Grochocinski v. Mayer Brown Rowe & Maw LLP et al Doc. 236

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

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

DAVID GROCHOCINSKI'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SANCTIONS

Unable to seek sanctions under Rule 11 for the claims advanced by plaintiff because they did not submit proper safe harbor motions after receiving any of the papers advancing those claims, defendants resort to the inherent power of the court to punish wayward litigators. But their complaints about Mr. Grochocinski's conduct focus on acts and omissions before the lawsuit was removed to this court-the very conduct that resulted in the entry of judgment as a matter of law against plaintiff. And defendants do not even mention that the personal liability of a bankruptcy trustee depends on his having acted willfully and deliberately in violation of his fiduciary duties. As this response and the record will show, Mr. Grochocinski should not be sanctioned and defendants' motion, as to him, should be denied.

In this case the defendants are seeking to shift their legal fees and costs onto David

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Grochocinski individually, not as Trustee of the bankruptcy estate of CMGT, Inc. They invoke the exception to the American Rule of the court's inherent power to punish litigation conduct that interferes with the judicial process. That power, of course, is not without limitation, and one of the limits is that it does not extend to the punishment of pre-litigation conduct. It is what happened before this litigation commenced--much of which occurred before Mr. Grochocinski was appointed Trustee and which was then attributed to him, as Trustee, under the doctrine of judicial estoppel–that formed the basis of the court's entry of summary judgment and now forms the basis of the motion for sanctions. Since Mr. Grochocinski has done nothing to frustrate the court's processes during the pendency of the case in this court, he should not be subject to the punishment sought by defendants.

A bankruptcy trustee owes fiduciary duties to several different constituents, whose desires and interests are not necessarily congruent. Accordingly, the law invests a wide degree of discretion in a trustee's decision-making so as to enable him to carry out his duties without constant second-guessing by affected parties. A critical feature of the trustee system is that those who serve as trustees are immune from personal liability for their official actions unless they have acted willfully and deliberately in breach of their fiduciary duties. As the ensuing discussion will reveal, at no time did Mr. Grochocinski act willfully and deliberately against the defendants.

ARGUMENT

I. Because the court's inherent authority extends only to a party's behavior in the litigation before the court, and the conduct cited by defendants took place prior to the removal of this case from state court, sanctions should not be entered against Mr. Grochocinski.

The purpose of the court's inherent power to order sanctions is to control the

conduct of the litigants appearing before the court, during those proceedings. "These powers are 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (citation omitted). "[T]he imposition of sanctions under the bad-faith exception depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation." Id. at 53.

Chambers is the leading Supreme Court case on the shifting of attorneys' fees under the court's inherent power, and the case primarily cited by defendants. The facts of that case vividly illustrate the confines of the court's inherent power. There, the defendant in an action for specific performance of a contract to sell a television station was notified (as required by Fed.R.Civ.P. 65 and a local district court rule) on a Friday that plaintiff would be filing suit the following Monday, seeking a temporary restraining order. Over the weekend defendant acted to place the station out of the court's jurisdiction by conveying the station's property to a trust by warranty deeds that were recorded early Monday morning. Speaking to the court that morning, defendant's lawyer intentionally withheld that information. Later, defendant defied a preliminary injunction, took delaying actions, filed meritless court documents and tried to take unwarranted discovery, then stipulated on the eve of trial that the purchase agreement was enforceable. After trial, defendant continued his obstruction by violating injunctive orders, asking the FCC to allow relocation of the transmission facilities, and removing equipment from the station.

After a frivolous appeal, the district court imposed sanctions in the form of the plaintiff's attorneys' fees and expenses. The Fifth Circuit affirmed, and so did the Supreme

Court. As the facts in Chambers and the Supreme Court's opinion make clear, the focus of the inherent power to punish litigants is on their conduct before the court. That limitation is consistent with the status of the inherent power as an exception to the American Rule against recovery of attorneys' fees. As noted in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 260 (1975) (rejecting judicially-created fee-shifting on a "private attorney general" basis and emphasizing the role of Congress in creating exceptions to the American Rule), Congress has not "extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted."

