assure a benefit for CMGT's estate establishes that Plaintiff did not file this case solely to benefit Spehar. At the very least, it shows that Joyce has a reasonable basis for believing that Plaintiff filed this case for the benefit of CMGT's entire estate.

Plaintiff's contentious and litigious relationship with Spehar is further evidence that Plaintiff was not Spehar's proxy. After the Financing Order was entered, a dispute erupted between Plaintiff and SC regarding the meaning the Letter Agreement and the Financing Order. Plaintiff believed that neither the Letter Agreement nor the Financing Order removed his ability to challenge SC's assertion that it had a secured claim, while Spehar believed that the Letter Agreement and the Financing Order estopped Plaintiff from asserting such a challenge. That dispute is what led to the adversary proceeding between Plaintiff and Spehar, which was eventually tried before the Bankruptcy Court.

After hearing testimony and taking evidence, the Bankruptcy Court found that (a) the Letter Agreement and Financing Order did not prevent Plaintiff from challenging SC's secured status, and (b) SC's claim was unsecured. (Ex. C hereto, 3/17/09 Mem. Op., at pp. 25-27 and 32.) Judge Squires later noted that this Court's finding in its Opinion that Plaintiff acted as Spehar's proxy "is in marked contrast to the bitter and hard fought dispute between the Trustee [Plaintiff] and Spehar in this Court." (*See* Exhibit D hereto, Judge Squire's August 11, 2010 Memorandum Opinion, at p. 2, n. 1.)

Plaintiff's efforts to subordinate SC to an unsecured position for the benefit of CMGT's unsecured creditors is evidence that Plaintiff was not acting solely for Spehar's benefit. Moreover, although the Bankruptcy Court's March 17, 2009 Opinion was later reversed by the District Court, its finding that the Letter Agreement and Financing Order did not prevent Plaintiff from challenging SC's secured status supports Plaintiff's explanation that he entered into the Letter Agreement and Financing Order to ensure that the unsecured creditors would benefit from this lawsuit. Accordingly, sanctions are not appropriate here.

The reaction of Dr. Ronald Holman ("Dr. Holman"), one of CMGT's unsecured creditors, to this Court's Opinion also shows that Plaintiff did not file this case solely for Spehar's benefit. Before Plaintiff filed this case, Dr. Holman sent him a letter blaming Spehar for CMGT's demise. In response to paragraph 131 of Defendants' Rule 56.1 statement regarding Dr. Holman's letter, Joyce stated that Dr. Holman likely did not know about the facts that are revealed by the contemporaneous documents. (Pl. Resp. to Defs. Rule 56.1 Statement at ¶ 131.) This Court cited to and relied on Dr. Holman's letter in concluding that Plaintiff was not acting in the interests of the unsecured creditors when he filed this case. (Op. at p. 25.)

After this Court issued its Opinion, Dr. Holman filed a "Limited Ratification" of Spehar's motion to alter or amend the judgment.[6] (A copy of Dr. Homan's Limited Ratification is attached hereto as Ex. E.) In that filing, Dr. Holman objected to this Court's finding that Plaintiff "is really bringing [Spehar's] personal claim against Defendants," and Dr. Holman stated that he and other legitimate creditors have a $1.6 million interest in this lawsuit. (*Id.*) Dr. Holman also stated that he wants this lawsuit to go to trial so that the truth can be discovered. (*Id.*)

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[6] After this Court entered its Opinion on Defendants' Motion for Summary Judgment, Spehar filed (1) a motion to intervene, and (2) a motion to alter or amend the Court's Opinion.

