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 CV 05486
MAYER BROWN ROWE & MAW LLP and RONALD B. GIVEN	)	District Judge Virginia M. Kendall
Defendants.	)	

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR SANCTIONS AGAINST DAVID GROCHOCINSKI, BANKRUPTCY TRUSTEE FOR CMGT, INC.

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Defendants Mayer Brown LLP ("Mayer Brown") and Ronald B. Given ("Ronald") (collectively, "Defendants"), by their attorneys, Novack and Macey LLP, submit this reply memorandum in further support of their motion for sanctions against David Grochocinski (the "Trustee"), who is the trustee for the bankruptcy estate of CMGT, Inc ("CMGT").[1]

ARGUMENT

In his response ("Trustee's Response" or "T.Resp. at __"), the Trustee raises three principal arguments in an effort to avoid sanctions. First, the Trustee contends that his wrongful actions constitute "pre-litigation conduct" and that, as a matter of law, this Court does not have the inherent authority to sanction him for such conduct. Second, he argues that Rule 11 governs his wrongful conduct and preempts this Court's inherent authority to sanction him for conduct that Rule 11 covers. Third, he argues that his wrongful conduct was not willful and deliberate so that sanctions are inappropriate. None of these arguments has any validity.

I. THIS COURT HAS THE INHERENT AUTHORITY TO SANCTION THE TRUSTEE

The Trustee's main argument is that this Court does not have the inherent authority to sanction him for "pre-litigation" conduct. (T. Resp. at 2-7.) The Trustee's Response contends (at 2) that the Court's inherent authority to sanction litigants "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 . . . ." This is wrong.

A. The Trustee's Response Misstates the Law

In Chambers v. Nasco, Inc., 501 U.S. 32, 57 (1991), the Supreme Court rejected the Trustee's argument that sanctions cannot be based on actions outside the court's presence:

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[1] Capitalized terms used but not defined herein shall have the meaning given them in Defendants' Memorandum in Support of Their Motion for Sanctions (Docket No. 177) (the "Opening Memorandum" or "Op. Mem. at __".)

> Chambers challenges the District Court's imposition of sanctions for conduct before other tribunals, including the FCC, the Court of Appeals and this Court, asserting that a court may sanction only conduct occurring in its presence. Our cases are to the contrary, however. As long as a party receives an appropriate hearing, . . the party may be sanctioned for abuses of process occurring beyond the courtroom . . . .

The fact that the Trustee's Response (at 4) cites a dissenting opinion in Chambers to support his position is a dead give-away that the Trustee is incorrect. Indeed, even the Trustee's recitation of the applicable facts of Chambers (T.Resp. at 3) demonstrates that sanctions can be based on conduct that predates the litigation. In Chambers, the sanctioned party was notified on a Friday that the plaintiff would be filing suit and seeking a temporary restraining order the following Monday. Over the weekend, the sanctioned party attempted to transfer the subject of the coming lawsuit (a television station) to a trust so that it would be outside the court's jurisdiction. Sanctions were based on this pre-litigation conduct, and the sanctions award was affirmed by the Supreme Court. Chambers, 501 U.S. at 36-37. Chambers defeats the Trustee's argument.

Seventh Circuit decisions -- including those cited by the Trustee -- confirm this Court's power to sanction pre-filing conduct pursuant to its inherent authority. For example, in a case cited in the Trustee's Response (at 7), the Seventh Circuit recently held that "bad faith may occur beyond the filing of the case and 'may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation.'" Mach v. Will County Sheriff, 580 F.3d 495, 501 (7th Cir. 2009) (emphasis added) (quoting Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980)).

The Trustee's Response (at 7) accepts the decision in Methode Electronics v. Adam Technologies, Inc., 371 F.3d 923, 927-28 (7th Cir. 2004), as an instance where the court properly used its inherent power to sanction the plaintiff for litigation conduct because, the Trustee says,

the plaintiff "intentionally filed a complaint with a false allegation in order to secure venue." Yet, as here, Methode involved wrongful actions taken in connection with the pre-filing preparation of the complaint. In Methode, the wrongful action was creating a false basis for venue; here, the wrongful action was creating a false and perverse basis for the lawsuit altogether, including the failure to investigate whether there was any legitimate basis for the claims being asserted. Methode stands for the proposition that litigants violate their duty to the court system when they file a complaint that makes false allegations. Id. at 928. That is exactly what the Trustee did here.

