# EXHIBIT D

Edward T. Joyce & Associates, P.C.'s Response in Opposition to Defendants' Motion for Sanctions

Filed March 14, 2011

**UNITED STATES BANKRUPTCY COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | | |
|---|---|---|
| IN RE: | ) | Bankruptcy No. 04 B 31669 |
| CMGT, INC., | ) | Chapter 7 |
| | ) | Judge John H. Squires |
| Debtor. | ) | |
| | ) | |
| DAVID E. GROCHOCINSKI, Trustee, | ) | |
| | ) | Adversary No. 07 A 00838 |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| SPEHAR CAPITAL, LLC, | ) | |
| | ) | |
| Defendant. | ) | |

## MEMORANDUM OPINION

This matter comes before the Court on the motion filed by Spehar Capital, LLC ("Spehar") asking the Court to reconsider an order it entered on March 26, 2010 that dismissed the instant adversary proceeding pursuant to a remand from the United States District Court for the Northern District of Illinois. For the reasons set forth herein, the Court denies Spehar's motion.

## I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. It is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (K), and (O).

## II. FACTS AND BACKGROUND

A brief recitation of some of the litigation in this adversary proceeding is necessary. On August 30, 2007, David E. Grochocinski, the Chapter 7 case trustee (the "Trustee") for the estate of CMGT, Inc. (the "Debtor") filed the instant adversary proceeding against Spehar. The Trustee filed an amended complaint on October 5, 2007, wherein he sought to determine the validity, extent, or priority of claims and interests of Spehar. Specifically, the amended complaint alleged the following: Spehar and the Trustee entered into a post-petition financing agreement whereby Spehar agreed to loan the Debtor's estate funds in order for the Trustee to prosecute a malpractice claim[1] on behalf of the estate against former attorneys for the Debtor. As part of the financing

---

[1] The malpractice action was filed in August 2006 in the Circuit Court of Cook County, Illinois, and was thereafter removed to the United States District Court for the Northern District of Illinois on October 10, 2006, *Grochocinski v. Mayer Brown Rowe & Maw LLP*, No. 06 C 5486. On March 31, 2010, Judge Virginia M. Kendall found that the Trustee's malpractice action failed as a matter of law, and granted the Defendants' motion for summary judgment. 2010 WL 1407256 (N.D. Ill. Mar. 31, 2010). In that decision, Judge Kendall found that the Trustee did not bring the malpractice action on behalf of the unsecured creditors of the Debtor's estate. Rather, she found that the Trustee "served as Spehar's puppet and brought the suit to benefit solely Spehar." *Id.* at *13. She referred to Spehar as the "puppetmaster" and the Trustee as his "puppet." *Id.* at *12. In pertinent part, Judge Kendall stated:

> The circumstances presented in this case reveal a deliberate manipulation of the judicial system designed to benefit only one individual. Sadly, that individual had the complicit agreement of a bankruptcy trustee whose obligation to the court and to others was paramount to his dealings with this individual "creditor" and that trustee continued the manipulation through his lack of diligence and myopic devotion to Spehar's plan.

*Id.* at *17. The irony of such findings, which are adverse to both the Trustee and Spehar, is in marked contrast to the bitter and hard fought dispute between the Trustee and Spehar in this Court.

agreement, Spehar was to make specific advances to the Debtor's estate in exchange for a share in the net recovery from the malpractice litigation. The Trustee filed a motion seeking approval of his agreement with Spehar, and the Court subsequently entered a financing order which allowed the Trustee to obtain credit on behalf of the Debtor's estate in order to pursue the malpractice claim. Spehar disputed the settlement of certain adversary proceedings that the Trustee had filed against investors of the Debtor, and he refused to make any further advance payment to the Debtor's estate. As a result, the Trustee filed the instant adversary proceeding against Spehar challenging Spehar's claim of a secured lien position against the Debtor and its estate assets which included the malpractice claim. In his amended answer filed on December 14, 2007, Spehar raised affirmative defenses and filed a counterclaim that alleged the Trustee breached the financing agreement.

On January 16, 2008, Spehar filed a motion for judgment on the pleadings. (Docket No. 39.) On March 12, 2008, the Court denied Spehar's motion. *Grochocinski v. Spehar Capital, LLC (In re CMGT, Inc.)*, 384 B.R. 497 (Bankr. N.D. Ill. 2008). Subsequently, on March 25, 2008, Spehar filed a motion to reconsider the denial of the motion for judgment on the pleadings. (Docket No. 59.) While that motion was pending, Spehar filed a motion for summary judgment on May 21, 2008. (Docket No. 70.) The Trustee filed a cross-motion for summary judgment on August 13, 2008. (Docket No. 96.) On July 16, 2008, the Court denied Spehar's motion to reconsider the denial of the motion for judgment on the pleadings. (Docket No. 83.) Thereafter, on October 30, 2008, the Court denied both motions for summary judgment. *Grochocinski v. Spehar Capital, LLC (In re CMGT, Inc.)*, 2008 WL 4767434 (Bankr. N.D. Ill. Oct. 30, 2008).

On November 24 and 25, 2008, the Court held a trial in this matter. After that hearing, on March 17, 2009, the Court entered judgment in favor of the Trustee on all counts of his amended complaint and on Spehar's counterclaim. *Grochocinski v. Spehar Capital, LLC (In re CMGT, Inc.)*, 402 B.R. 262 (Bankr. N.D. Ill. 2009). Spehar filed an appeal of the Court's March 17, 2009 decision on March 27, 2009. The appeal was assigned to Judge Robert W. Gettleman.

While that appeal was pending before Judge Gettleman, on July 20, 2009, Spehar filed a motion for relief from this Court's March 17, 2009 judgment. (Docket No. 225.) On July 24, 2009, this Court denied Spehar's motion. (Docket No. 228.) Shortly thereafter, on July 29, 2009, Judge Gettleman remanded the matter to the Court for the limited purpose of having the Court entertain a motion by Spehar under Federal Rule of Civil Procedure 60(b). (Docket No. 230.) On August 26, 2009, Spehar filed that motion before this Court (Docket No. 231) and, on September 24, 2009, the Court denied that motion. *Grochocinski v. Spehar Capital, LLC (In re CMGT, Inc.)*, 417 B.R. 69 (Bankr. N.D. Ill. 2009).