After filing the Limited Ratification, Dr. Holman signed an affidavit stating, among other things, that the letter he sent to Plaintiff blaming Spehar "was represented to [him] as being actually prepared by Franco and Mayer Brown." (Ex. F hereto, Holman Aff., at ¶ 11.) Dr. Holman also stated in his affidavit that after reading Spehar's June 10, 2010 "Supplement to Spehar Motion to Alter or Amend," he has concluded that it "now appears most likely that Mayer Brown and Franco may have made some behind the scene deals which put money in their pockets (Chron. ¶ 21, 31 and 37), with nothing going to CMGT's shareholders and creditors." (*Id.*) The specific paragraphs of Spehar's Supplement that Dr. Holman references in that statement relate to Given's nine-point "functional equivalent" deal. (*See* Supplment to Spehar Motion to Alter or Amend at ¶¶ 21, 31 and 37.) Dr. Holman concludes his affidavit by stating that he wants this matter to go to trial "where hopefully the whole truth will come out, and maybe some money will come back to my wife and me." (Ex. F at ¶ 12.)

Dr. Holman's reaction to this Court's Opinion demonstrates that it was not sanctionable for Joyce to conclude that this lawsuit was for the benefit of all of CMGT's creditors, and that at least some of those creditors would have supported this case if Given/Franco had shared with them the contemporaneous documents that Plaintiff and Joyce obtained from Defendants. Thus, sanctions are not warranted here.

D. None of this Court's Findings Regarding Joyce Support the Imposition of Sanctions

Defendants argue that the findings in this Court's Opinion support their motion for sanctions. Defendants are wrong. Most of those findings relate to Plaintiff's conduct -- not

Joyce's conduct.[7] This Court made six findings concerning Joyce's conduct, none of which warrant the imposition of sanctions:

Finding One: Spehar located an attorney (Joyce) who would work for a contingency fee. (Op. at p. 8.) It is true that Spehar identified Joyce to Plaintiff as a potential lawyer for this case, but that fact is not evidence of bad faith or fraud by Joyce. Thus, this finding does not support an imposition of sanctions.

Finding Two: Joyce did not interview Franco, Trautner, other CMGT shareholders, officers or directors or Defendants before filing this case. (Op. at p. 9.) This is mostly true, but it is not evidence of bad faith or fraud. The key to Joyce's pre-filing investigation was obtaining contemporaneous documents that came from Defendants' own files. Many of those contemporaneous documents were authored by Given, Franco and Trautner's lawyer, which established a good faith factual basis for Plaintiff's claims, all of which arise from the conflicts of interest revealed by these documents. Moreover, Joyce tried to talk to Franco and Wong, but they refused. (Exhibit G hereto, Affidavit of Edward T. Joyce at ¶ 3.)

Finding Three: At Spehar's direction, Joyce sent Franco and Wong tolling agreements with letters threatening litigation. (Op. at p. 13.) Joyce did send Franco and Wong letters requesting an interview with tolling agreements enclosed, and those letters did raise the possibility of them being named in a lawsuit. However, Joyce did not send those letters at Spehar's direction. (Ex. G at ¶¶ 2-4.) Rather, Joyce sent those letters on its own accord to toll the statute of limitations during the period that Joyce hoped to interview Franco and Wong, but they refused to be interviewed. (*Id.*) It was not sanctionable for Joyce to send two witnesses tolling agreements with a letter seeking an interview.

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[7] By making this statement, Joyce is not in any way implying that it agrees with Defendants' arguments as to Plaintiff in their motion for sanctions. Joyce is making this point simply for the purpose of explaining that it is only going to address findings that were made as to its own conduct.

