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

In re:	)	Chapter 7 Liquidation
	)	
marchFIRST, INC., *et al*.,	)	**CASE NO. 01 B 24742**
	)	(Substantively Consolidated**)**
	)	
Debtors.	)	Hon. John D. Schwartz
	)	Hearing Date: June 26, 2008
	)	Hearing Time: 10:00 A.M. CDT

MOTION OF TRUSTEE ANDREW J. MAXWELL FOR AN ORDER PURSUANT TO FEDERAL RULE OF BANKRUPTCY PROCEDURE 9019 GRANTING AUTHORITY TO COMPROMISE AND SETTLE CLAIMS BETWEEN THE ESTATE AND KPMG LLP

Andrew J. Maxwell, not individually but in his capacity as chapter 7 trustee (the "Trustee"), for the bankruptcy estates (the "Estates") of debtors marchFIRST, Inc., *et al*. (the "Debtors"), by and through the undersigned counsel, hereby moves this Court (this "Motion") to enter an order authorizing the Trustee to compromise certain claims between the Estates and defendant KPMG, LLP ("KPMG"). In support of the Motion, the Trustee states:

Jurisdiction and Venue

1. This Court has jurisdiction pursuant to 28 U.S.C. § 1334(a).

2. Venue is proper in this federal judicial district pursuant to 28 U.S.C. § 1409(a).

3. This is a core proceeding pursuant to 28 U.S.C. § 157(b).

4. The statutory predicates for the relief requested herein are sections 105(a) and 363(b) of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code"), as supplemented by Rules 2002 and 9019 of the Federal Rules of Bankruptcy Procedure.

Background

5. On or about April 12, 2001 (the "Petition Date"), the Debtors commenced these cases (the "Cases") in the United States Bankruptcy Court for the District of Delaware (the

"Delaware Court") by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code. Subsequently, the Debtors moved to convert the Cases to chapter 7. On or about April 26, 2001, the Cases were converted to chapter 7 cases pursuant to section 1112 of the Bankruptcy Code.

6. By order dated July 10, 2001, the United States Bankruptcy Court for the District of Delaware Court transferred the Cases to the United States Bankruptcy Court for the Northern District of Illinois (the "Court").

7. The Trustee was appointed interim chapter 7 trustee for the Cases on July 16, 2001, and thereafter became the permanent case trustee.

8. On April 11, 2003, the Trustee filed an adversary proceeding against KPMG seeking, *inter alia*, damages resulting from KPMG's alleged failure to discharge its professional obligations in performing auditing services for marchFIRST's predecessor company, Whitman-Hart, Inc. (Adv. Pro. No. 03-01417, the "KPMG Adversary"). Upon motion by KPMG, the District Court for the Northern District of Illinois (the "District Court") subsequently withdrew the reference of the case from this Court and, on July 20, 2007, granted summary judgment in KPMG's favor. On April 16, 2007, KPMG filed a bill of costs in the KPMG Adversary asserting a claim against the Trustee in the amount of $67,048.08 (the "Bill of Costs"). The Trustee filed an objection to the amount sought by KPMG in the Bill of Costs.

9. The Trustee appealed the District Court's decision to the United States Court of Appeals for the Seventh Circuit (the "Court of Appeals"), which entered an opinion affirming the District Court's decision on March 21, 2008. At the end of its opinion, the Court of Appeals suggested that KPMG may wish to file a motion for sanctions under both Federal Rule of Appellate Procedure 38 ("Appellate Rule 38") and Federal Rule of Bankruptcy Procedure 9011

("Bankruptcy Rule 9011") against Maxwell in his personal capacity ("Maxwell"). A copy of the Court of Appeals' opinion is attached hereto as Exhibit A and incorporated herein by reference.

10. On April 4, 2008, KPMG filed a motion with the Court of Appeals seeking sanctions including attorneys' fees from the Trustee, his counsel, Williams Montgomery & John ("WMJ"), and Maxwell arising from the Estate's appeal of the District Court's decision on the KPMG Adversary (the "Appellate Sanctions Motion"). KPMG is asking for an award of $234,228.99 in the Appellate Sanctions Motion. KPMG has also filed in the Court of Appeals a motion for leave to file a motion for sanctions in the District Court (the "Motion for Leave"). If the Motion for Leave is granted, KPMG has stated that it intends to file a motion for sanctions in the District Court under Bankruptcy Rule 9011 and 28 U.S.C. § 1927 against, among other parties, the Trustee and Maxwell (the "District Court Sanctions Motion").[1] KPMG asserts that it plans to seek sanctions of over $4,000,000 in the District Court Sanctions Motion.