On February 2, 2010, Judge Gettleman issued a Memorandum Opinion whereby he vacated the Court's March 17, 2009 judgment and remanded the matter for further proceedings. *Spehar Capital, LLC v. Grochocinski (In re CMGT, Inc.)*, 424 B.R. 355 (N.D. Ill. 2010). Judge Gettleman concluded that the Court "erred when it entertained the [Trustee's] Adversary Proceeding." *Id.* at 361. He opined that by allowing the adversary proceeding to be prosecuted by the Trustee, this Court "in effect vacated the Financing Order after ruling that there were insufficient reasons to do so under Rule 60(b)." *Id.*

As a result of Judge Gettleman's decision, on March 26, 2010, the Court held a status hearing in this matter, and entered an order whereby it dismissed the entire adversary proceeding.

(Docket No. 253.) On April 9, 2010, Spehar filed the instant motion asking the Court to reconsider its dismissal of the adversary proceeding. (Docket No. 257.) Spehar alleges that the Court erred when it dismissed its counterclaim against the Trustee. According to Spehar, Judge Gettleman's ruling did not mandate the dismissal of its counterclaim and, as a matter of law, the dismissal of that counterclaim by this Court was improper. As detailed above, the litigation in this matter has been hotly contested at every stage.

## III. APPLICABLE STANDARDS

A "motion to reconsider" is not formally designated by either the Federal Rules of Bankruptcy Procedure or the Federal Rules of Civil Procedure, except as provided in Bankruptcy Rule 3008, which allows reconsideration of orders allowing or disallowing claims against the estate. Fed. R. Bankr. P. 3008. Rule 59(e) of the Federal Rules of Civil Procedure, as adopted by Bankruptcy Rule 9023, permits a party to move the court to alter or amend a judgment by filing a motion to alter or amend, not one styled as a "motion to reconsider." Fed. R. Civ. P. 59(e). Spehar fails to cite to the specific Rule it seeks relief under. The substance of the motion at bar speaks to errors of law, a basis encompassed by Rule 59(e). *See Sigsworth v. City of Aurora, Ill.*, 487 F.3d 506, 511-12 (7th Cir. 2007). Hence, the Court will treat the motion under Rule 59(e). *See Obriecht v. Raemisch*, 517 F.3d 489, 493 (7th Cir. 2008) (stating that a post-judgment motion should be analyzed according to its substance, not its timing or label); *Borrero v. City of Chi.*, 456 F.3d 698, 701-02 (7th Cir. 2006) (same).

Rule 59(e) motions serve a narrow purpose and must clearly establish a manifest error of law or fact, newly discovered evidence, *Obriecht*, 517 F.3d at 494; *Sigsworth*, 487 F.3d at 512,

or an intervening change in the controlling law. *Cosgrove v. Bartolotta*, 150 F.3d 729, 732 (7th Cir. 1998). The decision to grant or deny a Rule 59(e) motion is within the court's discretion. *In re Prince*, 85 F.3d 314, 324 (7th Cir. 1996); *LB Credit Corp. v. Resolution Trust Corp.*, 49 F.3d 1263, 1267 (7th Cir. 1995).

"The rule essentially enables a . . . court to correct its own errors, sparing the parties and the appellate courts the burden of unnecessary appellate proceedings." *Russell v. Delco Remy Div. of Gen. Motors Corp.*, 51 F.3d 746, 749 (7th Cir. 1995). Indeed, the Rule permits a party to bring to the attention of the trial court "factual and legal errors that may change the outcome so they can be corrected. It does not allow a party to introduce new evidence earlier available, or advance arguments that could and should have been presented prior to the judgment." *Herbstein v. Bruetman (In re Bruetman)*, 259 B.R. 672, 673-74 (Bankr. N.D. Ill.), *aff'd*, 266 B.R. 676 (N.D. Ill. 2001), *aff'd*, 32 Fed. Appx. 158 (7th Cir. 2002). "A 'manifest error' is not demonstrated by the disappointment of the losing party. It is the wholesale disregard, misapplication, or failure to recognize controlling precedent." *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000) (internal quotation omitted).

The function of a motion to alter or amend a judgment is not to serve as a vehicle to relitigate old matters or present the case under a new legal theory. *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996). Moreover, the purpose of such a motion "is not to give the moving party another 'bite of the apple' by permitting the arguing of issues and procedures that could and should have been raised prior to judgment." *Yorke v. Citibank, N.A. (In re BNT Terminals, Inc.)*, 125 B.R. 963, 977 (Bankr. N.D. Ill. 1990). The rulings of a bankruptcy court "are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure." *See Quaker*

*Alloy Casting Co. v. Gulfco Indus., Inc.*, 123 F.R.D. 282, 288 (N.D. Ill. 1988). "A motion brought under Rule 59(e) is not a procedural folly to be filed by a losing party who simply disagrees with the decision; otherwise, the Court would be inundated with motions from dissatisfied litigants." *BNT Terminals*, 125 B.R. at 977.

## IV. DISCUSSION

Spehar contends that when the Court dismissed the entire adversary proceeding, it incorrectly dismissed the counterclaim against the Trustee. According to Spehar, Judge Gettleman's ruling did not require the Court to dismiss the counterclaim. Rather, Spehar maintains that because Judge Gettleman used the word "vacate" when referring to the Court's March 17, 2009 Memorandum Opinion, and remanded the adversary proceeding for "further proceeding[s] consistent with this opinion," it was clear that there was action to be taken on the counterclaim after the complaint was dismissed.