Finding Four: Spehar prepped Joyce with his version of the events and his ultimate goal of collecting the default judgment. (Op. at p. 20.) It is true that Spehar conveyed his version of the events to Joyce and Joyce knew that Spehar wanted to collect on the default judgment. However, that does not prove that Joyce pursued this case in bad faith or somehow committed a fraud. Moreover, the pleadings in this case prove that Joyce did not simply rely on Spehar's version of the events. For example, Joyce supported the allegations in Plaintiff's complaint with 17 separate exhibits, many of which were authored by Given and Franco. And, in response to Defendants' motion for summary judgment, Joyce supported the allegations of Plaintiff's complaint with more than 100 exhibits that Plaintiff and Joyce obtained before this case was filed. (*See* the Appendix of Exhibits, including the index attached thereto, and Ex. 1 (Carroll Affidavit). The most significant of those exhibits were emails and memoranda authored by Franco, Given or others -- not Spehar. (*See e.g.*, Exs. 7, 16-19, 32, 34-37, 42-43, 62, 66, 68, 74, 75, 77, 79, 81-84 and 92.) Thus, the fact that Spehar told Joyce his story does not warrant the imposition of sanctions.

As to Joyce's knowledge that Spehar wanted to collect on SC's default judgment through this lawsuit, that fact has never been hidden; it has been front and center from day one of this lawsuit when Defendants presented this Court with their fraud on the court defense. (*See* Defs. November 30, 2006 Memorandum of Law in Support of Their Motion to Dismiss at pp. 1-7.) At every turn, Joyce asserted good faith arguments based on reasonable interpretations of existing law as to why the posture of this case -- i.e., the fact that SC could collect on some of its judgment -- did not warrant dismissal. (*See* pp. 31-35 *infra* for more discussion on this point.) Even at the end, Defendants did not assert the legal theory that led to dismissal; rather this Court relied on a legal theory -- judicial estoppel -- that was never raised by Defendants. It was not

reckless for Joyce to fail to anticipate that judicial estoppel, a rarely invoked doctrine that was never raised by Defendants, would be invoked in this case. Thus, the fact that Joyce, like everyone else, knew that Spehar was trying to collect SC's judgment does not support Defendants' sanction request.

Finding Five: Spehar spoke to Joyce more than Grochocinski did. (Op. at p. 23.) That may be true, but it does not evidence bad faith or fraud. As an occurrence witness, Spehar could tell Joyce more about the occurrence facts than could Grochocinski, who has no personal knowledge about any of the occurrence facts because he is simply the bankruptcy trustee. Moreover, the fact that Spehar told Joyce his version of the occurrence facts does not mean that Joyce blindly accepted those facts. As shown above, Plaintiff's claims are supported by the contemporaneous documents, many of which were authored by Franco and Given. Thus, sanctions are not warranted.

Finding Six: Joyce made inappropriate objections during Grochocinski's deposition. (Op. at pp. 23-24.) With the exception of this one finding, there were never any negative findings about Joyce's conduct during this case. In fact, the only discovery dispute that was litigated was decided in Joyce's favor. During oral argument on that dispute, Magistrate Denlow stated, "I have been on the bench now 12 years, and I have done a number of these [privilege disputes]. I have never seen files as well organized and presented as they [Joyce] have done and the systematic way it has been presented in the categories. I mean, they have credibility with me in the professional way that it's all been put together..." (Ex. H hereto, Tr. dated 5/14/08 at p. 17.) Thus, Joyce's conduct during this case does not demonstrate bad faith or fraud.[8]

[8] Defendants argue that "Mr. Joyce's belligerent and combative conduct during that deposition was a microcosm of his whole approach to this case -- attack, attack, attack with no regard for the lack of merit in the baseless and cynical malpractice claim that he was advancing." Defendants do not support their hyperbole with any facts because their contention is simply not true. Throughout this case, neither Plaintiff nor his counsel was on the

E. Joyce's Responses to Defendants' "Fraud on the Court" and "Absurd Result" Defenses Do Not Support an Imposition of Sanctions

1. Defendants' Motion to Dismiss

Defendants first raised their "fraud on the court" defense in their 2006 motion to dismiss. They argued that this case should be dismissed as a sanction pursuant to this Court's inherent authority because Spehar, with Plaintiff's assistance, was committing a fraud on the court. As factual support for that argument, Defendants attached (1) the transcript from the California default prove-up hearing, (2) the involuntary bankruptcy petition filed by SC, and (3) the Financing Order entered by the Bankruptcy Court. As legal support, Defendants cited *REP MCR Realty, L.L.C. v. Lynch*, 363 F. Supp. 2d 984, 998 (N.D. Ill. 2005), for the proposition that federal courts have the inherent authority to dismiss a case as a sanction for bad faith or fraudulent conduct by a party.