The Trustee relies on Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., 313 F.3d 385 (7th Cir. 2002), but Zapata does not support his position. In Zapata, the district court awarded attorney's fees to a victorious plaintiff in a breach of contract case because the defendant had no valid defense to the plaintiff's claim, but did not admit liability and, thereby, inconvenienced all concerned by requiring the case to be tried. The Seventh Circuit reversed, holding that the district court did not have the authority to change state substantive law and award attorney's fees for breach of contract -- even if the defendant had no valid excuse for its failure to honor the contract. Id. at 389-91. Importantly, unlike here, the party sanctioned had not perpetrated a fraud on the court or violated any duty to the court system. Indeed, the Seventh Circuit noted that the defendant had "acknowledged liability for $858,000 of the $890,000 sought in the complaint," but the judge erroneously failed to grant the plaintiff's motion for partial summary judgment. Thus, it was largely the district court's fault that a trial was necessary. Id. at 391.

Zapata stands for the principle that a district court cannot change substantive law and grant an award of attorneys' fees under the guise of a sanction just because it is offended by how

the sanctioned party behaved in the underlying transactions that led to the parties' dispute. Zapata does not limit a court's authority to sanction improper conduct that occurs in connection with the preparation or filing of the complaint or any other action that concerns the court system, regardless of when that improper conduct took place.

The Seventh Circuit explained this distinction when it said that a court's inherent authority can be used to punish misconduct "occurring in the litigation itself not in the events giving rise to the litigation (for then the punishment would be a product of substantive law -- designed, for example, to deter breaches of contract) . . ." Id. (emphasis added). Of course, "events giving rise to the litigation" consisted of the breach of contract, not pre-litigation investigation or preparation of court pleadings. The Trustee's Response (at 5) quoted this language, but omitted the phrase "not in the events giving rise to the litigation" without indicating the omission. Because this very language explains the distinction between sanctionable and non-sanctionable conduct, it is highly suspicious that the Trustee omitted this portion of the quote. Indeed, this same distinction is recognized in Chambers, 501 U.S. at 54, where the Supreme Court noted:

> . . . the District Court did not attempt to sanction petitioner for breach of contract, but rather imposed sanctions for the fraud he perpetrated on the court and the bad faith he displayed toward both his adversary and the court throughout the course of the litigation.

In a similar vein, the Trustee's Response (at 7) cites United States v. American Home Assurance Co., 98 C 0995, 1999 WL 618216, at *2 (N.D. Ill. August 9, 1999), and declares:

> Perhaps most telling of all is United States v. American Home Assurance Co., . . . 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.

Once again, the "pre-litigation" conduct at issue in American had nothing to do with any attempted fraud on the court or manipulation of the judicial process. Am. Home, 1999 WL 618216, at *1. Rather, as in Zapata, the plaintiff alleged that the defendants acted in bad faith by breaching an underlying contractual obligation to pay plaintiff and having no valid excuse for that breach. Am. Home, 1999 WL 618216, at *1

It also does not matter that this case was originally filed in state court and then removed. Although it is true that Rule 11 does not apply to the filing of a state-court complaint when the case is later removed to federal court, e.g., Schoenberger v. Oselka, 909 F.2d 1086, 1087-88 (7th Cir. 1990), the Court's inherent authority to sanction bad faith conduct is not subject to the same restriction. E.g., Davis v. MCI Communications Servs., Inc., 421 F. Supp. 2d 1178, 1187-88 (E.D. Mo. 2006) (holding that the combination of Rule 11 and the Court's inherent power gives a federal court the authority to assess sanctions against a plaintiff for filing a non-meritorious claim in state court that was removed to federal court). Indeed, the fact that Rule 11 cannot reach this kind of conduct is one of the things that justifies the Court's use of its inherent authority.

In sum, although it is true that the Court cannot use its inherent authority to redress bad faith that occurred in connection with the underlying events that gave rise to the parties' dispute, it can sanction bad faith conduct that occurred before the lawsuit was filed if that conduct is part and parcel of the litigation and thereby implicates the party's duty to the court system. The "pre-litigation" misconduct by the Trustee is of the latter type and, therefore, is subject to sanctions.

