

EXHIBIT D

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9 Attorneys for Plaintiff,
SPEHAR CAPITAL, LLC, a California limited liability company

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 FOR THE COUNTY OF LOS ANGELES
13 (NORTH CENTRAL DISTRICT -- BURBANK)

14 SPEHAR CAPITAL, LLC, a California
15 limited liability company,
16 Plaintiff,
17 v.
18 CMGT, INC., a Delaware corporation, and
DOES 1 through 100, inclusive,
19 Defendants.
20

CASE NO. EC 037602

**JUDGMENT AND PERMANENT INJUNCTION
AGAINST CMGT, INC.**

Dept.: NC"A"

22 This matter came before the Court on the motion of Plaintiff, Spehar Capital, LLC
23 ("Spehar") for a default judgment against defendant, CMGT, Inc. ("CMGT"). On February 26,
24 2004, at 08:30 a.m., the Court held a hearing on Spehar's motion, during which Spehar Capital's
25 President, Gerry Spehar, testified and presented evidence regarding its damages from CMGT's
26 breach of Spehar Capital's contract. Having reviewed the pleadings and heard testimony and
27 received evidence on Spehar's damages, and being sufficiently advised of their premises, the
28 Court enters the following findings of fact and conclusions of law:

FILED
LOS ANGELES SUPERIOR COURT
MAR 18 2004
JOHN A. CLARKE, CLERK
Jeff W. Lipp
BY JEFF W. LIPP, DEPUTY

"F.O."
PAA

1 1. CMGT was validly served with Spehar's First Amended Complaint on December
2 8, 2003.

3 2. The Court has jurisdiction over CMGT under Cal. Code Civ. P. 410.10, because
4 CMGT has purposefully availed itself of the benefits and burdens of doing business in California
5 and CMGT has sufficient minimum contacts with California to satisfy due process. CMGT has
6 directed a steady and numerous stream of business contacts and communications to California
7 during the past two years, specifically:

8 a. Spehar Capital contracted with CMGT in California.

9 b. CMGT has transacted business in California by providing services to several clients
10 that are located in California and partnering with other California businesses.

11 c. Over the course of the over 2 years preceding this action, CMGT's President, Lou
12 Franco, deliberately directed extensive daily telephone and email communications to Spehar
13 Capital in California, and CMGT's President has traveled to California to meet with CMGT's
14 clients, and Spehar Capital.

15 d. CMGT attempted to raise capital from at least one investor, the Washoe tribe,
16 which is located in California.

17 3. CMGT has not answered Spehar's First Amended Complaint, entered an
18 appearance or responded in any way to any pleading in this case.

19 4. The clerk entered a default against CMGT on January 12, 2004.

20 5. Because CMGT has not answered Spehar's First Amended Complaint, all
21 allegations in the First Amended Complaint are deemed to have been confessed. Johnson v.
22 Stanhiser, 72 Cal.App.4th 357, 361 (1999). The Court incorporates these deemed admissions by
23 reference herein as findings of fact.

24 6. Spehar has proven damages in the following amounts for the following items for
25 which Spehar's contract with CMGT entitles Spehar to compensation:

26 a.	Legal Expenses	58,863.00
27 b.	Cash Success Fee	150,000.00
28 c.	Management Consulting Fee	100,000.00

1	d.	Stock Compensation	11,253,627.00
2	e.	<u>Investment Banking Rights</u>	<u>5,483,290.00</u>
3		Total	17,045,780.00

4 7. Spehar's damages are: (a) based on either specific dollar amounts that are set forth
5 in its contract with CMGT, or on facts, figures, projections and assumptions that are either the
6 same as, or not materially different from, the facts, figures, projections and assumptions that
7 CMGT presented to and that were relied on by both CMGT and potential investors; and (b)
8 otherwise supported by the evidence that Spehar presented.

9 8. Spehar Capital's damages are reasonably certain to have been realized but for
10 CMGT's wrongful acts.