The four dissenters in Chambers dissented, in part, because they perceived that the district court had punished pre-litigation conduct, which should be outside the ambit of the inherent power. "When a District Court imposes sanctions so immense as here under a power so amorphous as inherent authority, it must ensure that its order is confined to conduct under its own authority and jurisdiction to regulate." 501 U.S. at 72 (Justice Kennedy, dissenting).

> When a federal court, through invocation of its inherent powers, sanctions a party for bad-faith prelitigation conduct, it goes well beyond the exception to the American Rule and violates the Rule's careful balance between open access to the federal court system and penalties for the willful abuse of it. Id. at 74.

Since Chambers was decided, no Supreme Court case has extended the inherent power to pre-litigation conduct.

In the Seventh Circuit particularly, pre-litigation conduct does not fall into the bad faith exception to the American Rule. That is established by the leading case (that is, the case that contains the most substantive discussion of the issue) in the circuit, and one not

cited by defendants, Zapata Hermanos Sucesores v. Hearthside Baking Co., 313 F.3d 385 (7th Cir. 2002). In Zapata, defendant Lenell had been sued for breach of a contract for the purchase of cookie tins and took the case to trial even though it conceded that it owed at least half of plaintiff's damages and had no excuse for not paying for those tins. The judge then tacked on all of plaintiff's attorneys' fees to punish "Lenell for having failed to acknowledge liability and spare Zapata and the judge and jury and the witnesses and so on the burden of a trial." 313 F.3d at 391. After finding that the Convention on Contracts for the International Sale of Goods did not provide authority for "abandoning the hallowed American rule", id. at 389, the court then determined that the court's inherent authority did not extend that far either, and reversed the attorneys' fees award.

The heart of the court's opinion in Zapata, and the portion that applies especially to the instant case, is as follows:

> The inherent authority of federal courts to punish misconduct before them is not a grant of authority to do good, rectify shortcomings of the common law (as by using an award of attorneys' fees to make up for an absence that the judge may deem regrettable of punitive damages for certain breaches of contract), or undermine the American rule on the award of attorneys' fees to the prevailing party in the absence of statute. [citations omitted] These cases and others we could cite make clear that it is a residual authority, to be exercised sparingly, to punish misconduct (1) occurring in the litigation itself (for then the punishment would be a product of substantive law--designed, for example, to deter breaches of contract), and (2) not adequately dealt with by other rules, most pertinently here Rules 11 and 37 of the Federal Rules of Civil Procedure, which Lenell has not been accused of violating. Id. at 390-91.

In the instant case, judgment was entered in favor of defendants on the merits of their unclean hands defense, which depended entirely on conduct that did not occur in the

Grochocinski v. Mayer Brown litigation itself but which, rather, occurred before (in many instances, well before) the action was removed to this court. The conduct cited by defendants in their motion consists of Spehar Capital LLC's ("SC") obtaining a default judgment in California and filing an involuntary bankruptcy petition against CMGT, and Trustee Grochocinski's failing to try to vacate the judgment and failing to investigate the malpractice claim adequately before filing it. The court considered the relationship between SC and its principal, Gerry Spehar ("Spehar"), and the trustee, between the time shortly after his appointment and the time shortly before filing suit, attributed Spehar's conduct to the trustee (and, hence, to CMGT) and thereby invoked the doctrine of judicial estoppel to enter summary judgment for defendants.

Since the basis of the court's summary judgment was pre-litigation conduct, it is not subject to fee-shifting through the court's inherent power. Again, as the court explained in Zapata:

> Insofar as he focused on Lenell's behavior in the litigation itself, which, to repeat, is the only lawful domain of the relevant concept of "inherent authority"–the authority could not constitutionally be extended to give parties remedies not available to them under the law of the state that furnishes the substantive rules of decision in the case–the judge punished Lenell for having failed to acknowledge liability.... Id. at 391.