B. In All Events, The Trustee's Bad Faith Continued During the Litigation

In all events, the Trustee's bad faith was not limited to conduct occurring before the litigation. Afterward, the Trustee continued to act as a "proxy for the real party in this case" -- Spehar. (Op. at 19.) "Instead of taking control of the case as an independent reviewer of the

matter, [the Trustee] merely took Spehar's orders and followed them." (Id. at 23.) "Spehar was the puppetmaster and [the Trustee] his puppet." (Id. at 24.) To take just a few examples, the Trustee: (1) sat by while his lawyers, acting at Spehar's urging, threatened witnesses with a lawsuit if they did not buckle under; (2) smirked and joined in the fray when his attorneys tried to obfuscate his deposition with improper objections and comments; (3) continued his lawsuit long after the fundamental defects in his case were brought to his attention, fighting the motion for summary judgment; and (4) never once tried to stop the runaway litigation that he started. Such conduct -- which occurred during and throughout the litigation itself -- also is sanctionable pursuant to the Court's inherent authority. E.g., Mach, 580 F.3d at 501-02 (awarding attorney's fees pursuant to inherent authority when litigant "pressed all six of his arguments after discovery had long ago revealed that five of the six were 'worthless.'")

Finally, the Trustee's reliance (T.Resp. at 9) on an out-of-context portion of Magistrate Judge Denlow's resolution of a discovery dispute is misplaced. Judge Denlow was not addressing sanctions. Rather, he was dealing with the question of whether certain documents that reflected communications between and among Spehar, the Trustee and/or the Trustee's counsel were discoverable or were protected work product. Ruling in the Trustee's favor, Judge Denlow decided that the documents were protected work product. In making his ruling, Judge Denlow said that the documents reflected the pre-litigation actions of the Trustee and his counsel as they prepared this case for filing.

Defendants do not dispute Judge Denlow's finding. In fact, it makes Defendants' very point. In his preparation of the Complaint and his planning of this case, the Trustee met extensively with Spehar and his private counsel and, as this Court found, thereafter acted as "proxy" for Spehar "the real party in interest" in this case. By becoming Spehar's "puppet"

instead of doing a proper investigation and by filing a perverse complaint with no factual or legal basis, the Trustee violated his duties to the court system. As the many cases Defendants cited show, pre-litigation conduct is sanctionable when it relates to the litigation itself and constitutes a violation of the litigant's duties to the court system and to the litigant's adversary. The Trustee's pre-litigation behavior -- including his preparation and filing of a perverse complaint and his utter failure to investigate the facts -- is sanctionable because, as this Court has found and explained in great detail, the Trustee failed to meet his duties.

II. THE COURT'S INHERENT AUTHORITY IS NOT PREEMPTED BY RULE 11

In Chambers, the Supreme Court recognized that a court's inherent authority overlapped with the power to sanction granted by various rules and statutes, including Rule 11. 501 U.S. at 47, 50. Nevertheless, the Court held that a federal court has the power to "sanction bad-faith conduct by means of the inherent power" even if "that conduct could also be sanctioned under the statute or the Rules." Id. Chambers discussed the type of situation in which it would be appropriate to invoke the Court's inherent authority, even if other rules might apply. It stated that, "when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power." Id. at 50. "But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power." Id. Thus, in Chambers, the Supreme Court upheld the use of the district court's inherent authority, even though some of the conduct could have been punished under specific rules. Id. at 50-51. The Court reasoned as follows:

> Like the Court of Appeals, we find no abuse of discretion in resorting to the inherent power in the circumstances of this case. It is true that the District Court could have employed Rule 11 to sanction Chambers for filing "false and frivolous pleadings," 124 F.R.D. at 138, and that some of the other conduct might have been

> reached through other Rules. Much of the bad-faith conduct by Chambers, however, was beyond the reach of the Rules; his entire course of conduct throughout the lawsuit evidenced bad faith and an attempt to perpetrate a fraud on the court, and the conduct sanctionable under the Rules was intertwined within conduct that only the inherent power could address. In circumstances such as these in which all of a litigant's conduct is deemed sanctionable, requiring a court first to apply Rules and statutes containing sanctioning provisions to discrete occurrences before invoking inherent power to address remaining instances of sanctionable conduct would serve only to foster extensive and needless satellite litigation, which is contrary to the aim of the Rules themselves.

Id. (citing Advisory Committee's Notes on 1983 Amendment to Rule 11). Here, the Trustee, like the Chambers plaintiff, embarked upon a "course of conduct" that "evidenced bad faith and an attempt to perpetrate a fraud on the court." Id. Though some of his conduct may be covered by rules like Rule 11, other conduct, such as the filing of a perverse and frivolous complaint in state court, is not. See Schoenberger, 909 F.2d at 1087-88. Moreover, the Trustee's conduct as a whole was designed to be "a deliberate manipulation of the judicial system." (Op. at 31.) Thus, the Court may invoke its inherent authority to sanction the Trustee without first determining which rules might be applied to any specific part of the Trustee's global misconduct. Chambers, 501 U.S. at 50-51.