11 THEREFORE, the Court:

12 1. Enters judgment IN FAVOR of Spehar Capital, LLC and AGAINST CMGT, Inc.
13 in the total amount of \$17,045,780;

14 2. Imposes a constructive trust in favor of Spehar Capital, LLC on all assets of any
15 type whatsoever of CMGT and Newco that either CMGT or Newco have transferred: (a) between
16 themselves; (b) to Newco or CMGT shareholders or any other financiers of CMGT or Newco
17 (including persons who have loaned or contributed money or other capital to CMGT); or (c) to
18 another person or entity other than in the ordinary course of CMGT's business, as CMGT's
19 business existed and operated at the commencement of this action;

20 3. Permanently ENJOINS AND RESTRAINS CMGT, Inc. and its officers, agents,
21 servants, employees, representatives, and all persons acting in concert or participating with them,
22 from engaging in, committing, or performing, directly or indirectly, any and all of the following
23 acts:

24 (a) proceeding with the asset sale transaction between CMGT and Newco;

25 (b) proceeding with an asset purchase, business or asset sale, or any other financing
26 arrangement of any type whatsoever between CMGT and any other person or entity without the
27 express written consent of Spehar Capital, LLC;

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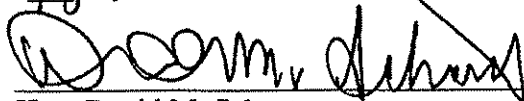
1 (c) consummating or taking any further steps toward consummating, the asset purchase
2 transaction or any other financing, capital-raising, purchase, sale or other transaction between
3 CMGT and Newco, or any other transaction of any type by CMGT whose terms do not expressly
4 acknowledge, incorporate and comply with all terms of the CMGT-Spehar agreement and this
5 judgment;

6 (d) selling, transferring, pledging or encumbering any of CMGT's assets or property, other
7 than in the ordinary course of ordinary course of CMGT's business, as CMGT's business existed
8 and operated at the commencement of this action; and

9 (e) licensing, selling, disposing of, or otherwise authorizing the use any of CMGT's
10 software by a person or entity other than CMGT, taking any action or acting in any way that
11 would diminish the value to CMGT of CMGT's software.

12 4. Releases the \$25,000 bond that Spehar Capital posted in connection with the
13 preliminary injunction that the Court entered on October 3, 2003. To allow Spehar to domesticate
14 this judgment in any other jurisdiction, the Court's preliminary injunction shall remain in full
15 force and effect until midnight on the 20th day after this judgment enters.

16 ENTERED AND ORDERED this 18 day of March, 2004.

17 

18 Hon. David M. Schacter
19 Superior Court Judge, Los Angeles County

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EXHIBIT E

ORIGINAL

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

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In re:) Case No.: 04 B 31669
CMGT, INC.)
Debtor.) Chapter 7

AT WHEATON, IL BEFORE THE HONORABLE JOHN SQUIRES, US BANKRUPTCY
JUDGE, THIS ^{2nd} DAY OF September, 2005

This matter coming before the Court on the Application of the Trustee to Enter into Post-petition Secured Financing and for Other Relief ("Application"), due notice having been given, no objections having been filed and the Court being otherwise advised in the premises:

IT IS HEREBY ORDERED:

1. The Application be, and the same hereby is, GRANTED.
2. Spehar Capital, LLC ("Spehar") shall advance to the chapter 7 estate of Debtor, CMGT, Inc. ("Estate") the sum of \$5,000.00 within ten business days of the delivery of this Order to Spehar or its counsel.
3. Spehar shall advance additional sums to the Estate upon the Trustee's written request for such an advance that is accompanied by a generalized statement as to the Trustee's expenditures to the date of the additional request and a brief statement as to the reasons for the requested additional advance. Provided, however, that: (a) the Trustee's statement of reasons for the requested additional advance shall not serve as the basis for Spehar to withhold any requested advance; (b) Spehar is not required to advance more than a total of \$5,000 to the estate under this provision, until and unless the Trustee provides Spehar with written confirmation from the special counsel that the Trustee has moved or will move to employ (Edward T. Joyce & Associates, P.C.) that the special counsel has committed to proceed with one or more of the causes of action that the Trustee has retained special counsel to evaluate; and (c) Spehar's total liability for any and all advances made or requested pursuant to this Order (including Spehar's initial advance of \$5,000.00) shall not exceed \$18,500.

1 4. The Estate shall use Spehar's initial advance to (a) obtain all documents that
2 have been produced to or made available to the Trustee related to any cause of action that the
3 Trustee is pursuing, or is considering pursuing, and deliver said documents to the special
4 counsel and (b) offset any cost or expense of administering the Estate.

5 5. Any and all advances by Spehar to the Estate shall: (a) accrue interest at the
6 minimum Applicable Federal Rate as published by the Internal Revenue Service from time to
7 time; and (b) be deemed to be an administrative expense under 11 U.S.C. § 506(c).