Here, the court found that because of what happened before this suit was filed, plaintiff could not establish proximate cause of loss under Illinois law (citing, among other cases, Warren v. Williams, 730 N.E.2d 512, 517 (2000), "holding that the plaintiff who alleged his attorney was negligent in allowing a default judgment to be entered against him was required to show that he would otherwise have successfully defended the underlying

action"; Opinion at 27). Of course, under Illinois law there could be no fee-shifting remedy in this case because Illinois follows the American Rule. Hamer v. Kirk, 64 Ill.2d 434, 437, 356 N.E.2d 524, 525, 1 Ill.Dec. 336, 337 (1976). (Indeed, Illinois law prohibits entirely the awarding of punitive damages in legal malpractice actions. 735 ILCS 5/2-1115.)

The cases in this district that impose sanctions under the court's inherent power also show that the focus is on the conduct of the litigation, not what preceded it. Thus, in Mach v. Will County Sheriff, 580 F.3d 495, 500 (7th Cir. 2009), the district court had ordered plaintiff to pay a portion of defendant's legal fees in preparing a summary judgment motion because he had retained certain claims in the suit even after discovery established their lack of merit. In REP MCR Realty v. Lynch, 363 F.Supp.2d 984 (N.D.Ill. 2005), aff'd, 200 F.App'x. 592 (7th Cir. 2006), the defendant used forged documents in an evidentiary hearing. And in Methode Electronics, Inc. v. Adam Technologies, Inc., 371 F.3d 923 (7th Cir. 2004), plaintiff had intentionally filed a complaint with a falsehood in order to secure venue. Perhaps most telling of all is United States v. American Home Assurance Co., 98 C 0995, 1999 WL 618216, at *2 (N.D.Ill. August 9, 1999), in which the court denied attorneys' fees sought by plaintiff against defendant for refusing to investigate plaintiff's claim, specifically on the ground that the inherent power to enter sanctions does not extend to pre-litigation conduct.

Finally, Mr. Grochocinski wishes to point out that to the extent that the motion for sanctions may be construed to complain of post-removal conduct, such as Grochocinski's filing a response in opposition to the summary judgment motion rather than withdrawing the claim, that conduct would have been covered by Fed.R.Civ.P. 11, and would not be the

subject of the court's inherent authority, because it would have involved the filing of a paper with the court. Inherent authority does not extend to the entry of sanctions for conduct that is governed by federal rules of procedure.

> This Court has recognized the need to be cautious when resorting to inherent powers to justify an action, particularly when the matter is governed by other procedural rules, lest (even in the absence of a direct conflict) the restrictions in those rules become meaningless.
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> Sanctions authorized only by the inherent power of the court are therefore available only when no direct conflict with laws or national rules of procedure would arise. Even then, they must be used only with great caution.
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> Kovilic Construction Co. v. Missbrenner, 106 F.3d 768, 772-73 (7th Cir. 1997) (reversing sanctions when counsel's failure to file appearance and affidavit of ethical conduct were not fraudulent, dilatory or in bad faith) (citations omitted).

The court in Zapata also commented on the relation of Rule 11 to inherent authority:

> But it may be useful in guiding further proceedings on remand to point out that to the extent that those rules place limits on the award of sanctions under them (for example by the provision of safe harbors in Rule 11), those limitations are equally limitations on inherent authority, which may not be used to amend the rules. 313 F.3d at 391 (citing Kovilic).

The defendants did not serve any Rule 11 motions on plaintiff pursuant to the safe harbor provision of Rule 11(c)(2), so sanctions cannot be ordered based on contentions and statements made in plaintiff's filings in this court. In other words, defendants should not be permitted to appeal to the court's inherent authority as an end run around Rule 11.