Indeed, as the Seventh Circuit expressly held, "Rule 11 has not robbed the district courts of their inherent power to impose sanctions for abuse of the judicial system." Methode, 371 F.3d at 927. Citing Chambers, the court further stated that "the [Chambers] Court was quite clear that 'the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct.'" Id. The court reached the exact same conclusion in Mach, 580 F.3d at 502.

Despite these clear precedents, the Trustee's Response argues (at 7-8) that some of the Trustee's misconduct may have been covered by Rule 11 and that: "Inherent authority does not extend to the entry of sanctions for conduct that is governed by federal rules of procedure." Yet

the very case that the Trustee's Response cites (at 8) for this proposition -- Kovilic Const. Co v. Missbrenner, 106 F.3d 768, 772 (7th Cir. 1997) -- says the exact opposite. In addressing inherent authority to sanction, Kovilic states: "This power exists even where procedural rules govern the same conduct." Id. Even worse, this statement appears on the very same pages (i.e., 772-73) the Trustee cited in support of his contrary position. To put it bluntly, every authority cited by the Trustee contradicts his argument.

III. WILLFULNESS

A. The Willfulness Standard Should Not Apply Here

In this Circuit, a trustee may not be held personally liable for a breach of fiduciary duty unless that breach was "willful and deliberate." In re Chicago Pac. Corp., 773 F.2d 909, 915 (7th Cir. 1985).[2] In this case, Defendants are seeking sanctions against the Trustee for his bad faith conduct in the litigation; they are not pursing a claim for breach of fiduciary duty. Neither Chicago Pacific, nor any of the other reported cases cited by the Trustee in support of the "willful and deliberate" standard, involved a situation where an opposing litigant was seeking fees as a sanction. The willfulness standard set forth in those cases should not apply here.

The rationale for the Seventh Circuit's rule of substantive law -- i.e., that when a trustee is being sued for breaching his fiduciary duty, personal liability attaches only when that breach was willful -- is that a trustee should have discretion and be protected from personal liability in connection with his or her business judgments in managing a bankruptcy estate. However, imposing sanctions on a trustee for abusing the judicial system is a totally different matter. It is a

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[2] The leading Supreme Court decision on this issue -- Mosser v. Darrow, 341 U.S. 267 (1951) -- has resulted in a circuit split, with some circuits imposing personal liability even for negligent breaches of fiduciary duty. Compare Chicago Pac., 773 F.2d at 915 with In re Rigden, 795 F.2d 727 (9th Cir. 1986) and In re Gorski, 766 F.2d 723 (2nd Cir. 1985).

procedural remedy based on the trustee's violation of duties to the court system, not a damage award based on mistaken business decisions and damage to the bankruptcy estate.

Indeed, there is no reason why a bankruptcy trustee should have any lesser duty to the court system than any other litigant. To the contrary, a bankruptcy trustee should have the same obligation of good faith and the same obligation to conduct a proper investigation before filing suit. Indeed, as an appointed representative of the bankruptcy court, a trustee should, if anything, be held to a higher litigation standard. Consistent therewith, the Seventh Circuit has indicated that courts must be "vigilant" against frivolous suits filed by bankruptcy trustees, noting:

> The filing of lawsuits by a going concern is properly inhibited by concern for future relations with suppliers, customers, creditors, and other persons with whom the firm deals (including government) and by the cost of litigation. The trustee of a defunct enterprise does not have the same inhibitions. A related point is that while the management of a going concern has many other duties besides bringing lawsuits, the trustee of a defunct business has little to do besides filing claims that if resisted he may decide to sue to enforce. Judges must therefore be vigilant in policing the litigation judgment exercised by trustees in bankruptcy, and in an appropriate case must give consideration to imposing sanctions for the filing of a frivolous suit.

Maxwell v. KPMG LLP, 520 F.3d 713, 718 (7th Cir. 2008) ("Maxwell I").

The Trustee's Response (at 14) cites to the Seventh Circuit's unpublished follow-up decision in Maxwell v. KPMG LLP, Case No. 07-2819, 2008 WL 6140730 (7th Cir. Aug. 19, 2008) ("Maxwell II"), in which the court applied the willfulness standard. In declining to hold the trustee personally liable, Maxwell II found that there was no evidence that he "willfully violated his fiduciary duties." Id. at *4. The Trustee's Response (at 14) says that Maxwell II should be "highly persuasive." Yet, Maxwell II did not address the distinction between the trustee's fiduciary duties, as addressed in Chicago Pacific, and the trustee's very different duties to the court system. Apparently, no argument relating to that distinction was presented.