11. On April 11, 2003, the Trustee filed a second adversary proceeding against KPMG seeking to avoid certain prepetition transfers (the "Transfers") to KPMG by the Debtors as preferences (Adv. Pro. No. 03-01561, the "Preference Action"). KPMG has denied liability in the Preference action and has asserted several affirmative defenses. No dispositive motion has been filed in the Preference Action, which is still pending before this Court.

12. By this Motion, the Trustee seeks the Court's approval to enter into a settlement of all claims between the Estate and KPMG (the "Settlement Agreement", attached as Exhibit B and incorporated herein by reference), described more fully below.

[1] Included in the term "District Court Sanctions Motion" is any motion, complaint or other pleading in any forum seeking monetary or non-monetary sanctions against the Trustee or Maxwell, but excluding the Appellate Sanctions Motion previously filed in the Court of Appeals.

Requested Relief

13. By this Motion, the Trustee requests that this Court allow the Trustee to compromise all claims between the Estate and KPMG by authorizing the Trustee's execution of the Settlement Agreement.

14. Pursuant to the terms of the Settlement Agreement,[2] KPMG will, among other things:

a. Release all claims against the Trustee.

b. Refrain from filing the District Court Sanctions Motion against the Trustee or Maxwell, or, if any such motion has been filed, withdraw such motion with prejudice as to the Trustee and Maxwell.

c. Withdraw with prejudice the Bill of Costs request that is pending before the District Court. If the Bill of Costs request is granted prior to withdrawal, KPMG will not seek payment of the Bill of Costs.

d. Not seek payment from the Trustee should the Court of Appeals grant the Appellate Sanctions Motion.

e. Not share information relating to the Debtors' Estates with, strategic advice with, or otherwise assist any third-party that has been a party to, is currently a party to, or is contemplating becoming a party to any adversary proceeding or other litigation with the Trustee or the Debtors' Estates, unless subpoenaed and ordered by a court of competent jurisdiction to share such information, subject to certain limited exceptions.

[2] The terms and conditions set forth in the Motion do not substitute for the terms and conditions in the Settlement Agreement. If there is any conflict between the terms of the Settlement Agreement as described in the Motion and the Settlement Agreement itself, the Settlement Agreement will control.

f. Provide notice of and an opportunity to object to any subpoena served upon KPMG that seeks the production of any documents, testimony or information relating to the KPMG Adversary, the Preference Action, or the Debtors' bankruptcy cases generally.

15. Pursuant to the Settlement Agreement, the Trustee will, among other things:

a. Release all of the Estates' claims against KPMG.

b. Dismiss with prejudice the Preference Action and with each party to bear its costs and attorneys' fees.

16. Pursuant to the Settlement Agreement, Maxwell will, among other things:

a. Release all claims against KPMG, except for rights, claims or defenses relating to the Appellate Sanctions Motion or otherwise specified.

b. Retain all rights and claims, if any, for indemnity, reimbursement or similar claims against the Debtors' Estates.

17. No part of the Settlement Agreement will discharge or have any other effect on any claims held by the Trustee, Maxwell or KPMG against WMJ.

Basis for Relief

18. Section 363(b) of the Bankruptcy Code provides that "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b). This Court has recognized that the settlement of a cause of action held by a bankruptcy estate "is plainly the equivalent of the sale of that claim." *In re Commercial Loan Corp.*, 316 B.R. 690, 697 n.5 (Bankr. N.D. Ill. 2004) (Goldgar, J.) (quoting *In re Telesphere*, 179 B.R. 544, 552 n.7 (Bankr. N.D. Ill. 1994)).

19. Furthermore, Bankruptcy Rule 9019 provides that "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." Fed. R. Bankr.