From the U. S. Supreme Court to the district court level, then, it is established that the court's inherent power to shift legal fees as a sanction is intended for, and limited to, the punishment of conduct that occurred during the litigation itself, not before. The defendants

won this case on the basis of their unclean hands defense, which, as Magistrate Judge Denlow noted in ruling on discovery issues, pertained entirely to pre-litigation behavior. Doc. 101, Memorandum Opinion and Order of June 9, 2008, p. 4; id., p. 26: "Moreover, because these documents were created after the complaint was filed, they do not involve Plaintiff's pre-filing investigation, and are thus not relevant to the unclean hands issue." Since the complained-of conduct on the part of Mr. Grochocinski took place before the case was removed to this court, defendants' motion for sanctions should be denied on that ground alone. Nevertheless, Mr. Grochocinski now will go on to explain why he did not act willfully and deliberately at any time in this matter, before and after removal.

II. Mr. Grochocinski did not commit a willful and deliberate breach of his fiduciary duty.

"Because of their very potency, inherent powers must be exercised with restraint and discretion." Chambers, cited above at p. 3, 501 U.S. at 44. "NASCO emphasizes that the imposition of sanctions, including attorneys' fees, on the basis of the court's inherent power is to be undertaken with great circumspection." U.S. ex rel. Treat Brothers. Co. v. Fidelity & Deposit Co., 986 F.2d 1110, 1120 (7th Cir. 1993). Mr. Grochocinski has always respected the authority of this court and the judicial system, has followed established bankruptcy procedures, and never set out to perpetrate a fraud. The following discussion will explain why this court, employing the appropriate degree of restraint, discretion and circumspection, should not punish Mr. Grochocinski for his conduct under the circumstances.

In order to pierce the official capacity of a bankruptcy trustee and reach him personally with the imposition of sanctions, it must be established that he was guilty of the "willful and deliberate violation of his fiduciary duties." In re Chicago Pacific Corp., 773 F.2d

909, 915 (7th Cir. 1985). The court recognized this standard in footnote 12 of its Opinion. Mr. Grochocinski will not belabor the reasons that a trustee's conduct must sink to such depths in order to justify sanctions, except to say the following.

The willful and deliberate standard is the manifestation of the rule that "bankruptcy trustees are generally immune from suit for actions arising out of the operation of the estate." In re Markos Gurnee Partnership, 182 B.R. 211(Bankr.N.D.Ill. 1995) (containing a thorough discussion of trustee immunity and personal liability). "'[A] trustee is not liable in any manner for mistakes in judgment where discretion is allowed.'" Id. at 219 (quoting In re Hutchinson, 5 F.3d 750, 753 (4th Cir. 1993)). That immunity facilitates public policy objectives important to the efficient administration of bankruptcy estates, such as the distraction from a trustee's duties that would result if he could be sued left and right and the need to attract qualified trustees by minimizing the irksomeness of the task. In re Linton, 136 F.3d 544, 545 (7th Cir. 1998). A trustee is stuck in the middle of a group of disparate entities looking over his shoulder: the debtor, secured and unsecured creditors, their lawyers, the U.S. Trustee's office and the bankruptcy court. Thus, a wide degree of latitude must be accorded a trustee, and hence the existence of a rigorous standard of personal liability that requires not only a breach of fiduciary duty, but a willful and deliberate breach.

The very words, "willful and deliberate", bespeak a subjective standard that requires the analysis of a trustee's conduct to be viewed from the standpoint of the trustee. The Chambers case itself calls for a subjective standard to be used when a court determines whether to enter sanctions under its inherent power, as contrasted with the objective standard utilized under Rule 11. 501 U.S. at 47. Therefore Mr. Grochocinski submits his

declaration as Exhibit A of this response, not to contradict the record but to place the events of this case in context. As needed, he also will refer to the record in support of this response.