Based on the foregoing, Defendants submit that the willfulness standard should not be applied to the litigation conduct of bankruptcy trustees. Rather, in their role as litigants, trustees should be held to the same standard of behavior as -- if not a higher standard than -- any other party. If the Court agrees, it need not consider whether the abuses committed by the Trustee were willful. Nevertheless, there can be no question that the Trustee's actions were willful and, if necessary, the standard has been met.

B. Definition Of Willful

Neither Maxwell II nor Chicago Pacific provides a definition of "willful." The term "willful" is also not defined by the Bankruptcy Code. Black's Law Dictionary defines "willful" as "[v]oluntary and intentional, but not necessarily malicious." Black's Law Dictionary 1630 (8th ed. 2004). Black's definition comports with the courts' interpretation of the phrase "willful and malicious" in Section 523(a) of the Bankruptcy Code. 28 U.S.C. § 523(a). Specifically, in that Section of the Code, "willful means deliberate and intentional" whereas "malicious means in conscious disregard of one's duties or without just cause or excuse." In re Shala, 251 B.R. 710, 713 (N.D. Ill. 2000) (quoting In re Thirtyacre, 36 F.3d 697, 700 (7th Cir. 1994).

In addition, in various contexts, courts have held that a party's conduct can be deemed willful, even if the party actually was ignorant, if that ignorance is the result of "willful blindness." E.g., In re Aimster Copyright Litig., 334 F.3d 643, 650 (7th Cir. 2003) ("Willful blindness is knowledge, in copyright law . . . . as it is in the law generally.") (citations omitted); see also Desnick v. Am. Broad. Cos., 233 F.3d 514, 517 (7th Cir. 2000) (actual malice, for defamation of a public figure, may be proved by willful blindness). As the Seventh Circuit explained in Aimster:

> One who, knowing or strongly suspecting that he is involved in shady dealings, takes steps to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings

> is held to have a criminal intent, United States v. Giovannetti, 919 F.2d 1223, 1228 (7th Cir.1990), because a deliberate effort to avoid guilty knowledge is all that the law requires to establish a guilty state of mind.

Aimster, 334 F.3d at 650.

Based on the foregoing, even under Maxwell II, the Court may impose personal liability on the Trustee for sanctions if it finds that his misconduct was voluntary and intentional or that he stuck his head in the sand in order to render himself willfully blind.

C. This Court's Findings In Its Opinion Amply Demonstrate That The Trustee Acted Willfully, Or -- At the Very Least -- Was Willfully Blind

This Court has already determined that "[t]he circumstances presented in this case reveal a deliberate manipulation of the judicial system designed to benefit only one individual" -- i.e., Spehar. (Op. at 31; emphasis added.) Further, this Court found that Spehar "had the complicit agreement" of the Trustee acting as Spehar's "proxy" and "puppet." (Id. 19, 24, 31.) In furtherance of the scheme, the Trustee "agreed to proceed with the action to not only collect the unsupported judgment but also to accuse attorneys who were in no way involved in the action to be held responsible for the artificially inflated judgment." (Id. at 22.) The Court found that the Trustee was acting as Spehar's "personal debt-collector . . . in order to fulfill [Spehar's] personal business grudge." (Id. at 25.) The Court found that Spehar and the Trustee's conduct before and during the litigation was an attempt "to pervert the legal process." (Id. at 32.)

The Court's findings were based on an evidentiary record -- including, critically, the Trustee's 400-page deposition. (Id. at 23.) The Trustee argues that his conduct was not willful, invoking the "empty head, pure heart" defense. This argument fails for several reasons.

First, it is patently unbelievable that, in these circumstances, the Trustee did not know what he was doing. In addition to the foregoing factual findings, this Court also found that even though the Trustee knew that it was in the interest of the estate to vacate the Default Judgment,

he failed to do so and, instead, immediately sided with Spehar. (Id. at 20.) The Trustee "accepted [Spehar's] funds, the lawyering, and Spehar's theory without question, without investigation, and without regard to his obligations to any other creditors or the estate." (Id.) The Trustee also permitted Spehar to run the show. He was aware that Spehar not only hired the Trustee's counsel but that Spehar spoke with him "more often than" the Trustee. (Id. at 22-23.) The Trustee could not reasonably expect that the counsel selected and controlled by Spehar would provide him with an independent evaluation of Spehar's claim.