P. 9019. A bankruptcy court should approve a settlement agreement unless it is unreasonable and unfair in light of the circumstances of the case. *See Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25 (1968). In making this determination, the Court should consider: (i) the terms of the settlement agreement; (ii) the probability of success in the underlying litigation; (iii) the difficulty in collecting any judgment that may be obtained; (iv) the complexity of the litigation involved; (v) the expense, inconvenience, and delay necessarily attendant to such litigation; (vi) the interest of creditors and stockholders; and (vii) any other factors relating to the "wisdom of the proposed compromise." *Id.*; *see also In re Andreuccetti*, 975 F.2d 413, 421 (7th Cir. 1992) (approving settlement where comparison of the settlement's terms with the litigation's probable costs and benefits supported conclusion that it was "in the best interests of the estate"); *In re Patel*, 43 B.R. 500, 505 (N.D. Ill. 1982) (same). "To answer that question, the court must compare 'the settlement's terms with the litigation's probable costs and probable benefits.'" *Commercial Loan*, 316 B.R. at 697 (quoting *LaSalle Nat'l Bank v. Holland (In re Am. Reserve Corp.)*, 841 F.2d 159, 161 (7th Cir. 1987)). "Only if the settlement 'falls below the lowest point in the range of reasonableness' should the trustee's decision be disturbed." *Id.* at 698 (quoting *In re Energy Co-op, Inc.*, 886 F.2d 921, 929 (7th Cir. 1987) (internal quotation omitted)).

20. Here, to evaluate the proposed Settlement Agreement, the Trustee compared the value of the assets that the Estates will give up under the Settlement Agreement -- primarily consisting of the Estates' claims in the Preference Action -- against the value of the release of liability the Estates will receive -- primarily consisting of KPMG's pending and potential sanctions claims and the Bill of Costs, as well as the relative costs and expenses likely to be incurred in prosecuting the Preference Action as well as defending the claims asserted by

KPMG. If KPMG were to successfully prosecute the Appellate Sanctions Motion and the District Court Sanctions Motion, it could receive damages equal to amount of attorneys' fees KPMG expended in defending against the KPMG Adversary and the subsequent appeal as well as, potentially, interest on those attorneys' fees. KPMG has already sought $234,228.99 in sanctions damages for defending the appeal of the KPMG Adversary and has indicated that it may seek to recover an amount in excess of $4,000,000 in sanctions damages for its defense of the KPMG Adversary in the District Court. Additionally, KPMG has filed the Bill of Costs seeking $67,048.08. Therefore, the value of KPMG's release of claims against the Estate may exceed $4,300,000.00.

21. Next, the Trustee retained separate and independent counsel, Ronald R. Peterson of Jenner & Block LLP (the "Special Counsel"), to evaluate the value of the assets that the Estates would give up under the Settlement Agreement. These assets consist primarily of the Estates' claims against KPMG under the Preference Action. The Special Counsel valued the Preference Action by first identifying all transfers by KPMG to the Debtors that occurred in the 90-day preference period and then applying the potential defenses that KPMG could be expected to assert to the Preference Action. In so doing, the Special Counsel prepared an analysis that examined what the value of the Preference Action would be if KPMG were able to successfully assert various combinations of (i) a section 547(c)(2) ordinary course of business defense; (ii) a section 547(c)(4) new value defense; and (iii) a defense based on a challenge to Debtors' insolvency at the time of the Transfers. With respect to KPMG's ordinary course defense, the Special Counsel performed a sensitivity study of the variance in time until payment from the mean and the median time until payment using a fifteen day deviation.

22. As to KPMG's new value defense, the Special Counsel considered the impact of a recent Court of Appeals decision in *In re Globe Building Materials, Inc.*, 484 F.3d 946 (7th Cir. 2007). In *Globe*, the court held that the fulfillment of a preexisting contractual obligation -- in that case, the delivery of goods contemplated by a contract -- is not "new value." *Id*. at 949-50. The Special Counsel concluded that if KPMG's rendering of auditing services was the fulfillment of a preexisting contractual obligation and *Globe* does apply, the recovery would be between $717,563 and $1,129,750. However, if *Globe* does not apply, the Trustee's recovery changes to a range between $144,284 and $240,718. In addition, while the Special Counsel heavily discounts KPMG's argument on solvency, if KPMG were to prevail, then the recovery would be zero.

23. After applying the different permutations of affirmative defenses described above, the Special Counsel discounted the resultant values calculated for the Preference Action to credit KPMG for the section 502(h) claim to which it would be entitled if the Trustee were to avoid the Transfers, assuming a 20% hypothetical distribution to creditors.[3] The section 502(h) deduction reduced the gross potential values for recovery on the Preference Action to a range between $115,427 and $903,800.