Mr. Grochocinski is a suburban attorney who represents middle-class individuals and small businesses in debtor/creditor matters, and also is a member of the panel of private trustees maintained by the office of the U.S. Trustee. Ex. A, ¶¶ 1 and 2. Appointments to individual cases are random. Ex. A, ¶ 3. When an involuntary petition is filed (as in the CMGT case), very little information about the debtor, such as schedules of assets and liabilities, is provided to the trustee. Ex. A, ¶¶ 6 and 7.

Mr. Grochocinski was appointed trustee of CMGT by letter dated September 17, 2004, which he received on September 21, 2004. Ex. A, ¶ 5. He became aware of the judgment against CMGT and did not go to California or hire a California attorney to try to vacate it. His reasons for that (lack of funds, lateness and unlikelihood of success on the merits) were given in his deposition and are recounted in the court's Opinion (p. 9), and will not be belabored here. But put this in context. Mr. Grochocinski can't recall ever trying to vacate a default judgment in a no-asset case, because it does not prove in his experience to be a worthwhile or practical strategy.[1] Ex. A, ¶ 10.

The evidence does not show that he willfully and deliberately set out to do nothing about the judgment. In fact, he did take some time to look into California law, and reached

[1] The CMGT case was, for all intents and purposes, a no-asset case. All CMGT had was some software that was sold to SC for $1,500. Ex. 16 of Grochocinski deposition, Doc. No. 138-16, ¶ 25.

the conclusion that there was nothing he could do legally, as well as practically.[2] His conclusion in that regard also shows why he did not obtain a transcript of the California hearing: if he couldn't try to vacate the default, there would be no need for him to look at it. From the vantage point of Mr. Grochocinski as trustee, the handling of the default judgment was well within his discretion and surely should not be the subject of sanctions as having been a willful and deliberate breach of his duties.

By the nature of his position, a bankruptcy trustee is not a participant in the events that led up to the bankruptcy filing and therefore can have no personal knowledge of them. Since he is not a fact witness, a trustee a unique type of litigant. And while a trustee should be conversant with bankruptcy law and procedure, other areas of substantive law may well be beyond his expertise. So when a complicated professional liability claim is brought to his attention, with potential to benefit the unsecured creditors of the debtor, the trustee must rely on an attorney versed in the subject matter of the claim to investigate and evaluate the facts.[3] That is precisely what happened here: Mr. Grochocinski retained special counsel to

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[2] In fact, since his research was conducted on November 29, 2004, as the billing record indicates (Ex. I of defendants' summary judgment motion, Doc. No. 138-4. P. PL 007571), it was too late to vacate. The judgment was entered on March 18, 2004, and the California statute allows six months to try to vacate it, which takes it to September 18, 2004, before Mr. Grochocinski was appointed trustee. Under the Bankruptcy Code, 11 U.S.C. § 108, an additional 60 days is afforded from the date of the order of relief, which in this case was September 15, 2004. Defendants' summary judgment brief, Doc. No. 136, pp.7-8. November 29 is more than 60 days after September 15, so even if Mr. Grochocinski could have acted instantaneously it was too late.

[3] On July 31, 2006, Mr. Grochcinski wrote to Gerry Spehar as follows (in relevant part): "Mr. Joyce is the estate's special counsel. [H]e has great leeway in obtaining information to prosecute the case if one exists. I am not going to tell him how to run the case or substitute my opinions or suggestions. If that was my intent then I

investigate and that counsel recommended the filing of suit against Mayer Brown Rowe & Maw ("MBRM"). Ex. A, ¶¶ 15 and 19. That decision was not a willful and deliberate breach of fiduciary duty on his part, and indeed from his perspective it was in fulfillment of his duty.

No claim is made that attorney Edward Joyce is unqualified for the task he undertook on behalf of Trustee Grochocinski, who personally reviewed his qualifications before petitioning the court for approval. Ex. A, ¶ 16. Since the selection of Mr. Joyce was approved by the bankruptcy court, there can be no claim that seeking his appointment was a breach of duty. In re Markos Gurnee Partnership, cited above at p. 10, 182 B.R. at 218.