At the same time, the Trustee refused to listen to the chorus of voices raised against Spehar and the filing of this suit. (Id. at 22.) As the Court found, based on these differing allegations, the Trustee "should have known an investigation was warranted." (Id.) Nevertheless, he failed to conduct any investigation. Instead, he pressed forward with this case, claiming that Defendants committed malpractice by allowing a default judgment to be entered, despite his actual knowledge that the judgment "'was entered by default largely due to the lack of funds by the debtor.'" (Id.) Indeed, the Trustee himself now argues that he could not vacate the Default Judgment because CMGT's bankruptcy estate lacked the funds to hire a California attorney. (T.Resp. at 11.) Yet, with stunning hypocrisy, the Trustee alleged in his Complaint that CMGT's *transactional* attorneys in Illinois were blameworthy for not traveling to California and litigating the entire California Action when CMGT did not have the funds to hire them either. In sum, the Trustee knew something was wrong with Spehar's scheme from the beginning, but he participated in it anyway.

Furthermore, the Trustee is not like the trustee in Maxwell II. There, the court noted that the trustee "does not have any professional expertise in the areas of accounting or auditing malpractice" and relied on "experts" to evaluate the case for him. Maxwell II, 2008 WL

6140730, at *4. The Trustee's Response makes a parallel, but completely unbelievable assertion. Specifically, it claims (at 13-14) that, despite his over 25 years of experience as a practicing lawyer, he is ignorant of the law governing legal malpractice claims. It is one thing for a lawyer-trustee not to have "professional expertise" in matters of accounting and auditing malpractice. It is quite another for a lawyer-trustee to feign ignorance regarding legal malpractice. Indeed, if the Trustee has no understating of legal malpractice, how does he avoid committing it? The Trustees' protestations of ignorance are simply outrageous.

Second, even if the Trustee's claimed ignorance were genuine, such ignorance could only be the result of willful blindness. Again, the Court already found that the Trustee "should have known an investigation was warranted" in this case. (Id. at 22.) Indeed, the bizarre nature of Spehar's assertions and the contrary accounts of events from CMGT's officers and employees should have made him highly suspicious of Spehar's motive and the validity of the story he was telling. Nevertheless, based on the Trustee's deposition, the Court found that the Trustee failed utterly to conduct any investigation. As the Court wrote:

> Throughout the hours of questioning, Grochocinski was completely incapable of answering questions about the facts underlying the case he brought other than to say that those facts were presented to him from Spehar or through Spehar's attorneys. He cannot explain the source of the factual allegations regarding the original agreement between CMGT and Spehar, the theory of malpractice, and the financial status of CMGT.
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> * * *
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> Although Grochocinski's attorney served more as a bully during the deposition than a professional, his attempts to thwart the answers from being given cannot hide the truth that his client had conducted no independent review of the case and was incapable of explaining his actions in bringing the matter.

(Id. at 23-24.) Indeed, the Court found that the Trustee acted on Spehar's instruction to initiate suit without investigation. (Id. at 11.) So, although he should have known an investigation was

necessary, the Trustee intentionally did nothing to educate himself about the glaring defects in his case. The Court should thus find that, if the Trustee was so ignorant as he claims, his ignorance was willful and, therefore, does not insulate him from sanctions.

D. The Court Should Reject the Trustee's Self-Serving Declaration

Despite the Court's findings of fact, the Trustee submits a declaration with his Response -- supposedly "not to contradict the record but to place the events of this case into context." (T.Resp. at 11 & Ex. A.) The declaration, however, changes nothing. If anything, it reaffirms the Court's findings and demonstrates -- again -- that the claims the Trustee filed were baseless. Specifically, in addition to confirming his lack of a factual investigation, the Trustee's declaration touts his ignorance of the law. (T.Resp. at Ex. A, ¶¶ 3, 12.) As noted, the Trustee argues that he was incapable of assessing the merits of his claim because he is not a malpractice lawyer.

However, it does not take a legal malpractice specialist to recognize that there is something fundamentally wrong with the case the Trustee filed. One needs no more than a simple understanding of the elements of a malpractice claim to know that the Trustee could succeed only if he were able to prove that Spehar had no right to recover in the first place. But, as soon as the Trustee proved this, he would have to hand over almost all of the recovery to Spehar -- whom he just proved should not have received anything. That alone should have been enough to stop this case before it got out of the starting block.