The Court rejects Spehar's argument. The Court disagrees with Spehar's interpretation of Judge Gettleman's decision. In the opening paragraph of his ruling, Judge Gettleman acknowledges that Spehar raised affirmative defenses and filed a counterclaim against the Trustee. *Spehar Capital*, 424 B.R. at 356. In the next paragraph of that decision, he notes that this Court entered judgment in favor of the Trustee on all counts of his amended complaint and on Spehar's counterclaim. *Id.* Judge Gettleman did not make any further mention of the counterclaim. Instead, he concluded that this Court erred when it entertained the adversary proceeding, which encompassed both the Trustee's claims against Spehar and Spehar's counterclaim against the Trustee. *Id.* at 361. Specifically, he found that by allowing the adversary proceeding to be

prosecuted by the Trustee, this Court, in effect, vacated the financing order after it had ruled that there were insufficient reasons to do so under Rule 60(b). *Id.* Judge Gettleman vacated the March 17, 2009 judgment and remanded the matter for further proceedings consistent with his ruling. *Id.*

Although Judge Gettleman included two references to the counterclaim in his recitation of the factual background, *id.* at 356, he made no specific findings regarding the counterclaim in his decision. That he did not address Spehar's counterclaim is easily explained. Spehar's brief filed in the appeal before him did not identify this Court's judgment in favor of the Trustee on the counterclaim as an independent issue or basis for the appeal. (Trustee Resp. to Spehar Mot. to Reconsider, Ex. D.)[2] Understandably then, Judge Gettleman did not make any specific findings with respect to the counterclaim.

The Court, when it entered its Order dismissing the adversary proceeding, interpreted Judge Gettleman's decision to include the counterclaim. Judge Gettleman did not indicate that the counterclaim should survive. Rather, he stated that this Court "erred when it entertained the

---

[2] In its brief filed before Judge Gettleman, Spehar, in the statement of issues section, listed the following five alleged errors made by this Court:

1. Whether the Court erred by permitting the Trustee to collaterally attack the clear and unambiguous finance order through the adversary proceeding.
2. Whether the Court erred in denying Spehar's summary motions and imposing the wrong burden of proof upon Spehar.
3. Whether the Court erred in precluding deposition testimony and ruling there was insufficient service of process regarding the citations to discover assets.
4. Whether the Court's material factual decisions after trial were clearly erroneous requiring a judgment against the Trustee and in Spehar's favor.
5. Whether the Court erred in denying Spehar's post-trial Rule 60(b) motion.

(*Id.* at p. 1.)

Adversary Proceeding." *Spehar Capital*, 424 B.R. at 361. The Court construed that language to include the termination of the counterclaim, which was a part of the adversary proceeding.

Spehar cites to several cases for the proposition that a compulsory counterclaim is allowed to proceed without regard to the fate of the original claim, including dismissal of the complaint. *See Amoco Prod. Co. v. United States*, 852 F.2d 1574, 1579 (10th Cir. 1988); *Nat'l Research Bureau, Inc. v. Bartholomew*, 482 F.2d 386, 388-89 (3d Cir. 1973). The Seventh Circuit has taken a similar position and opined "that where a counterclaim states a cause of action seeking affirmative relief independent of that stated in the complaint, the dismissal of the complaint does not preclude a trial and determination of the issues presented by the counterclaim." *Switzer Bros., Inc. v. Chi. Cardboard Co.*, 252 F.2d 407, 410 (7th Cir. 1958).

Even though a counterclaim can survive when the original action is dismissed, the Court finds that it is bound to follow Judge Gettleman's conclusion and mandate that the filing and prosecution of the entire adversary proceeding was improper under the law of the case doctrine. This doctrine provides that "'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (*quoting Ariz. v. Cal.*, 460 U.S. 605, 618 (1983)). An elementary application of the doctrine occurs when an appellate court reverses a final judgment and remands the case to the district court. *In re S. Beach Sec., Inc.*, 376 B.R. 881, 888 (Bankr. N.D. Ill. 2007), *aff'd*, 421 B.R. 456 (N.D. Ill. 2009), *aff'd*, 606 F.3d 366 (7th Cir. 2010). On remand, "the district court is required to comply with the express or implied rulings of the appellate court." *Creek v. Vill. of Westhaven*, 144 F.3d 441, 445 (7th Cir. 1998) (internal quotation omitted). The same holds true for a bankruptcy court on a remand from the district

court. *S. Beach Sec.*, 376 B.R. at 888. On remand, the law of the case doctrine generally requires the lower court to confine its discussion to the issues remanded. *United States v. Morris*, 259 F.3d 894, 898 (7th Cir. 2001).

Judge Gettleman's February 2, 2010 ruling is the law of the case. Judge Gettleman clearly opined and concluded that this Court "erred when it entertained the Adversary Proceeding." *Spehar Capital*, 424 B.R. at 361. The Court is bound by that express ruling and therefore dismissed the adversary proceeding. The Court corrected the error identified by Judge Gettleman when it dismissed the adversary proceeding. Moreover, the implication of Judge Gettleman's ruling, which the Court is required to follow, is that if the adversary proceeding should not proceed, then neither should Spehar's counterclaim. Judge Gettleman did not determine that the counterclaim should survive. Rather, he simply addressed the propriety of the filing of the Trustee's action against Spehar as the threshold issue. He determined that by virtue of the financing order's terms, Spehar had a perfected superior lien on the assets of the Debtor's estate and that the Trustee should not have been allowed to challenge such lien rights in the adversary proceeding. Even though Judge Gettleman included limited narrative with respect to the counterclaim having been filed by Spehar, he made no specific findings regarding that counterclaim. Because the relief Spehar sought in its counterclaim was not an issue Spehar raised in its list of issues on appeal, and the counterclaim was not further discussed in the scope of Judge Gettleman's mandate, the Court determined that dismissal of the entire adversary proceeding, including the counterclaim, was proper.

The Trustee argues that even if Spehar is not precluded from prosecuting the counterclaim, Spehar is now barred from bringing such claim against the Trustee personally. Pursuant to the

Barton doctrine,[3] a party must obtain leave of the bankruptcy court before suit can be brought against a trustee for actions taken within the trustee's administrative capacity. *In re Linton*, 136 F.3d 544, 545 (7th Cir. 1998). Before leave is given by the bankruptcy court, the claimant must demonstrate that he has a prima facie case against the trustee. *In re Weitzman*, 381 B.R. 874, 880 (Bankr. N.D. Ill. 2008); *In re Kids Creek Partners, L.P.*, 248 B.R. 554, 558 (Bankr. N.D. Ill.), *aff'd*, No. 00 C 4076, 2000 WL 1761020 (N.D. Ill. Nov. 30, 2000); *In re Berry Publ'g Servs., Inc.*, 231 B.R. 676, 679 (Bankr. N.D. Ill. 1999). The purpose of the Barton doctrine is to protect the integrity of the bankruptcy process:

> Just like an equity receiver, a trustee in bankruptcy is working in effect for the court that appointed or approved him, administering property that has come under the court's control by virtue of the Bankruptcy Code. If he is burdened with having to defend against suits by litigants disappointed by his actions on the court's behalf, his work for the court will be impeded.