While Mr. Grochocinski has been criticized for not having knowledge of the facts alleged in the complaint, that is understandable given the role of special counsel in the case: to investigate and advise as to the wisdom of bringing suit against MBRM. Mr. Grochocinski is qualified neither to investigate nor to litigate a professional liability claim. Ex. A, ¶ 17 ; Grochocinski deposition, Ex. J of summary judgment motion, Doc. No. 138-5, pp. 35 (lines 23-24), 123 (lines 8-13). The order appointing Mr. Joyce charged him with those tasks. Ex. 1 of Ex. A. He carried them out, not only recommending that suit be filed but also, when faced with a motion to dismiss and a motion for summary judgment, recommending that the motions be opposed. Ex. A, ¶ 27. It is anticipated that Mr. Joyce will defend the reasonableness of suing Mayer Brown, and of course if the court agrees there can be no sanctions against Mr. Grochocinski for having authorized him to do so. But even if Mr. Joyce is wrong, Mr. Grochocinski's reliance on his advice is justifiable and should not

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would have hired my own firm to do the case but I did not because I am simply not schooled in this area of the law." Ex. 31 of Grochocinski deposition, Doc. No. 138-18, p. PL 02226.

lead to sanctions.

Mr. Grochocinski's position, therefore, is identical to that of Trustee Maxwell in Maxwell v. KPMG LLP, No. 07-2819, 2008 WL 6140730 (7th Cir. August 19, 2008) (Maxwell II). In Maxwell I (Maxwell v. KPMG LLP, 520 F.3d 713, 719), the court had invited the successful appellee to bring a motion for sanctions for the filing of a frivolous appeal, which it did under Fed.R.App.P. 38. Sanctions were sought against both the appellant, Trustee Maxwell, and his attorney. First the court found the appeal to have been frivolous. But then it noted that the record showed that Maxwell had no professional expertise in the areas that formed the subject matter of the suit he brought, that he had relied on counsel when deciding to appeal, and that he therefore should not be sanctioned.

> Maxwell attached an affidavit to his response explaining that he retained counsel to investigate and, if appropriate, pursue legal claims against KPMG. Maxwell does not have any professional expertise in the areas of accounting or auditing malpractice, and so–though he regularly consulted with counsel and the experts they recommended and monitored the litigation–he ultimately relied upon counsel's judgement that this lawsuit and the subsequent appeal were in the best interests of marchFirst's creditors. In the absence of any contrary evidence, we do not find that Maxwell willfully violated his fiduciary duties. Accordingly, Maxwell is not personally liable for the sanction. Id. at *4.

While Maxwell II is not precedential, it should be highly persuasive in this matter. Here, Mr. Grochocinski regularly consulted with counsel and monitored the litigation. The recommendation was to go forward, both before and during the pendency of the case. Mr. Grochocinski even conferred with counsel concerning the impact of Maxwell I, and was told that it was distinguishable and not an impediment to the case against MBRM. Ex. A, ¶ 27. Mr. Grochocinski is not schooled in professional liability claims and relied on special counsel's judgment. There is no contrary evidence to the foregoing, and defendants

themselves are aware of it and have affirmatively promoted the fact of the trustee's reliance on counsel: "The trustee's deposition testimony leaves no doubt that he relied almost entirely on his attorneys to conduct a pre-filing investigation." Doc. No. 126, Defendants' supplemental objection to the "alternative ruling" in Magistrate Judge Denlow's June 9, 2008 Memorandum Opinion and Order, p. 7. Under these circumstances there was not a willful and deliberate breach of fiduciary duty.