Yet, the Trustee's ignorance went far beyond that. The Trustee's claim was based on his allegation that Defendants should not have allowed the Default Judgment to be entered. The Trustee, however, needed no malpractice expertise to realize that CMGT had no funds to defend against the California Action, and made a business decision to default. Indeed -- the Trustee seeks to absolve himself from responsibility for not seeking to vacate the Default Judgment on

the grounds that this was a no asset bankruptcy estate. But the same was true when the California Action was filed; CMGT had no assets at that time. Indeed, CMGT: (1) had operated at a loss for three straight years and never turned a profit; (2) had run out of funds; (3) had lost nearly all its employees and clients; (4) had not paid its sole remaining officer (Franco) a salary in nearly two years; (5) was deeply in debt; (6) could not pay its ongoing expenses; and (7) had failed for years to find new financing or to convince its shareholders to contribute more capital. Many of these facts are recited in the Trustee's own complaint and in the exhibits attached to it. Because of its lack of resources and the financial exhaustion of its shareholders, CMGT chose not to appear in the California Action for the very same reasons the Trustee used to explain why he made no effort to vacate the Default Judgment. Why would it be permissible for the Trustee not to seek to vacate the Default Judgment due to a lack of funds, but not permissible for CMGT to decide not to defend a lawsuit in California when it had no funds and CMGT was a failing business with no assets?[3]

Beyond that, how complicated would it have been for the Trustee, or any lawyer with 25 or more years experience, to investigate why Defendants did not rush out to California to defend CMGT in Spehar's lawsuit and how the Default Judgment came to be entered? If the Trustee had so much as picked up the telephone and called Franco (CMGT's Chief Executive Officer), Wong (CMGT's controller), Baliga (CMGT's principal investor), Ronald, or any of the many shareholders who tried to contact him before he filed suit, the Trustee would have learned the truth.

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[3] One can only wonder why the Trustee's Response (at 12 n.2) trumpets that the Trustee did not research the law on vacating a default judgment until after he had already allowed the time for doing so to pass.

For example, the Trustee would have learned the most critical fact -- i.e., that CMGT and its shareholders did not hire Defendants to represent them in the California Action and did not expect them to do so. In fact, six months before the Default Judgment was entered, Defendants specifically told CMGT and each one of its shareholders in writing that they had not been retained to represent CMGT in the California Action and that CMGT did not have the funds to hire counsel to defend it. (Communications stating this were attached as Exhibits 15 and 16 to the Trustee's Complaint -- the Trustee either affirmatively chose not to read them or he ignored what he read.) The Trustee would also have learned that Franco asked CMGT's shareholders to provide CMGT with the funds to hire counsel, but that CMGT's shareholders did not think it was worthwhile to do so. The Trustee also would have learned that Franco, Wong and Baliga interviewed potential counsel to represent CMGT and vacate the Default Judgment, but could not find anyone whom CMGT could afford. (See Defendants' Local Rule 56.1(a) Statement of Undisputed Facts in Support of Their Motion for Summary Judgment Based on Their Unclean Hands Defenses (Docket No. 137), ¶ 126.)

Had the Trustee so much as picked up the phone, he also would have learned that Spehar sued CMGT in California knowing CMGT could not afford to defend itself, and that he did so because he disagreed with the unanimous decision of CMGT's shareholders that it was time to close CMGT's business and to sell its assets to a new group of investors who were willing to risk new capital. The Trustee also would have learned that, when they learned of Spehar's lawsuit, these new investors lost interest.

In short, the Default Judgment was entered because of a deliberate and rational business decision by CMGT's shareholders that it did not make economic sense to spend more money just to fight Spehar over CMGT's carcass. It was not entered due to professional malpractice. The

Trustee, with more than 25 years experience as a lawyer, did not lack the ability to ask basic questions about the malpractice claims that he filed, he just chose not to do so.

Further, the Trustee's declaration does contradict the record. For instance, the Trustee claims that when Spehar brought a "complicated professional liability" claim to his attention, he (the Trustee) retained "special counsel to investigate" it. (T.Resp. at 12-13 & Ex. A, ¶ 15.) As just discussed, the claim was not complicated. Moreover, this Court already found that Spehar -- and not the Trustee -- personally "hand-picked" the counsel to bring the malpractice claims, and that Spehar thereafter directed the litigation. (Op. at 8, 19-20, 23-24.) The Court further found that neither the Trustee nor his counsel discussed the malpractice case with any CMGT officers, employees or shareholders. (Id. at 9.) Instead, the Court found that, on June 28, 2006 -- before the suit was filed -- Spehar encouraged the Trustee to file the lawsuit without investigation, and that the Trustee followed Spehar's directive. (Id. at 11, 22.)