24. Finally, the Special Counsel observed that, given the hotly contested nature of the litigation between KPMG and the Trustee, the attorneys' and expert witnesses' fees likely to accrue in prosecuting the Preference Action could exceed $500,000, which could result in a negative recovery to the Estates should KPMG prevail under some of the affirmative defenses considered by the Special Counsel. Given the wide range of potential outcomes for the Preference Action, the uncertainty of litigation, and the potential exposure of the Estate under the

[3] This hypothetical distribution percentage was used solely for this analysis and does not constitute an estimate of the actual distribution to be made to creditors in this case.

District Court Sanctions Motion and the Appellate Sanctions Motion, the Trustee believes that the proposed Settlement Agreement is a reasonable compromise of the potential costs and benefits of further litigation of the Preference Action.

25. The proposed Settlement Agreement is therefore in the best interest of the Debtors' Estates and should be approved by this Court.

Notice

26. The Trustee has given approximately 13 days' notice of the Motion to: (a) the United States Trustee, and (b) all parties who formally requested notice in the Debtors' bankruptcy case and who appear on the service list in customary use in this case. The Trustee believes this notice is sufficient and requests that the Court waive any further notice requirement.

WHEREFORE, the Trustee respectfully requests that this Court enter an order: (a) authorizing the Trustee's execution of the Settlement Agreement (in the form attached as Exhibit B or in a substantially similar form); and (b) granting such further relief as the Court deems necessary and appropriate.

Dated: June 12, 2008

Respectfully submitted,

ANDREW J. MAXWELL, not individually, but solely as trustee of the bankruptcy estate of marchFIRST, Inc., et al.

One of his attorneys

/s/ Ronald R. Peterson

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Exhibit A

In the
United States Court of Appeals
For the Seventh Circuit

No. 07-2819

ANDREW J. MAXWELL,

Plaintiff-Appellant,

v.

KPMG LLP,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 03 C 3524—**Joan B. Gottschall**, *Judge.*

ARGUED FEBRUARY 27, 2008—DECIDED MARCH 21, 2008

Before EASTERBROOK, *Chief Judge*, and POSNER and WOOD, *Circuit Judges*.

POSNER, *Circuit Judge*. The plaintiff is the Chapter 7 bankruptcy trustee of a company named marchFIRST. He brought this suit against KPMG, the accounting firm claiming that marchFIRST had been harmed as a result of the accounting firm's breaching its duty of care in violation of Illinois tort law. He seeks more than $600 million in damages. The district judge withdrew the case from the bankruptcy court and ultimately granted summary judgment in the defendant's favor.

KPMG was the auditor of a firm called Whittman-Hart, which offered consulting services in information technology. In the fall of 1999 Whittman-Hart became interested in buying a firm larger than itself called US Web/CKS, which provided consulting services primarily to companies that used the Internet to sell goods or services. The purchase was consummated on March 1, 2000; the date became Whittman-Hart's new name. Whittman-Hart paid the owners of US Web more than $7 billion. It paid entirely in the form of stock, a risky currency; for beginning in the following month many Internet-related ("dot.com") businesses experienced deep, often terminal, reverses. By virtue of the acquisition of US Web, marchFIRST was such a business, and the following April, thirteen months after the acquisition, it declared bankruptcy.

The trustee argues that while the acquisition was being negotiated, KPMG approved a statement of Whittman-Hart's fourth-quarter 1999 earnings that it should have known was false. It should have known, the trustee argues, that Whittman-Hart had engaged in a form of what is called "round-tripping." A company makes a loan to a firm controlled by it, with the understanding that the borrower will purchase services from the lender in an amount equal to the amount of the loan, though the services may never be performed or if performed may have little value and thus cost the lender little or nothing. In effect the loan is reclassified from an account receivable by the lender to operating income to him minus only the zero or nominal cost of the services that he renders or pretends to render the borrower.

The trustee also complains that KPMG should not have approved Whittman-Hart's classifying prepaid consulting fees that it had received in the fourth quarter of 1999 as revenue in that quarter, rather than allocating them to 2000, when the fees were earned. Cf. *Indiana Lumbermens Mutual Ins. Co. v. Reinsurance Results, Inc.*, 513 F.3d 652, 653-55 (7th Cir. 2008).