8 6. Spehar's advances shall be collateralized by, and Spehar shall be repaid from,
9 the Estate's recovery that results from the action or participation of special counsel, including,
10 but not limited to, the pursuit of a cause of action by special counsel. By virtue of its Citation to
11 Discover Assets, Spehar has a valid and perfected lien on the proceeds of any such recovery.
12 If the Estate does not obtain any recovery, then Spehar's advances shall not be repaid.

13 7. Spehar shall share its Net Recovery with the Estate in accordance with the pro
14 forma attached to the Application, which is also attached hereto as Exhibit A, and is
15 incorporated herein by reference. Net Recovery shall mean the Estate's gross recovery, less
16 any special counsel fees and expenses as approved by the Court, less the repayment of any
17 amounts advanced to the Estate by Spehar.

18 8. The Trustee shall take all reasonable and appropriate actions to void all liens that
19 are asserted to be superior to Spehar's valid and perfected lien in CMGT's assets and take all
20 necessary or appropriate steps to assist any special counsel that the Estate retains in his
21 evaluation of any causes of action that the special counsel has been retained to evaluate.

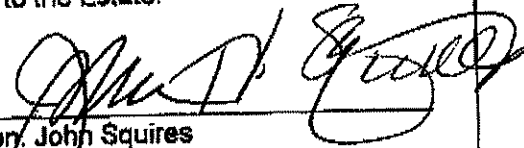
22 9. The Trustee shall provide Spehar with copies of any documents that have been
23 produced to the Trustee. If the Trustee possesses these documents in an electronic format, the
24 Trustee shall provide them to Spehar in an electronic format.

25 10. Spehar shall pay the Estate \$1,500 for all of the Estate's right, title and interest in
26 and to or derived from the Estate's software and intangibles, including, but not limited to,
27 CMGT's proprietary "Absence Expert" and "Poster" software. Spehar's payment shall be due
28 within 20 days of the delivery to Spehar of the computer code for, and a working copy of, the
29 version of the aforementioned software that CMGT last used to service its customers as of
30 August 1, 2003, or upon such other terms and conditions as Spehar and the Estate have agreed

1 in writing. If Spehar fails to pay the \$1,500 the sale to Spehar shall be void, Spehar shall be
2 deemed to forfeit repayment of its initial \$5,000 advance to the Estate.

3
4 DATED: _____

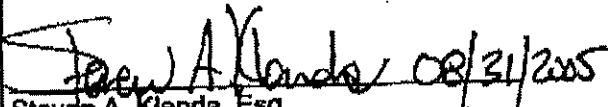
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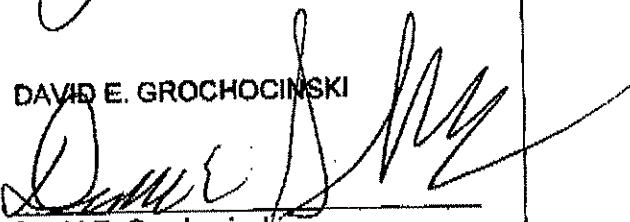

Hon. John Squires
United States Bankruptcy Judge

7 APPROVED AS TO FORM:

8 STEVEN A. KLENDIA, LLC

DAVID E. GROCHOCINSKI

9
10  08/31/2005
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14 ATTORNEY FOR
15 SPEHAR CAPITAL, LLC

CHAPTER 7 TRUSTEE

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Sharing Agreement Between CMGT ITTEE & Spehar Capital, LLC