*Linton*, 136 F.3d at 545.

As an officer of the court, a trustee's exposure to personal liability is limited. *Kids Creek*, 248 B.R. at 558. "A trustee 'cannot be held personally liable unless he acted outside the scope of his authority as trustee. . . .'" *Id.* (*quoting State of Ill., Dep't of Revenue v. Schechter*, 195 B.R. 380, 384 (N.D. Ill. 1996)). A trustee's personal liability for a breach of fiduciary duty extends only to "a willful and deliberate violation of his fiduciary duties." *In re Chi. Pac. Corp.*, 773 F.2d 909, 915 (7th Cir. 1985).

---

[3] The doctrine, which originated in *Barton v. Barbour*, 104 U.S. 126 (1881), required a party to obtain permission of the appointing court before bringing suit against a receiver.

On December 14, 2007, Spehar's attorney at that time[4] appeared before the Court on its motion for leave to file its amended answer and counterclaim. As filed, the counterclaim alleged a claim for breach of contract. The pleading stated that such claim is against the Trustee, "not individually but solely as Chapter 7 Trustee of the Estate of CMGT. . . ." (Docket No. 33.) The Court listened to arguments made by the Trustee and Spehar's counsel and granted Spehar's motion for leave to file the amended answer and counterclaim. Specifically, the Court opined that the counterclaim did "not seek any damages against the [T]rustee individually, but solely in his capacity as trustee of the estate." (Trustee Resp. to Spehar Mot. to Reconsider, Ex. C. at p. 10, lines 21-23.) The Court further stated that because "there is no in personam relief requested in the counterclaim against [the Trustee] personally but only in his capacity as trustee, and the request would be for damages against the bankruptcy estate for the alleged . . . contention that [the Trustee] . . . supposedly violated or breached the underlying financing agreement between the parties, I don't think the Barton doctrine applies. . . ." (*Id.* at p. 11, lines 3-12.)

Spehar's fourth and current attorney, contrary to the counterclaim filed by its second attorney, now clearly asserts personal liability against the Trustee in the motion at bar. Spehar presently maintains that it is "entitled to obtain judgment on its counterclaim, to seek sanctions against the Trustee for its [sic] wrongful actions and to petition the court for attorneys' fees regarding the same." (Spehar Mot. for Reconsideration ¶16.) A request to impose sanctions against a party is inherently personal. Thus, Spehar now seeks personal liability against the Trustee. The Barton doctrine prevents this claim against the Trustee. Moreover, as a result of the

---

[4] When the counterclaim was filed, Spehar was represented by its second set of attorneys of record. Now, Spehar is represented by a fourth set of attorneys.

dismissal of the malpractice litigation in the District Court, there are virtually no assets for the Trustee to administer in the Debtor's estate. Therefore, any recovery by Spehar on its counterclaim would be against the Trustee personally and barred by the Barton doctrine. Spehar did not request nor did it receive leave from this Court to seek in personam relief against the Trustee.

Spehar cites to *Maxwell v. KPMG, LLP*, 520 F.3d 713 (7th Cir. 2008) for the proposition that it can sue the Trustee for sanctions for filing a frivolous suit. Spehar's reliance on this case as a basis for this Court to vacate its Order dismissing the adversary proceeding and enter judgment on its counterclaim is misplaced. In *Maxwell*, the Seventh Circuit found that a Chapter 7 bankruptcy trustee's malpractice action against an accounting firm "may well be frivolous." *Id.* at 719. The court stated that the term frivolousness "must depend not on the net expected value of a suit in relation to the cost of suing, but on the probability of the suit's succeeding. If that probability is very low, the suit is frivolous. . . ." *Id.* The court invited the defendants in *Maxwell* to file a motion for an award of attorney's fees. *Id.* In a subsequent decision in the same case, the court addressed the defendants' motion for sanctions filed before it as well as a motion for leave to file a motion for sanctions in the district court. *Maxwell v. KPMG LLP*, No. 07-2819, 2008 WL 6140730 (7th Cir. Aug. 19, 2008). The court granted the motion for sanctions against the trustee's counsel. *Id.* at *4. However, the court refused to sanction the trustee. According to the Seventh Circuit, a trustee is "personally liable only if he willfully and deliberately violated his fiduciary duties." *Id.* The court found that there was no evidence to suggest that the trustee willfully violated his fiduciary duties, and thus, declined to hold him personally liable for the sanction. *Id.*

Here, the Court finds that Spehar has not alleged, much less demonstrated, that the Trustee willfully and deliberately violated his fiduciary duties. Rather, Spehar alleged that the Trustee breached the financing agreement. Furthermore, Spehar has not shown or presented evidence of a prima facie case against the Trustee. Consequently, Spehar's argument fails.

Furthermore, even if the Court finds that the counterclaim survives the dismissal of the adversary proceeding, the doctrine of judicial estoppel prevents Spehar from proceeding on its counterclaim. The Seventh Circuit has stated that a court "may raise [judicial] estoppel on its own motion in an appropriate case." *In re Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990). This is such a case.

Judicial estoppel arises when "a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter . . . assume a contrary position. . . ." *N.H. v. Me.*, 532 U.S. 742, 749 (2001) (internal quotation omitted). *Accord Zedner v. United States*, 547 U.S. 489, 504 (2006). Judicial estoppel is an equitable concept invoked at a court's discretion and designed "'to prevent the perversion of the judicial process[.]'" *Cannon-Stokes v. Potter*, 453 F.3d 446, 448 (7th Cir. 2006) (*quoting Cassidy*, 892 F.2d at 641). In other words, "[j]udicial estoppel is intended to protect the courts from the litigatory shenanigans that would result if parties could, without limitation or consequence, swap litigation positions like hats in successive cases based on simple expediency or self-benefit." *Jarrard v. CDI Telecomms., Inc.*, 408 F.3d 905, 915 (7th Cir. 2005). "One who argues a position in court, and prevails, rarely is entitled to switch ground and argue an inconsistent position later, even within the scope of a single proceeding." *In re Hovis*, 356 F.3d 820, 823 (7th Cir. 2004).