As a result of these accounting maneuvers, Whittman-Hart's fourth-quarter 1999 earnings were significantly overstated. We'll assume, without having to decide, that KPMG was negligent in approving the maneuvers that generated the overstatement. Had the earnings been correctly stated, US Web would have learned that they had been considerably lower than Whittman-Hart's third-quarter earnings and its anticipated as opposed to realized fourth-quarter earnings. Therefore, the trustee argues, US Web would have lost interest in being acquired by Whittman-Hart and the acquisition would have fallen through. There is no "therefore." Whittman-Hart was eager to make the acquisition and so might have paid more for US Web to offset, as it were, the poor fourth-quarter results—in which event KPMG's alleged negligence would actually have saved Whittman-Hart's shareholders money had marchFIRST prospered. But we'll accept the trustee's argument, though just to move the analysis along, and also accept his further argument that had the acquisition fallen through, Whittman-Hart, though presumably not US Web, would have survived the travails of the dot.com sector. US Web was larger than Whittman-Hart and more of a dot.com business. It was, the argument goes, only because Whittman-Hart was chained to a drowning US Web by virtue of the acquisition that it too drowned.

An immediate problem, unremarked by the parties, is that the principal beneficiaries should the trustee prevail in this suit would be the former shareholders of US Web, even though there is no claim that US Web would have survived had it not been acquired. The trustee is asking for damages far in excess—more than $500 million in excess—of the $93.6 million owed marchFIRST's unsecured creditors. The bulk of the recovery would thus go to the shareholders, and US Web's shareholders received 57 percent of the stock of marchFIRST. Yet the linchpin of the trustee's case is that US Web pulled marchFIRST down to its doom. US Web cannot be at once the cause of the bankruptcy and its principal beneficiary.

More important, to say that had it not been for KPMG's negligence the acquisition would have fallen through and Whittman-Hart would have survived, and therefore KPMG was a cause of the debacle, conflates a necessary condition—confusingly called by lawyers a "but-for cause"—with a real "cause," confusingly called by them a "proximate cause" and enigmatically defined as something "that produces an injury through a natural and continuous sequence of events unbroken by any effective intervening cause." *Cleveland v. Rotman*, 297 F.3d 569, 573 (7th Cir. 2002) (Illinois law). Conventional as these usages are, they are unhelpful.

A necessary condition is a sine qua non, but it is rarely a "cause" in any meaningful sense of the word. No one would say that Whittman-Hart's demise was "caused" by the invention of the Internet, though had it not been invented and enticed US Web, Whittman-Hart would, if the trustee is correct, be fine. Cf. *Movitz v. First National Bank of Chicago*, 148 F.3d 760, 762 (7th Cir. 1998). Among the myriad of necessary conditions for anything to occur, the one designated "the cause" is the one that is significant from the standpoint of the person making the designation. There may of course be more than one such necessary condition, and there was here. There are also cases in which a condition that is not necessary, but is sufficient, is deemed the cause of an injury, as when two fires join and destroy the plaintiff's property and each one would have destroyed it by itself and so was not a necessary condition; yet each of the firemakers (if negligent) is liable to the plaintiff for having "caused" the injury. *Kingston v. Chicago & N.W. Ry.*, 211 N.W. 913 (Wis. 1927); cf. *Summers v. Tice*, 199 P.2d 1 (Cal. 1948). This is not such a case.

The necessary conditions for Whittman-Hart's demise that are relevant to this appeal were first its decision to buy US Web and second the precipitate decline of the dot.com business. The decision to buy US Web was not influenced by KPMG's approving Whittman-Hart's accounting decisions, and neither, of course, were the dot.com troubles. US Web's agreement to be bought may have been influenced by KPMG's advice to Whittman-Hart, but that is irrelevant because US Web was doomed by the coming collapse of its market and so was not harmed by the advice.

The same conclusions can be reached by a different route, by asking what duty, enforceable by tort law, was assumed by KPMG as Whittman-Hart's auditor. It was the duty to protect creditors of and investors in Whittman-Hart from being misled to their harm by financial statements issued by Whittman-Hart that contained errors that would be material to a creditor or an investor. E.g., 15 U.S.C. § 77k(a)(4); 225 ILCS 450/30.1; *FDIC v. Ernst & Young LLP*, 374 F.3d 579, 580-81 (7th Cir. 2004) (Illinois law). It was not a duty to give the company business advice, such as advice on whether to acquire another company. *Johnson Bank v. George Korbakes & Co.*, 472 F.3d 439, 443 (7th Cir. 2006) (Illinois law); *Fehribach v. Ernst & Young LLP*, 493 F.3d 905, 911-12 (7th Cir. 2007). The knowledge required to give such advice is possessed by the business itself and by business-consulting firms, as distinct from auditors. The auditors' concern is with the accuracy of the company's books rather than with the demand for the company's products or services or the attractiveness of its investment opportunities. It is true that many accounting firms offer business consulting as well as auditing services and that KPMG is one of them and did some consulting for Whittman-Hart and hoped to continue doing so for marchFIRST. But the suit complains only about KPMG's auditing services, and there is no contention that they were influenced by the firm's consulting wing.