Indeed, Mr. Grochocinski's conduct demonstrates that he believed that he was acting in the best interests of unsecured creditors throughout the bankruptcy proceedings. When he negotiated the funding agreement, he believed that SC was a secured creditor but sought, and obtained, a carveout of a portion of any proceeds from the proposed litigation in favor of unsecured creditors, noting to SC's lawyer that he had no duty to pursue assets solely on behalf of a secured creditor.[4] Ex. A, ¶ 13. When he learned that there was evidence that SC was not a secured creditor after all, he filed an adversary proceeding that sought to reduce SC's interests to that of an unsecured creditor–a case that he won at trial (Memorandum Opinion of Judge Squires, March 17, 2009, Ex. H of the summary judgment motion, Doc. No. 138-4), although it was reversed on appeal to the district court. Ex. A, ¶ 25. Had the bankruptcy court's ruling of March 17, 2009, stood, SC's interest in the suit

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[4] He negotiated aggressively with that lawyer, as shown by one of the e-mails in the record. "I reviewed your [sic] of February 24, 2005 and frankly I think it will take some time to resolve this matter. It appears that each time I send you a proposal you reply and add more requirements....In the interim, I am going to prepare schedules and perhaps have Louis Franco designated as the representative of the debtor, set the matter for a meeting of creditors and unless there is some very good incentive for unsecured creditors I will file a no asset report and close my file. I am not obligated to pursue assets that benefit secured creditors." Ex. 7 of Grochocinski deposition, Doc. No. 138-11, p. PL 01827

against MBRM would have been that of an unsecured creditor, that is, the same interest as that of CMGT's shareholders. Ex. A, ¶ 26. Any proceeds of the litigation would have been distributed in accordance with the relative proportions of valid claims. Ex. A, ¶ 26. If Lou Franco's claim of $14 million held up, therefore, Mr. Franco would have received a considerable portion of the recovery, since his claim was close in amount to that of SC ($17 million). Ex. A, ¶¶ 24 and 26.

Mr. Grochocinski also dealt fairly with the shareholders of CMGT, as recounted at ¶ 28 of Exhibit A. When a complaint was registered with U.S. Trustee Ira Bodenstein, he gave a fair recounting of events. Exhibit 107 of plaintiff's response to the motion for summary judgment.

While defendants have argued a "fraud on the court" theory throughout this litigation, it is important to note that the fraud that was found by the court was committed by SC at the California prove-up. Mr. Grochocinski obviously did not participate in that hearing and since he did not read the transcript he did not know what had happened there. At some point special counsel had the transcript, but at no point did counsel recommend a halt in the prosecution of the claim. Mr. Grochocinski is tied to SC's fraud only by imputation, through the doctrine of judicial estoppel. That imputation should not be allowed to stand as indicative of bad faith on his part.

In this case, the record shows that the trustee was attempting to carry out his legal "duty to maximize the value of the estate." Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343, 352 (1985). He entered into a post-petition funding arrangement, which is a perfectly legitimate means of accomplishing the goal of obtaining recoveries. See Mellon Bank, N.A. v. Dick Corp., 351 F.3d 290, 292 (7th Cir. 2003). He retained special

counsel, as authorized by 11 U.S.C. § 327(a). Special counsel recommended the filing of this action, and it was lost on summary judgment. The client should not have to pay sanctions for the positions advanced on his behalf, particularly when he does not have the expertise to evaluate them, Rennie v. Dalton, 3 F.3d 1100, 1111 (7th Cir. 1993).

CONCLUSION

David Grochocinski is not Gerry Spehar, the true author of the misrepresentations recounted in the court's Opinion. Mr. Grochocinski, unaware of those misrepresentations, did not promote them either. He never tried to conceal the facts of the case, never made any misrepresentations himself, and always has respected this court's authority. Given the limits on the court's inherent power, and the fact that Mr. Grochocinski fulfilled his fiduciary duties as he saw them and certainly did not breach them willfully and deliberately, defendants' motion for sanctions should be denied.

Respectfully submitted,

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