There is no hard and fast or ready formula for determining the proper circumstances under which judicial estoppel is to be applied. *Levinson v. United States*, 969 F.2d 206, 264 (7th Cir. 1992). Although no precise formula guides the application of judicial estoppel, several factors are relevant in deciding whether invocation of the doctrine would be appropriate: (1) the later position is clearly inconsistent with the earlier position; (2) the facts at issue are the same in both cases; (3) the party to be estopped convinced the first court to adopt its position; and (4) the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Jarrard*, 408 F.3d at 914-15; *United States v. Christian*, 342 F.3d 744, 747 (7th Cir. 2003).

The Court finds that all of the factors are present in order to properly invoke the doctrine here. First, Spehar's filed counterclaim specifically stated that such claim is against the Trustee "not individually but solely as Chapter 7 Trustee of the Estate of CMGT. . . ." (Docket No. 33.) In the instant motion, however, Spehar maintains that it is "entitled to obtain judgment on its counterclaim, to seek sanctions against the Trustee for its [sic] wrongful actions and to petition the court for attorneys' fees regarding the same." (Spehar Mot. for Reconsideration ¶16.) When the counterclaim was filed, Spehar was not making a claim against the Trustee personally. Presently, however, Spehar unquestionably seeks sanctions against the Trustee personally for his alleged wrongful actions. Spehar has changed its position in the instant motion and seeks in personam relief against the Trustee after the malpractice action was dismissed by Judge Kendall in the District Court. Clearly, Spehar seeks to tax the Trustee personally with the attorneys' fees it has incurred. Thus, Spehar's current position is inconsistent with his earlier position.

Second, the Court finds that the facts at issue are the same. Next, Spehar alleged to this Court that its counterclaim against the Trustee was not against him personally. On December 14, 2007, Spehar's attorney appeared before the Court on its motion for leave to file its amended answer and counterclaim. The Court listened to arguments made by Spehar's counsel and granted Spehar's motion for leave to file the amended answer and counterclaim. The Court stated that the counterclaim did "not seek any damages against the [T]rustee individually, but solely in his capacity as trustee of the estate." (Trustee Resp. to Spehar Mot. to Reconsider, Ex. C. at p. 10, lines 21-23.) The Court further noted that because "there is no in personam relief requested in the counterclaim against [the Trustee] personally but only in his capacity as trustee, and the request would be for damages against the bankruptcy estate for the alleged . . . contention that [the Trustee] . . . supposedly violated or breached the underlying financing agreement between the parties, I don't think the Barton doctrine applies. . . ." (*Id.* at p. 11, lines 3-12.) The Court acknowledged Spehar's position that the counterclaim was not against the Trustee personally and granted Spehar leave to file the counterclaim. Therefore, the third element has been satisfied.

Finally, the Court finds that Spehar would derive an unfair advantage or impose an unfair detriment on the Trustee if not estopped. In December of 2007 when Spehar sought leave to file its amended answer and counterclaim, its counsel at the time argued to this Court that the claim was not against the Trustee personally. Specifically, he stated to the Court that "[m]y client is not seeking to sue [the Trustee] personally. My client has a counterclaim against the [T]rustee's standing as trustee. (*Id.* at p. 7, lines 22-25.) Based upon that representation, the Court found that the Barton doctrine did not prevent Spehar from filing his counterclaim. (*Id.* at pp. 10-12.) Now, with its fourth attorney, Spehar has changed its course a full 180 degrees and seeks sanctions

against the Trustee personally. As a result of the dismissal of the malpractice litigation in the District Court, there are virtually no assets for the Trustee to administer and distribute. Accordingly, any imposition of sanctions would be against the Trustee personally, which would impose an unfair detriment on him.

## V. CONCLUSION

For the foregoing reasons, the Court denies Spehar's motion.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

**ENTERED:**

**DATE:** 8/11/10

**John H. Squires**
**United States Bankruptcy Judge**

cc: See attached Service List

**SERVICE LIST**

**David E. Grochocinski, Trustee v. Spehar Capital, LLC**
**Adversary Case No. 07 A 00838**

Kathleen M. McGuire, Esq.
Grochocinski, Grochocinski & Lloyd, Ltd.
1900 Ravinia Place
Orland Park, IL 60462

John G. Lamb, Esq.
Russell G. Winick & Associates, P.C.
1220 Iroquois Avenue, Suite 100
Naperville, IL 60563

William T. Neary, United States Trustee
219 S. Dearborn Street
Suite 873
Chicago, IL 60604

# EXHIBIT E

Edward T. Joyce & Associates, P.C.'s Response in Opposition to Defendants' Motion for Sanctions

Filed March 14, 2011

**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. | ) | |

**LIMITED RATIFICATION**

NOW COMES Ronald & Linda Holman ("HOLMAN") acting *pro se* for his/her LIMITED ratification of Robert Gerard Spehar's ("Spehar") Motion to Alter or Amend ("Spehar's Motion") filed with this Court on April 28, 2010 and respectfully states as follows:

1. I am a valid shareholder and/or unsecured creditor claimant against the Chapter 7 bankruptcy estate of CMGT, Inc. ("Estate").

2. On March 31, 2010 this Court summarily dismissed the Estate's malpractice action ("Malpractice Action") in a Judgment and Opinion ("2010 Opinion") that stated in pertinent part:

> "Suits brought by a trustee on behalf of creditors must be claims that can be asserted by all creditors, not just one. A claim is "personal" "if the claimant

himself is harmed **and no other claimant or creditor has an interest in the cause.** Here, while Grochocinski's suit against Defendants is couched as a professional malpractice claim brought on behalf of CMGT's estate for the ultimate benefit of all the creditors, **Grochocinski is really bringing [Spehar's] personal claim against Defendants."** (2010 Opinion at 25) *Emphasis Added.*

3. On April 28, 2010 Spehar intervened in this matter and timely filed Spehar's Motion.

4. I hereby concur with Spehar's Motion to the limited extent that it represents: (a) there are other legitimate claimants against the Estate besides Spehar, including myself, who have an interest in the Malpractice Action ("Other Claimants"), (b) there is a potential $1.6 million recovery from the Malpractice Action due those Other Claimants, including myself, and thus those Other Claimants are harmed by this Court's dismissal of the Malpractice Action and (c) CMGT, Inc. was not a startup.