RECOVERY		SHARING AGREEMENT							
Gross Recovery ²	Estate & Legal Expenses	Joyce % (of Gross)	Joyce Fee	Net of Estate & Legal Expenses & Joyce Fee	Estate %	Estate Recovery ³	% Unsecured Recovered	Spehar Recovery ⁴	% Judgment Recovered
\$247,857	\$23,500	30%	\$74,357	\$150,000	15.0%	\$22,500	2%	\$45,160	0.3%
\$1,452,143	\$23,500		\$438,643	\$1,000,000	6.0%	\$150,000	14%	\$767,660	5%
\$2,890,714	\$23,500		\$867,214	\$2,000,000		\$270,000	20%	\$1,707,660	10%
\$4,318,286	\$23,500		\$1,295,786	\$3,000,000		\$330,000	25%	\$2,647,660	16%
\$5,747,857	\$23,500		\$1,724,357	\$4,000,000		\$390,000	31%	\$3,587,660	21%
\$7,176,429	\$23,500		\$2,152,929	\$5,000,000	10.0%	\$390,000	36%	\$4,527,660	27%
\$8,605,000	\$23,500		\$2,581,500	\$6,000,000		\$490,000	46%	\$5,427,660	32%
\$10,033,571	\$23,500		\$3,010,071	\$7,000,000		\$590,000	55%	\$6,327,660	37%
\$11,462,143	\$23,500		\$3,438,643	\$8,000,000		\$690,000	64%	\$7,227,660	42%
\$12,890,714	\$23,500		\$3,867,214	\$9,000,000		\$790,000	74%	\$8,127,660	48%
\$14,318,286	\$23,500		\$4,295,786	\$10,000,000	15.0%	\$890,000	83%	\$9,027,660	53%
\$15,747,857	\$23,500		\$4,724,357	\$11,000,000		\$1,040,000	97%	\$9,877,660	58%
\$17,176,429	\$23,500		\$5,152,929	\$12,000,000		\$1,190,000	111%	\$10,727,660	63%
\$21,452,143	\$23,500		\$5,438,643	\$15,000,000		\$1,600,000	149%	\$13,317,660	78%
Trial Award									
\$347,500	\$58,500	40%	\$139,000	\$150,000	15.0%	\$22,500	2%	\$45,160	0.3%
\$1,764,167	\$58,500		\$705,667	\$1,000,000	6.0%	\$150,000	14%	\$767,660	5%
\$3,430,333	\$58,500		\$1,372,333	\$2,000,000		\$270,000	20%	\$1,707,660	10%
\$5,097,500	\$58,500		\$2,039,000	\$3,000,000		\$330,000	25%	\$2,647,660	16%
\$6,764,167	\$58,500		\$2,705,667	\$4,000,000		\$390,000	31%	\$3,587,660	21%
\$8,430,333	\$58,500		\$3,372,333	\$5,000,000	10.0%	\$390,000	36%	\$4,527,660	27%
\$10,097,500	\$58,500		\$4,039,000	\$6,000,000		\$480,000	45%	\$5,427,660	32%
\$11,764,167	\$58,500		\$4,705,667	\$7,000,000		\$580,000	55%	\$6,327,660	37%
\$13,430,333	\$58,500		\$5,372,333	\$8,000,000		\$680,000	64%	\$7,227,660	42%
\$15,097,500	\$58,500		\$6,039,000	\$9,000,000		\$780,000	74%	\$8,127,660	48%
\$16,764,167	\$58,500		\$6,705,667	\$10,000,000	12.0%	\$880,000	83%	\$9,027,660	53%
\$18,430,333	\$58,500		\$7,372,333	\$11,000,000		\$1,010,000	94%	\$9,807,660	58%
\$20,097,500	\$58,500		\$8,039,000	\$12,000,000		\$1,130,000	105%	\$10,787,660	63%
\$25,097,500	\$58,500		\$10,939,000	\$15,000,000		\$1,490,000	139%	\$13,427,660	75%

¹ Per CMGT documents and representations.

² Any accepted Settlement or Trial Award will be a Lump Sum, not paid over time.

³ Estate Recovery is capped at \$1,600,000, after which 100% share goes to Spehar Capital, LLC.

⁴ Spehar Recovery calculated net of expenses and billed legal costs of \$82,340

EXHIBIT F

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTER DISTRICT OF ILLINOIS
EASTERN DIVISION**

IN RE: CMGT, INC., Debtor.	Bankruptcy No. 04 B 31669 Chapter 7
DAVID E. GROCHOCINSKI, Trustee,	Honorable John H. Squires (Wheaton)
v.	Adversary No. 07 A 838
SPEHAR CAPITAL, L.L.C., Defendant.	