The failure to state Whittman-Hart's fourth-quarter earnings accurately, insofar as it was due to KPMG, may as we said have been a wrong to US Web (though a wrong that did no harm if indeed that firm was doomed), but it was not a wrong to Whittman-Hart, as the auditor neither was asked to nor did advise Whittman-Hart to buy US Web. By swallowing a larger company, and one concentrated in the dot.com business, Whittman-Hart assumed the risk of being injured, fatally as it turned out, by a downturn in that business. It wants to make its auditor the insurer against the folly (as it later turned out) of a business decision (the decision to try to acquire US Web) unrelated to what an auditor is hired to do.

Nothing in Illinois law permits such an attempt to succeed. As we explained in the *Movitz* decision, also a case governed by Illinois law, "The distinction between 'but for' causation and actual legal responsibility for a plaintiff's loss is particularly well developed in securities cases, where it is known as the distinction between 'transaction causation' and 'loss causation.' Suppose an issuer of common stock misrepresents the qualifications or background of its principals, and if it had been truthful the plaintiff would not have bought any of the stock. The price of the stock then plummets, not because the truth is discovered but because of a collapse of the market for the issuer's product wholly beyond the issuer's control. There is 'transaction causation,' because the plaintiff would not have bought the stock, and so would not have sustained the loss, had the defendant been truthful, but there is no 'loss causation,' because the kind of loss that occurred was not the kind that the disclosure requirement that the defendant violated was intended to prevent. To hold the defendant liable for the loss would produce overdeterrence by making him an insurer against conditions outside his control . . . . Also, it is bad policy to encourage people harmed in some natural or financial disaster to cast about for someone on whom to lay off the consequences who had, however, committed only a technical breach of duty. The legal system is busy enough without shouldering the burden of providing insurance against business risks. Had [the investor] diversified his investments, he would not have taken such a big hit when the Houston real estate market collapsed." 148 F.3d at 763 (citations omitted).

As if this were not bad enough, the evidence that the trustee presented to prove damages was outlandish. The plaintiff's expert, a financial analyst named Paul Marcus, testified that had it not been for the acquisition of US Web, Whittman-Hart would have had a "fair market value" (whatever exactly that means) of $535 million on the day that instead marchFIRST declared bankruptcy. He based this estimate on the market capitalizations that day, compared with what they had been at the time of the acquisition, of companies that he deemed comparable to marchFIRST. But he admitted that before the high-tech stock market bubble burst, movements in the stock prices of those companies were not correlated with each other or with movements in the price of Whittman-Hart's stock. He suggested no basis for thinking that nevertheless they would have been affected the same way by the events that caused the bubble to burst.

In addition, he based his estimate of what Whittman-Hart's stock would have been worth in April 2001 on the average decline in the stock prices of his comparison group of companies without taking account of their capital structures. Yet an external shock will cause a company's stock price to fall farther the more debt the company has. If the value of a company's assets falls by 50 percent, and it has no debt, its stock price (setting aside any other influences on that price besides asset value) will fall by 50 percent. But if the company has 40 percent debt before the shock, its stock price will fall by 83 percent. For, originally worth $1 million, the company now is worth only $500,000 yet owes its creditors $400,000, leaving only $100,000 of value for the shareholders. The original equity value was $600,000 ($1 million minus the $400,000 in debt), and the decline in equity value was $500,000, which is 83 percent of $600,000.

The expert also failed to correct for the fact that although his valuation of what Whittman-Hart would have been worth in April 2001 assumed that US Web would not have been acquired, 57 percent of that value, if awarded as damages, would go to the former shareholders of US Web, contradicting the premise of his analysis that they would never have had an interest in Whittman-Hart. The trustee's lawyer confused matters at argument by stating incorrectly that he was representing only the unsecured creditors of Whittman-Hart. In fact he is representing the entire bankrupt estate of marchFIRST, and, as we know, seeking damages far in excess of the claims of the creditors.