In response, Plaintiff argued that (1) his malpractice claims have a factual and legal basis and, therefore, this case is not a fraud, (2) Defendants failed to present any evidence that SC's default judgment was "bogus" or obtained through the use of misrepresentations to the California Court, (3) Defendants failed to present any evidence that Plaintiff acted fraudulently or in bad faith, and (4) Defendants' argument could not even apply to Count I, because that count is not based on SC's default judgment.

In reply, Defendants argued, in part, that (1) they did not need to present evidence that the default judgment was bogus because the Complaint alleges that SC's California lawsuit was meritless, and (2) the transcript of the default prove-up hearing shows that the $17 million damage figure is "based on nothing more than Spehar's self-serving speculation."

"attack" because merits discovery was stayed and, due to Defendants' extensive motion practice, Joyce was on the defensive most of the time. Indeed, the only substantive motion that Joyce filed was on a privilege dispute, which Joyce won.

This Court held:

> The Lawyer Defendants have not demonstrated by clear and convincing evidence that the Chapter 7 Trustee has perpetrated any fraud on the judicial system. It would 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.

(6/28/07 Op. at p. 7.) This Court also denied most of Defendant's motion to dismiss on the basis that the law cited by Plaintiff and certain exhibits attached to the Complaint, such as an email authored by Given on September 19, 2003, sufficiently supported Plaintiff's Complaint such that he stated a claim. (*See* 6/28/07 Mem. Op. at 11-18.)

Joyce's response to Defendants' "fraud on the court" argument was reasonable and consistent with existing law. Moreover, this Court granted Defendants' motion for summary judgment on the basis of judicial estoppel; it did not find that Plaintiff committed a fraud on the court and it did not dismiss Plaintiff's claims as a sanction pursuant to *Lynch*. Because Joyce's response to Defendants' "fraud on the court" argument had a reasonable basis in fact and law, that response does not support an imposition of sanctions.

2. <u>Defendants' Motion for Reconsideration</u>

Defendants then argued in their 2007 motion to reconsider that the Complaint should be dismissed, regardless of whether a fraud was committed, because it would be absurd for SC -- the "real party in interest" -- to receive the "lion's share of the recovery." On this point, Defendants did not cite any legal theory for dismissing the Complaint other than dismissal as a sanction. Defendants also did not cite any legal authority besides *Lynch* to support their "absurd result" argument. In response, Joyce repeated its argument (and this Court's ruling) that to obtain a dismissal pursuant to *Lynch*, Defendants must prove with clear and convincing evidence

that Plaintiff committed a fraud on the Court. Joyce also argued that this proceeding is not the proper forum for addressing objections to SC's share of any potential recovery; rather, those objections should be handled by the Bankruptcy Court. Joyce's response was reasonable and in accord with existing law, including this Court's ruling on Defendants' motion to dismiss. Thus, Joyce's response to Defendants' motion to reconsider does not support an imposition of sanctions.

3. Defendants' Motion for Summary Judgment

Finally, in their motion for summary judgment, Defendants argued that this case should be dismissed because: (1) it will yield an "absurd result" (i.e., the same argument they unsuccessfully raised in their motion for reconsideration), (2) Plaintiff could have gotten the California default judgment vacated if he had tried, and (3) Plaintiff did not personally perform a pre-filing investigation and, if he had, he would have realized that the malpractice claims have no merit.