WHEREFORE, I hereby ratify the Spehar Motion's prayer that this Court reconsider its 2010 Opinion and immediately set the Malpractice Action for trial by jury so that the truth can be discovered in this matter and so that I and all Other Claimants might potentially recover on our legitimate claims against the Estate.

DATED: May 3, 2010

Respectfully submitted,

By Ronald Hedmon
Acting Pro Se

Address: 9516 BADEN AVE
CHATSWORTH, CALIFORNIA
9134

Phone: 818-251-5209 WORK
818-298-6100 CELL

The parties to this action and the names, addresses, and telephone numbers of their respective attorneys are as follows:

PLAINTIFF

David E. Grochocinski
Grochocinski, Grochocinski & Lloyd, Ltd.
1900 Ravinia Place
Orland Park, IL 60462
Telephone: 708-226-2700
Fax: 708-226-9030

Edward T. Joyce
Arthur W. Aufmann
Robert D. Carroll
EDWARD T. JOYCE & ASSOC., P.C.
11 South LaSalle Street, Ste., 1600
Chicago, Illinois 60603
Telephone: (312) 641-2600
Fax: (312) 641-0360

DEFENDANT

MAYER BROWN ROWE & MAW LLP and
RONALD B. GIVEN
71 South Wacker Drive
Chicago, IL 60606-4716
Telephone: (312) 782-0600

Stephen Novack
Mitchell L. Marinello
Steven J. Ciszewski
Novack and Macey LLP
100 N. Riverside Plaza
Chicago, IL 60606
Telephone: (312) 419-6900

**CERTIFICATE OF SERVICE**

I, Ronald Holman, certify that I caused a copy of the attached *Limited Ratification* to be served on the parties listed above, by fax and/or by depositing with the United States Post Office in Van Nuys, CA, postage prepaid, prior to 6:00 p.m. this 3 day of May, 2010.

# EXHIBIT F

Edward T. Joyce & Associates, P.C.'s Response in Opposition to Defendants' Motion for Sanctions

Filed March 14, 2011

MHN



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

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



**AFFIDAVIT OF RONALD HOLMAN TO SUPPLEMENT PREVIOUSLY-FILED LIMITED RATIFICATION**

This Affidavit was originally prepared by R. Gerard Spehar ("Spehar") based on our conversations and communications, and I reviewed & adjusted it, so this Affidavit represents my understanding. I, Ronald Holman, swear and affirm under oath and intending to be bound that I have carefully reviewed its contents, and that the following statements are true and correct:

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

2. I am the CEO of The Holman Group. The Holman Group has been in business for over 30 years providing a full array of managed-care and behavioral health services

for employers, associations, and trusts. The Holman Group was established in 1979 and now delivers Health Care to over 600 Employer groups globally.

3. In or about 2001, my wife and I invested a total of $200,000 in CMGT, Inc. ("CMGT"). We first invested $100,000 in CMGT's convertible debentures, which made us CMGT shareholders and eventually secured creditors of CMGT's bankruptcy estate ("Estate") in that amount. We then loaned another $100,000 to CMGT, and therefore we are also unsecured creditors of the Estate in that amount. We wish to recover our $200,000 investment in CMGT, if possible.

4. On March 31, 2010, this Court issued a final Opinion and Order dismissing this malpractice action in its entirety ("2010 Opinion"). I have read the 2010 Opinion.

5. On April 28, 2010, Spehar filed a Motion to Alter or Amend the 2010 Opinion ("Spehar Motion"). I have read the Spehar Motion and Exhibits, including Spehar's Affidavit (Exhibit 1).

6. On May 4, 2010, my wife and I filed a Limited Ratification ("Ratification") of the Spehar Motion. Our Ratification informed the Court that there are other legitimate claimants against the Estate besides Spehar, including ourselves, who have an interest in this matter, that there is a potential $1.6 million recovery due those other claimants, and that those other claimants are materially harmed by the Court's dismissal of this matter before trial. Our Ratification asked the Court to set this matter for trial so that the truth could be discovered and those other claimants might potentially recover their claims.

7. Our Ratification also informed the Court that CMGT was not a startup. I invested in CMGT because CMGT was ahead of its time in providing the *Absence Expert* tracking software it owned and its professionally-staffed *First In Touch* call center business

model. Prior to its demise, CMGT had been operating for several years, had signed up several significant partners and clients, was delivering services to those clients, had MANY interested new clients and had several national Insurance Brokers interested in CMGT, which is where much of the new business comes from for these kind of products. CMGT's software was a 'MUST HAVE' for ALL employers with 250 employees or more, and the upside to CMGT's already operating business was huge. I know this because I deliver Health Care to some 600 Employer groups, interact with these companies' Human Resource departments, Insurance Brokers and understand the kind of event tracking that every company's Human Resource department 'MUST' do in order to be compliant with the many State & Federal Laws, on an ongoing basis.

8. What happened to CMGT was a real tragedy for its shareholders, creditors, it's customers and potential customers. Whether or not Spehar's judgment is valid, CMGT's other investors and creditors deserve to at least potentially recover from our share of CMGT's lost profits.

9. On June 10, 2010, Spehar filed a Supplement to the Spehar Motion ("Spehar Supplement"), which included a Consolidated Chronology of Key Events In The SC-CMGT Dispute And The California Litigation ("Chronology"). I have read the Spehar Supplement, its Chronology and its Exhibits that are referred to below.