**TRUSTEE’S RESPONSE TO MOTION FOR JUDGMENT
ON THE PLEADINGS BY SPEHAR CAPITAL, LLC**

NOW COMES Plaintiff, David E. Grochocinski, not individually but solely as Trustee (the “Trustee”) for the estate of CMGT, Inc. (“CMGT” or the “Debtor”), by and through his attorneys, Grochocinski, Grochocinski & Lloyd, Ltd., and for his response to the motion for judgment on the pleadings (the “Motion”) of the Defendant, Spehar Capital, L.L.C. (“Spehar”), states as follows:

Background

In its counterclaim in this proceeding, Spehar contends that the Trustee induced Spehar to loan money to the Debtor’s bankruptcy estate by promising that Spehar would have a valid pre-petition secured claim against the Debtor’s estate in the amount of \$17,045,780.00. The agreement in question was a letter agreement of June 14, 2005 (the “Letter Agreement”), attached hereto as Exhibit A, which contained a provision that the Trustee would “take all

necessary or appropriate actions to void the UCC-1 financing statements or other liens that CMGT's shareholders or persons otherwise affiliated filed with the IL Secretary of State Illinois on or about 12/18/2003." The Letter Agreement does not address the priority of Spehar's claim in the event of any distribution to creditors.

The Letter Agreement was attached as an exhibit to the Trustee's Motion to Enter into Post-Petition Secured Financing Arrangement (the "Financing Motion"), which was filed on July 15, 2002 and initially heard on August 12, 2005. The Financing Motion informed the Court that Spehar was providing financing for a possible lawsuit against professionals who had rendered services to the Debtor (the "Malpractice Action"). As part of that agreement, Spehar had agreed to share any recovery in the Malpractice Action with the estate in accordance with a previously negotiated schedule. Paragraph 3 of the Financing Motion further stated that "[t]o the extent that assets are available in this matter, Spehar Capital, LLC by virtue of the citation to discover assets which was served upon the debtor more than 90 days prior to the filing of the petition has a valid perfected lien."

On September 2, 2005, the Court entered the proposed order that had been submitted with the Financing Motion (the "Financing Order"). A copy of the Financing Order is attached hereto as Exhibit B. The Financing Order provided that Spehar's advances to fund the Malpractice Action would be collateralized and repaid from the estate's recovery in that litigation, and it recited that "[b]y virtue of its Citation to Discover Assets, Spehar has a valid and perfected lien on the proceeds of any such recovery." Ex. B, ¶ 6. In addition, the Financing Order provided that "[t]he Trustee shall take all reasonable and appropriate actions to void all liens that are asserted to be superior to Spehar's valid and perfected lien in CMGT's assets . . ." Ex. B, ¶ 8.

At the time he filed the Financing Motion, the Trustee was unaware that Spehar had not perfected its alleged secured claim. *See* Affidavit of David E. Grochocinski (the “Affidavit”) attached hereto as Exhibit C. Because of the very large size of Spehar’s claim, the Trustee had verified that Spehar held a facially valid claim against the Debtor’s estate. Ex. C, ¶ 5. However, the Trustee had not considered the question of secured status, since Spehar filed the involuntary bankruptcy petition against CMGT more than 90 days after Spehar’s lien had allegedly been perfected through service of a citation to discover assets. Consequently, any lien would have been perfected before the preference period under 11 U.S.C. § 547(b). The Trustee did not interpret the use of the term “void” in the agreement as preventing him from following his customary procedure of preserving voided liens for the benefit of the estate pursuant to 11 U.S.C. § 551. Ex. C, ¶ 8.

Spehar’s alleged lien arises under Illinois law, which requires that a private corporation be served by leaving process with “its registered agent or any officer or agent of the corporation found anywhere in the State.” 735 ILCS 5/2-204. Spehar believed that Louis Franco (“Franco”) had resigned as president of CMGT, as reflected in the fact that it negotiated for an agreement that the Trustee would seek to avoid security interests that CMGT had allegedly created through UCC filings in December 2003. Notwithstanding that Franco would not have been an officer of CMGT at the time Spehar served its citation to discover assets in April 2004, Spehar apparently did not serve a copy of the citation on the Delaware Secretary of State. Ex. C, ¶ 11.

CMGT was a Delaware corporation doing business in Illinois. As indicated on the final page of Spehar’s amended proof of claim, attached hereto as Exhibit D, the Delaware Secretary of State had been served a copy of the judgment on which Spehar’s claim is based. Taking into account that Spehar served its judgment on the Delaware Secretary of State, and based on the

assertions of Spehar and its counsel that the claim was secured, the Trustee believed that CMGT had been properly served in connection with the citation to discover assets. Ex. C, ¶ 6.