The extreme weakness of the trustee's case, both on liability and on damages, invites consideration of the exercise of litigation judgment by a Chapter 7 trustee. 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. The Bankruptcy Code forbids reimbursing trustees for expenses incurred in actions not "reasonably likely to benefit the debtor's estate," 11 U.S.C. § 330(a)(4)(A)(ii)(I), and authorizes an "appropriate sanction" against parties who file such a claim. Bankruptcy Rule 9011(b)(2), (c)(1)(B); *In re Bryson*, 131 F.3d 601, 603-04 (7th Cir. 1997); *In re Cohoes Industrial Terminal, Inc.*, 931 F.2d 222, 227 (2d Cir. 1991). Not "reasonably likely to benefit the debtor's estate" may well be a correct description of this suit.

We are particularly disturbed by the damages claim. It is not only groundless, as we have seen; it is intimidating, because of its size. Nor is it a good plea that yes, the damages claim of $626 million is preposterous, but suppose that therefore the probability of its succeeding is only 1 in 1000; well, .001 × $626 million is $626,000, and that "expected value" of suing may exceed the cost of the suit to the bankrupt estate. There is something wrong with this reasoning. For if .001 is too high an estimate, the trustee can up his damages claim to $6.26 billion—the probability of success will be even lower, but even if it is only 1 in 10,000 (and how exactly would one demonstrate that it is less?), the expected value of suing will still be $626,000. A frivolous appeal has *some* chance of success: lightning may strike, or the law may change while the appeal is pending; and a trustee who succeeds in obtaining a judgment will share in it. 11 U.S.C. §§ 326(a), 330.

But frivolous suits are forbidden. So frivolousness must depend not on the net expected value of a suit in relation to the cost of suing, but on the probability of the suit's succeeding. If that probability is very low, the suit is frivolous; really that is all that most courts, including ours, mean by the word. See, e.g., *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 952 (7th Cir. 2006); *Moreland v. Wharton*, 899 F.2d 1168, 1170 (11th Cir. 1990). By that standard, this suit may well be frivolous. We note, therefore, that the defendant can file a motion in the district court for an award of reasonable attorney's fees, *In re Roete*, 936 F.2d 963, 966-67 (7th Cir. 1991) (of course to be paid by the trustee personally, not by the bankrupt estate), and a corresponding motion in this court under Fed. R. App. P. 38. We do not, however, prejudge the outcome of either type of motion.

AFFIRMED.

<u>Exhibit B</u>

SETTLEMENT AGREEMENT

This Settlement Agreement (this "Agreement") is made as of June 12, 2008, among Andrew J. Maxwell, in his capacity as Chapter 7 trustee (the "Trustee") for the bankruptcy estates of marchFirst, Inc., et al.[1] (the "Debtors"), and in his personal capacity ("Maxwell"), and KPMG LLP ("KPMG" and collectively with the Trustee and Maxwell, the "Parties," and each, a "Party").

Recitals

WHEREAS, on or about April 12, 2001 (the "Petition Date"), the Debtors commenced these cases (the "Cases") by filing voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "Delaware Court") and commencing the cases known as Case No. 01-B-01381 et. seq. Subsequently, the Debtors moved to convert the Cases to Chapter 7 liquidation cases. On or about April 26, 2001, the Cases were converted to Chapter 7 cases pursuant to 11 U.S.C. § 1112.

WHEREAS, by order dated July 10, 2001, the Delaware Court transferred the Cases to the United States Bankruptcy Court for the Northern District of Illinois (the "Bankruptcy Court"), and the Clerk of the Bankruptcy Court assigned the lead case number 01-24742.

WHEREAS, the Trustee was appointed interim Chapter 7 trustee for the Cases on July 16, 2001, and thereafter became the permanent case trustee.

WHEREAS, on April 11, 2003, the Trustee filed an adversary complaint against KPMG (Adv. Pro. No. 03-01417, the "KPMG Adversary") alleging, *inter alia*, that KPMG failed to

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[1] The Debtors consist of those debtors identified in the Order Directing Joint Administration of Cases Pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure entered in Case No. 01-B-24724 before the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division. (*See In re marchFirst, Inc., et al.*, 01-B-24742, Doc. No. 152).

discharge its professional obligations in performing auditing services for marchFirst's predecessor company, Whitman-Hart, Inc. ("Whitman-Hart"). The Trustee sought damages against KPMG in the approximate amount of $628.6 million. Upon motion by KPMG, the United States District Court for the Northern District of Illinois, Honorable Joan B. Gottschall presiding (the "District Court"), subsequently withdrew the reference of the KPMG Adversary from the Bankruptcy Court, whereupon it was assigned Case No. 03-CV-3524.