10. As noted above, I was a major CMGT shareholder and creditor during the entire time period covered by the Chronology (January 2003 through May 2004), and from my own personal experience and knowledge I hereby state and affirm:

a. Neither Franco nor Defendant Ronald Given ("Given"), nor anyone else associated with CMGT, ever informed me that Harlan Smith ("Smith")

was a principal investor in CMGT's disputed Newco deal ("Newco"), or that Spehar was "in the loop" with Smith and Newco. (Chron. ¶¶ 2, 6, 11, 12, 15 and 22) I first learned of Smith's existence and involvement in Newco from the Spehar Motion and Affidavit.

b. At no time either in or after April 2003, did Franco, Given or anyone else associated with CMGT ever inform me that Franco, Spehar and CMGT shareholders Jim Wong and Wayne Baliga had formed Millennium Partnership ("MP"), with Given as their counsel, to pursue an MOIC deal that would have also funded CMGT. (Chron. ¶¶ 4, 13, 16, 19 and 22) I first learned of the MOIC/CMGT deal from trustee David Grochocinski's ("Grochocinski") August 2006 complaint in this matter. I first learned of Counsel Tree Communications' and Madison Dearborn Partners' interest in funding MOIC and CMGT, and of their August 1, 2003 meeting with MP and Defendants, from the Spehar Motion, Affidavit and Supplement.

c. Exhibit 4 to the Spehar Supplement is Franco's May 7, 2003 rejection letter to Sealaska (Chron. ¶6), which states: "As is my duty, I will present your Term Sheet dated 5-01-03 to my shareholders." To the best of my recollection and knowledge, Franco never present Sealaska's 5-01-03 Term Sheet to me or other shareholders for our vote, either before or after Sealaska terminated its interest in CMGT on May 13, 2003. (Chron. ¶9)

d. In May 2003, neither Franco nor Given nor anyone else associated with CMGT ever informed me that CMGT was also considering Newco, while at the same time rejecting Sealaska's equivalently-priced Term Sheet.

(Chron. ¶10) Had I known this, and had I been given the opportunity to vote between those two deals, I would have voted to accept Sealaska's Term Sheet rather than Newco. That is because, unlike Newco, Sealaska's deal was dispute free, it left CMGT with 49% of the company (versus 20% with Newco), and it fully paid CMGT's creditors (including my wife and me). Also, Sealaska had already done extensive due diligence on CMGT and, from what I now know, it appears Sealaska would have been a committed and much stronger business partner for CMGT going forward. (Chron. ¶¶ 5-10)

e. I first learned of Newco from Franco's August 7, 2003 letter to shareholders, which stated "This is a deal we should and must do. There are no alternatives." (Chron. ¶14)

f. Neither Franco nor Given nor anyone else associated with CMGT ever informed me that the Washoe Tribe ("Washoe") were also very interested in funding CMGT, that CMGT had pre-approved a $2.5 million LOI which was sent to the Washoe on August 14, 2003, or that the Washoe had then actually committed to signing that LOI on August 29, 2003 and had returned it for CMGT's sign-off on their immaterial changes on September 2, 2003 before commencing due diligence. (Chron. ¶¶ 17-19, 23 and 25-28)

g. On August 15, 2003, Franco asked CMGT shareholders to vote to approve Newco (Chron. ¶19), and on August 27, 2003 Franco then informed us

that a majority had voted to approve Newco (Chron. ¶22). When voting on Newco, I had not been told and therefore did not know:

- Spehar was strongly disputing Newco because CMGT refused to pay him (Chron. ¶15),
- Spehar's payment claim likely had merit because Smith was both a principal Newco investor and "in the loop" with Spehar (*see* "a" above).
- Given had advised Spehar to seek legal counsel v. CMGT if he wished to pursue his payment claim (Chron. ¶16),
- There was little chance that CMGT would settle the Spehar dispute (Chron. ¶20),
- There were other investors besides Newco who were dispute-free and also interested in funding CMGT under much better terms than Newco (Chron. ¶13 and 17-18), and
- Given had solicited a $100,000 payment from Newco and advised Newco that, because of the Spehar dispute, it could "walk away with the software and, most importantly, Lou Franco without making any payment to CMGT whatsoever." (Chron. ¶21)

h. I first learned that Spehar disputed Newco from Franco's August 27, 2003 letter to shareholders informing us that we had approved Newco. Based on Franco's characterization of the Spehar/CMGT dispute in that letter, I did not believe it posed a risk to Newco and I thought Newco would close.

i. Had CMGT shareholders known all of the withheld information listed in paragraph "g" above when voting on Newco, I would not have voted for Newco and I do not believe a majority would have voted to approve Newco. Knowing the true risk to Newco from the Spehar dispute, and knowing that there were dispute-free alternatives with better terms available, I believe shareholders would have instead voted to pursue an alternative such as the Washoe LOI.

j. Neither Franco nor Given nor anyone else associated with CMGT ever informed me, on September 1, 2003 or at anytime thereafter, that "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," that the degree of risk of Spehar taking legal action was "high," or that the "likelihood of settlement is likely or even unknown if legal action is taken against CMGT, keeping me in the dark" (Chron. ¶24)

k. I was not asked to contribute money to defend CMGT against Spehar's California lawsuit. To the contrary, I was led to believe that defending against Spehar would be pointless and a waste of time and money, and that the UCC-1 statements that Franco and Given filed for shareholders in December 2003 would protect at least our $100,000 initial investment in CMGT if Spehar obtained a default judgment against CMGT. (Chron. 34, 35, 40, 47-50 and 55).

11. The letter I wrote to Grochocinski against Spehar (2010 Opinion at 25), which other shareholders also did, was represented to me as being actually prepared by Franco and Mayer Brown. Unknown to me (and likely to other shareholders who wrote letters to Grochocinski), 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. I now suspect that what we were told was to unknowingly position shareholders/creditors to support possible fraud on the part of Mayer Brown and Franco.

12. At this point, I believe it is possible that the Court made its decision without having all the facts. Having lost $200,000 in CMGT, I want 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. I know of no other way to get any of our money back.