As required under his agreement with Spehar, the Trustee has filed the Malpractice Action and brought actions under 11 U.S.C. S 547(b) to avoid the alleged security interests of parties that advanced funds to finance the Debtor's operations (the "Investors"). The order approving the settlement of those actions against the Investors (the "Preference Settlement Order"), attached hereto as Exhibit E, provides that "[p]ursuant to 11 USC 551, the lien, if any, arising from the purported security interest is hereby preserved for the benefit of the bankruptcy estate and David E. Grochocinski, as trustee is hereby deemed to be the secured party in the place and stead of the various adversary defendants." Ex. E, ¶ 3. The Preference Settlement Order further provides that nothing therein "shall be deemed to eliminate or obviate the right to subordinate the aforesaid claims based on 11 USC 510 by any party in interest in the case." Ex. E, ¶5.

The claims register in the Debtor's bankruptcy case, attached hereto as Ex. F, shows that with the exception of the claims by Spehar and the Investors, there are less than five claims filed against the Debtor's estate. Were Spehar to prevail in subordinating the Investors' claims, because the size of its judgment dwarfs the remaining claims filed in the case, Spehar would receive most of the funds distributed to unsecured creditors in this case. Also, pursuant to the Financing Agreement, Spehar would be repaid his advances to fund the Malpractice Action before there could be any distribution to unsecured creditors.

As set forth in his affidavit, the Trustee believes that it is inconsistent with his duties as trustee to allow secured status to a claim based on a citation to discover assets that was not properly served, and is therefore void under state law. The Trustee did not learn that Spehar's

lien was void until after entry of the Financing Order. Ex. C, ¶ 10. The Trustee learned that the Delaware Secretary of State had not been served with Spehar's citation to discover assets after he moved for approval of the preference suits against the Investors. In the exercise of his duties under 11 U.S.C. § 704(5), he then brought his complaint to determine the validity and priority of Spehar's claim.

In its counterclaim, Spehar does not take the position that the Trustee breached obligations under the Financing Agreement to bring the Malpractice Action or sell intangible assets to Spehar. Rather, the sole question presented is whether the Trustee breached an obligation to allow Spehar a secured claim, even though the underlying lien was not properly perfected and is void under state law.

Discussion

In its motion for judgment on the pleadings, Spehar argues that the application of four legal theories would entitle it to relief: (1) judicial estoppel, (2) promissory estoppel, (3) estoppel and (4) the doctrine of law of the case. In order to prevail on any of those grounds at this point in this litigation, Spehar must satisfy the requirements of Fed. R. Civ. P. 12(c), made applicable in bankruptcy by Fed. R. Bankr. P. 7012.

A party may move for judgment on the pleadings after the filing of the complaint and answer in a lawsuit. *Moss v. Martin*, 473 F.3d 694, 698 (7th Cir. 2007). The standard applied in ruling on such a motion is the same as the standard under Fed. R. Civ. P. 12(b). *Guise v. BWM Mortgage, L.L.C.*, 377 F.3d 795, 798 (7th Cir. 2004). The motion must be denied unless it appears beyond a doubt that the Trustee cannot prove any facts in support of his claims and Spehar demonstrates that there are no genuine issues of material fact to be resolved. *Moss*, 473 F.3d at 698.

As discussed in the sections that follow, as a matter of law and undisputed fact, the doctrines of judicial estoppel, law of the case and promissory estoppel are inapplicable here. The motion for judgment on the pleadings must also be denied because there are genuine issues of material fact bearing on Spehar's estoppel defense.

**Essential elements underlying application of the doctrines of
judicial estoppel and law of the case are not present in this case**

The law of the case doctrine creates a presumption against a court's revisiting its own rulings during the course of a litigation, absent some compelling reason warranting re-examination of a decision. *Minch v. City of Chicago*, 486 F.3d 294, 301 (7th Cir. 2007), *cert. denied*, 128 S.Ct. 924 (2008); *Marseilles Hydro Power, LLC v. Marseilles Land & Water Co.*, 481 F.3d 1002, 1004 (7th Cir. 2007); *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 796 (7th Cir. 2005). "[W]hen a court decides upon an issue of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Jarrard v. CDI Telecommunications, Inc.*, 408 F.3d 905, 911-12 (7th Cir. 2005).