In support of their "absurd result" argument, Defendants cited *Maxwell v. KPMG, LLC*, 520 F.3d 713 (7th Cir. 2008) for the proposition that SC cannot be at once the cause of the bankruptcy and its principal beneficiary. Joyce responded by arguing that: (1) the *Maxwell* court's statement regarding causation was non-binding *obiter dictum*, (2) whether Defendants or SC was a proximate cause of CMGT's insolvency is a disputed question of fact, (3) Plaintiff does not intend to prove that SC's contract claim was meritless, (4) regardless of whether SC's judgment is speculative, it cannot be collaterally attacked, (5) pursuant to the Bankruptcy Court's ruling, SC was an unsecured creditor and, therefore, its entitlement to any recovery in this case is limited to its *pro rata* share,[9] (6) any objections to SC receiving its *pro rata* share should be

[9] The District Court reversed the Bankruptcy Court's ruling after Joyce filed Plaintiff's response to Defendants' motion for summary judgment.

made by the unsecured creditors in the Bankruptcy Court, and (7) in *Brandon Apparel Group v. Kirkland and Ellis*, 382 Ill. App. 3d 273 (1st Dist. 2008), the Illinois Appellate Court reviewed a case involving a nearly identical posture (in terms of the judgment creditor being the "real party in interest" in the debtor's legal malpractice lawsuit), and rather than affirm the circuit court's dismissal, the appellate court reversed and remanded for trial. Each of these arguments had a reasonable basis in fact and law.

In support of their "Plaintiff could have gotten the default judgment vacated" argument, Defendants cited *State Farm Fire & Casualty Co. v. Pietak*, 109 Cal. Rptr. 2d 256 (Cal. Ct. App. 2001). In response, Joyce provided this Court with its analysis of *State Farm* and concluded that Plaintiff could not have gotten the default judgment vacated. Joyce's analysis of the law on that issue was both reasonable and correct. In fact, this Court has never held that Joyce's analysis of *State Farm* was either wrong or implausible.

Finally, to support their argument that this case should be dismissed because Plaintiff would have realized that his claims are meritless if he had personally conducted a proper pre-filing investigation, Defendants cited *Maxwell* for the proposition that bankruptcy trustees must exercise reasonable litigation judgment and not pursue frivolous claims. Joyce argued that regardless of what investigation Plaintiff personally performed, the contemporaneous documents that Plaintiff and Joyce obtained from Defendants pre-filing establish that Plaintiff's claims have a reasonable factual basis, especially because those documents reveal that Defendants' conduct was tainted by conflicts of interest. Joyce argued that Defendants failed to provide any legal authority that would authorize dismissing a case that has a reasonable basis in fact and law on the premise that the bankruptcy trustee did not personally investigate the underlying facts. Joyce's argument as to this issue had a reasonable basis in fact and law.

Ultimately, this Court granted Defendants' motion for summary judgment, but it did so on the basis of a legal theory that Defendants never advanced. Moreover, this Court did not make any findings that Joyce's response to Defendants' motion for summary judgment was without any factual or legal basis. Finally, this Court did not (and could not) reject Plaintiff's allegations about Defendants' conflicts of interest, because those conflicts are revealed by Defendants' own documents. (*See e.g.*, Exs. 34, 62 and 74.) Because Joyce's response to Defendants' motion for summary judgment had a reasonable basis in fact and law, sanctions are not warranted.

VI. CONCLUSION

As explained above, Joyce did not commit a fraud, did not act in bad faith and did not prosecute claims that have no plausible factual or legal basis. Accordingly, Defendants' motion for sanctions should be denied.

Respectfully submitted,
EDWARD T. JOYCE & ASSOCIATES, P.C.

BY: /s/ Edward T. Joyce

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CERTIFICATE OF SERVICE

The undersigned attorney, certifies that on March 14, 2011, he caused **EDWARD T. JOYCE & ASSOCIATES, P.C.'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SANCTIONS** to be served upon

Stephen Novack
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by electronically delivering a copy through the United States District Court's CM/ECF filing system.

/s/ Edward T. Joyce