Indeed, the Trustee's primary argument that he was not willful is premised on his supposed complete ignorance of the facts and law regarding the malpractice claim, and his complete reliance on Joyce to provide him with an independent analysis of the claim before filing. Given that Joyce was selected and controlled by Spehar, and that the Trustee knew it, there is no way to describe the Trustee's claimed reliance as justified. Moreover, as the Court found, Spehar told the Trustee in an email that Joyce did not perform an investigation before filing, but the Trustee filed suit anyway. (Id. at 11.) All of this evidence shows that the Trustee willfully and completely deserted his duties to the Court, the CMGT Bankruptcy estate and Defendants in favor of Spehar, and then stuck his head in the sand so that if a day of reckoning came -- i.e., today -- he could claim ignorance of any misconduct. Such willful blindness does not excuse him from being punished personally. E.g., Aimster, 334 F.3d at 650.

E. The Bankruptcy Court's Approval Of Joyce's Retention Does Not Insulate The Trustee From Sanctions

The Trustee's Response (at 13) notes that the Bankruptcy Court approved Joyce's retention, claiming that this insulates the Trustee from liability. (Citing In re Markos Gurnee P'ship, 182 B.R. 211 (Bankr. N. D. Ill. 1995).) Yet, the reason Defendants seek sanctions is not because the Trustee retained Joyce as his attorney. Rather, sanctions are sought because, among other things, the Trustee failed to investigate and evaluate the spurious claims he filed, failed to supervise Joyce, allowed one biased creditor to control the Trustee's litigation for his own selfish purposes and committed a fraud on the Court. In all events, an order approving trustee action will insulate the trustee from liability only when the trustee provides a "full notice of all of the relevant facts to the interested parties." Markos, 182 B.R. at 219. Here, the Trustee did not tell the Bankruptcy Court that he was going to use his retention of Joyce to bring frivolous claims and violates his duties to the court system.

F. The Trustee's Later Dispute With Spehar Is Irrelevant

The Trustee points the Court to his subsequent dispute with Spehar, claiming that this shows that he acted independently, stood up for CMGT's unsecured creditors and was not Spehar's puppet. Of course, this is simply an attempt to contradict the Court's finding that the Trustee was Spehar's puppet. (Op. at 24-25.) Moreover, because this dispute apparently arose in 2008, it has no bearing on the fact that Spehar and the Trustee were in cahoots in 2006 when the Trustee filed this suit. Indeed, the dispute had no effect on the Trustee's later behavior in this case. The Trustee pressed forward with his bogus claims even after his failed attempt to double-cross Spehar.

In reality, the Trustee's dispute with Spehar exemplifies nothing more than a "falling out among thieves." When the Trustee was appointed, he promised Spehar that he would have a

security interest in the proceeds of this lawsuit, and made his intention perfectly clear in the agreed financing order that he presented for the Bankruptcy Court to enter. See In re CMGT, Inc., 424 B.R. 355, 357-59 (Bankr. N.D. Ill. 2010). In reliance on this agreed order, Spehar gave the Trustee the funds needed to file this lawsuit. Id. Later, the Trustee reneged on his agreement with Spehar and argued that, for technical reasons, he was not bound to the agreed order and, instead, could treat Spehar as an unsecured creditor. Id. The Trustee almost got away with this double-cross but, on appeal, Judge Gettleman compelled him to honor his agreement. Id. at 359-60. Rather than a badge of honor, the whole episode illustrates the Trustee's lack of integrity.

This story of the Trustee's attempt to back out of his agreement with Spehar does not vitiate this Court's finding that the Trustee was Spehar's puppet. At most, it shows that the Trustee made a pact with Spehar to take his money to file this baseless claim, and then, after he "accepted [Spehar's] funds, the lawyering, and Spehar's theory" (Op. at 20), the Trustee tried to renege on the deal based on a technicality.

CONCLUSION

For the reasons stated herein and in the Opening Brief, Defendants respectfully request that the Court grant their Motion for Sanctions against the Trustee, set the matter for a prove-up of Defendants' attorneys' fees and costs incurred in defending this case, and grant Defendants such other and further relief as is appropriate.

Respectfully submitted,

MAYER BROWN LLP and RONALD B. GIVEN

By: /s/ Stephen Novack
One of Their Attorneys

CERTIFICATE OF SERVICE

Stephen Novack, an attorney, hereby certifies that he caused a true and correct copy of the foregoing Defendants' Reply in Support of Their Motion for Sanctions Against David Grochocinski, Bankruptcy Trustee for CMGT, Inc. to be served through the ECF system upon the following:

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and by Federal Express overnight service, upon the following:

Gerard Spehar
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on this 18th day of April, 2011.

By: /s/ Stephen Novack