The doctrine of judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Zedner v. United States*, 547 U.S. 489, 126 S.Ct. 1976, 1987 (2006) (citing *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000)). Although the doctrine is a flexible one, several factors are pertinent to the analysis. *Id.*

Importantly, the party sought to be estopped must have obtained a favorable ruling or settlement on the basis of a legal or factual **contention** that it wants to repudiate in the current litigation. *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656 (7th Cir. 2004), *cert. denied*, 543 U.S. 1051 (2005); *McNamara v. City of Chicago*, 138 F.3d 1219, 1225 (7th Cir.), *cert. denied*, 525 U.S. 981 (1998) (emphasis added). This requirement is aimed at protecting the integrity of the

judicial process by avoiding the perception in a later proceeding that the first court was misled. *ISMIE Mutual Ins. Co. v. U.S. Dep't of Health & Human Servs.*, 413 F.Supp.2d 954, 958 (N.D. Ill. 2006).

Also, the court must “consider whether the party asserting the inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” *Jarrard*, 408 F.3d at 915. Fairness must be viewed in the context of the motive for the change of position and not solely in the context of the unfavorable result to the other party. *Id.*

Clearly, in this case, neither doctrine applies because the Court has not been called upon to make a determination regarding the alleged secured status of Spehar’s claim. Although there were recitals concerning the question in the Financing Motion and the Financing Order, the Court was asked to approve an agreement of the parties. Both parties may have been mistaken about the status of the claim, but mutual mistake is not a factor that calls for application of either judicial estoppel or the doctrine of law of the case. In the present adversary proceeding, consistent with his fiduciary duties, the Trustee has moved for a determination whether the claim is secured.

Although Spehar argues that it would be unfair to allow the lawsuit to proceed, that argument ignores a number of factors. There were numerous inducements to the contract between these parties, including a commitment by the Trustee to bring a lawsuit that Spehar lacked standing to bring on its own behalf. The Trustee has fulfilled that aspect of the parties’ agreement and, as discussed previously, Spehar will be repaid its advances from any recovery in the Malpractice Action before any other creditor claims are paid.¹ Through its right to seek

¹ Any recovery to the estate is uncertain. In the Malpractice Action, *Grochocinski v. Mayer Brown Rowe & Maw LLP et al.*, 06 C 5486, pending in the United States District Court for the Northern District of Illinois, the defendants have not yet been required to answer the complaint. Instead, the District Court is considering the defendants’ assertion that by funding that litigation, Spehar is perpetrating a fraud on the judicial system.

subordination of the Investor claims, Spehar may also be in a position to receive the lion's share of the distribution to unsecured creditors in this case even if its claim is found to be unsecured. Weighing detriment to Spehar against the Trustee's valid motive for bringing this action, allowing this lawsuit to proceed would not accomplish an unfair result.

Factors essential to the application of either judicial estoppel or the doctrine of law of the case are clearly lacking here. Accordingly, Spehar's motion for judgment in its favor on these grounds must be denied.

The doctrine of promissory estoppel is inapplicable

Under Illinois law, the doctrine of promissory estoppel only applies in narrow circumstances where all elements of a contract exist, but consideration is lacking. *Dumas v. Infinity Broadcasting Corp.*, 416 F.3d 671, 677 (7th Cir. 2005). Promissory estoppel is not designed to give a party to a contract a second bite at the apple, and will only be applied where there is a gap in the remedial system for the doctrine to fill. *Id.*

Here there is no question that the parties entered into a contract supported by consideration. Because Spehar may seek relief for breach of contract, promissory estoppel is inapplicable. Spehar's request for judgment on this ground must therefore be denied.

Questions of material fact prevent a decision on Spehar's estoppel defense

To establish estoppel, the proponent of the defense must establish that the other party made a misleading representation on which the other party reasonably relied to its detriment. *Contempo Design, Inc. v. Chicago and Northeast Illinois Dist. Council of Carpenters*, 226 F.3d 535, 548 (7th Cir. 2000), *cert. denied*, 531 U.S. 1078 (2001).

In its motion, Spehar would characterize recitals in the Financing Motion and Financing Order as misrepresentation on the part of the Trustee. Those recitals were the product of

negotiations between the parties, however, and the circumstances surrounding those discussion have not been established as a matter of undisputed fact. The Trustee denies that he made any misrepresentation, and both reliance and detriment are questions of fact that cannot be decided on the present record. Because of the presence of issues of material fact, Spehar's request for judgment on grounds of estoppel must be denied.

Conclusion

For the reasons discussed above, defendant Spehar Capital, LLC has not established that it is entitled to judgment on the pleadings. Accordingly the Trustee, David E. Grochocinski, requests that the Court enter an order denying its motion.

Respectfully submitted,
David E. Grochocinski, Trustee for the
Estate of CMGT, Inc.

By: /s/ Kathleen M. McGuire
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