FURTHER AFFIANT SAYETH NAUGHT

DR Ronald Holman

Dr. Ronald Holman. CEO
The Holman Group
9451 Corbin Ave #100
Northridge, CA 91324

## CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California
County of LOS ANGELES }

On July 23 2010 (Date) before me, ALAN M. KAMINSKY NOTARY PUBLIC (Here Insert Name and Title of the Officer)

personally appeared RONALD HOLMAN (Name(s) of Signer(s))

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

ALAN M. KAMINSKY
Commission # 1823400
Notary Public - California
Los Angeles County
My Comm. Expires Dec 15, 2012

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Alan M. Kaminsky (Signature of Notary Public)

Place Notary Seal Above

### OPTIONAL

*Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.*

**Description of Attached Document**

Title or Type of Document: AFFIDAVIT

Document Date: _____ Number of Pages: _____

Signer(s) Other Than Named Above: _____

**Capacity(ies) Claimed by Signer(s)**

Signer's Name: _____
☐ Individual
☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Attorney in Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____
Signer Is Representing: _____

RIGHT THUMBPRINT OF SIGNER
Top of thumb here

Signer's Name: _____
☐ Individual
☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Attorney in Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____
Signer Is Representing: _____

RIGHT THUMBPRINT OF SIGNER
Top of thumb here

**CERTIFICATE OF SERVICE**

I, Ronald Holman, certify that I caused a copy of the attached *Affidavit Of Ronald Holman To Supplement Previously-Filed Limited Ratification* to be served on the parties listed below, by fax and/or by depositing with the United States Post Office in Van Nuys, California, postage prepaid, prior to 6:00 p.m. this 26th day of July, 2010.

PLAINTIFF

David Edward Morgans
MYERS & MILLER, LLC
30 North LaSalle Street, Suite 2200
Chicago, Il 60602
Telephone: (312) 345-7250
Fax: (312) 345-7251

Edward T. Joyce
Arthur W. Aufmann
Robert D. Carroll
EDWARD T. JOYCE & ASSOC., P.C.
135 South La Salle Street, Suite 2200
Chicago, Illinois 60603
Telephone: (312) 641-2600
Fax: (312) 641-0360

DEFENDANT

Stephen Novack
Mitchell L. Marinello
Steven J. Ciszewski
NOVACK AND MACEY LLP
100 N. Riverside Plaza
Chicago, IL 60606
Telephone: (312) 419-6900
Fax: (312) 419-6928

MOVANT

R. Gerard Spehar
1625 Grandview Avenue
Glendale, CA 91201
Telephone: (818) 247-5558
Fax: (818) 247-0616

# EXHIBIT G

Edward T. Joyce & Associates, P.C.'s Response in Opposition to Defendants' Motion for Sanctions

Filed March 14, 2011

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

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

**AFFIDAVIT OF EDWARD T. JOYCE**

Edward T. Joyce, being first duly sworn on oath, deposes and states as follows:

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

2. I have been a civil litigator for over forty years. During that time, I have been involved in hundreds of pre-filing investigations. It is typical in my pre-filing investigations to send letters with tolling agreements to witnesses who might have both knowledge of relevant facts and potential liability.

3. Consistent with that practice, I caused one of my associates, Robert D. Carroll, to send letters with tolling agreements to Louis Franco ("Franco") and James Wong ("Wong") before this lawsuit was filed. (Defendants submitted those two letters in support of their Motion for Summary Judgment on their Unclean Hands Defense as Exhibits 25 and 26.) In those letters, I

asked Franco and Wong to meet with me to discuss what happened to CMGT, Inc. Although both Franco and Wong signed the tolling agreements, they refused to meet with me.

4. I made the decision to send the foregoing letters and tolling agreements to Franco and Wong independently. I did not make that decision on the basis of anything that Gerry Spehar said or did. Moreover, my decision to send those letters is consistent with my normal practice for pre-filing investigations.

FURTHER AFFIANT SAYETH NAUGHT

Edward T. Joyce

Sworn to and subscribed before me this 14th day of March, 2011.

Notary Public

# EXHIBIT H

Edward T. Joyce & Associates, P.C.'s Response in Opposition to Defendants' Motion for Sanctions

Filed March 14, 2011

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

DAVID GROCHOCINSKI,
Plaintiff,
v
MAYER BROWN ROWE & MAW, LLP, et al.,
Defendants

Docket No. 06 C 5486
Chicago, Illinois
May 14, 2008
10:30 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MORTON DENLOW

PRESENT:

For the Plaintiff:
ROBERT D. CARROLL
Edward T. Joyce & Associates
11 South LaSalle Street, Suite 1600
Chicago, Illinois 60603

For the Defendants:
STEPHEN NOVACK
STEVEN J. CISZEWSKI
Novack & Macey
100 North Riverside Plaza, Suite 1500
Chicago, Illinois 60606

Court Reporter:
Lois A. LaCorte
219 South Dearborn Room 1918
Chicago, Illinois 60604
(312) 435-5558

they weren't in response to something that would allegedly give away counsel's theories, then we're going to come back and say "Wait a minute, we argued waiver, we don't need to argue waiver. This isn't" -- I just want to preserve that.

THE COURT: Let me say I have been on the bench now 12 years, and I have done a number of these. I have never seen files as well organized and presented as they 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, and clearly, I'm going to dig into it, but if I can resolve these things on the overarching legal issues, some of that may or may not come into play.

MR. NOVACK: Of course. So if I can return now, so we think they did inject this issue of the good faith. When we first filed our motion, we said that this was a fraud performed by Spehar Capital and we addressed Spehar Capital's conduct. Their response said no, it should be tested by the trustee's conduct, and the trustee made a good faith investigation, the trustee really believed in good faith, et cetera.

But, Judge, in a strange way it may not even matter because regardless of how we got here, Judge Kendall has opened the door to testing what the trustee did with investigation prior to filing this complaint.

THE COURT: Under that rationale why would she even bother to send it to me? Under that rationale if she had opened

THE COURT: Right, that's all. I'm not looking to open up other issues that we talked about here.

MR. CARROLL: Very good.

MR. NOVACK: Your Honor, just to make that perfectly clear, we are just going to address that case, we are not going to open up the whole common interest doctrine.

THE COURT: Just that case, just that case, period.

MR. NOVACK: Thank you, your Honor.

THE COURT: Thank you both. I enjoyed the argument. I'm going to take it under advisement and give you a ruling within 21 days.

MR. NOVACK: Thank you very much.

* * *

I certify that the above is a true and correct transcript of proceedings had in the above matter.

Lois A LaCorte

Lois A. LaCorte