WHEREAS, on July 20, 2007, the District Court granted summary judgment in the KPMG Adversary in KPMG's favor.

WHEREAS, the Trustee appealed the District Court's decision to the United States Court of Appeals for the Seventh Circuit (the "Court of Appeals"), which entered an opinion affirming the District Court's decision on March 21, 2008. At the end of its opinion, the Court of Appeals suggested that KPMG may wish to file motions for sanctions under Federal Rule of Appellate Procedure 38 ("Appellate Rule 38") in the Court of Appeals and under Federal Rule of Civil Procedure 11, Federal Rule of Bankruptcy Procedure 9011 and 28 U.S.C. § 1927 in the District Court.

WHEREAS, on April 4, 2008, KPMG filed a motion in the Court of Appeals seeking sanctions under Appellate Rule 38 (the "Appellate Sanctions Motion") against the Trustee; his attorneys, Williams Montgomery & John Ltd. ("WMJ"); and Maxwell in the amount of $234,228.99 for pursuing an appeal of the District Court's decision. KPMG alleges and the Trustee and Maxwell deny that the appeal was frivolous.

WHEREAS, on April 9, 2008, KPMG filed a motion with the Court of Appeals seeking leave to file a motion for sanctions in the District Court (the "Motion for Leave"). In the event that the Motion for Leave is granted, KPMG intends to file a motion for sanctions in the District

Court under Federal Rule of Bankruptcy Procedure 9011 and 28 U.S.C. § 1927 against, among other parties, the Trustee and Maxwell (the "District Court Sanctions Motion"[2]). KPMG asserts that its fees and costs in defending the KPMG Adversary in the District Court exceed $4,000,000 and that it may seek a recovery in excess of $4,000,000.

WHEREAS, on August 16, 2007, KPMG filed a bill of costs in the KPMG Adversary asserting a claim against the Trustee in the amount of $67,048.08 (the "Bill of Costs"). The Trustee filed an objection to the amount sought by KPMG in the Bill of Costs.

WHEREAS, the Trustee and Maxwell deny the material allegations of the Appellate Sanctions Motion and the Bill of Costs and deny that KPMG is entitled to any relief in respect thereto or to any relief in the District Court in the event that KPMG were to file the District Court Sanctions Motion.

WHEREAS, on April 11, 2003, the Trustee filed a second adversary complaint against KPMG seeking to avoid and recover certain prepetition transfers to KPMG by the Debtors (the "Transfers") as preferences pursuant to sections 547 and 550 of the Bankruptcy Code (Adv. Pro. No. 03-01561, the "Preference Action").

WHEREAS, the Trustee asserts in the Preference Action that KPMG received $1,301,893.00 in voidable preferences arising out of payments allegedly made in the 90 day period prior to the Debtors' Petition Date for auditing and tax services that KPMG allegedly performed for the Debtors.

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[2] Included in the term "District Court Sanctions Motion" is any motion, complaint or other pleading in any forum, whether currently on file with such forum or filed in the future, seeking monetary or non-monetary sanctions against Maxwell or the Trustee, but excluding the Appellate Sanctions Motion previously filed in the Court of Appeals.

WHEREAS, KPMG denies that the Trustee is entitled to the relief sought in the Preference Action and has asserted certain affirmative defenses pursuant to 11 U.S.C. § 547(c)(2) and (4) to the causes of action asserted against it in the Preference Action.

WHEREAS, to avoid the uncertainty of recovery or losses, time delay and the cost and expense of litigation, the Parties have now agreed to resolve all claims and disputes among them on the terms set forth herein.

NOW, THEREFORE, for good and valuable consideration, the receipt and adequacy of which the Parties acknowledge, the Parties agree as follows:

AGREEMENT

1. All Terms Contractual. The Parties agree that each term of this Agreement is contractual and not merely a recital.

2. Bankruptcy Court Approval. The Parties agree that this Agreement is contingent upon entry of a Final Order by the Bankruptcy Court, upon written application and after notice and a hearing, approving the settlement memorialized herein and authorizing the Trustee's execution, delivery and performance of this Agreement on behalf of the Debtors' estates (the "Approval Order").[3]

3. Withdrawal of Motion for Sanctions. The Parties agree that KPMG shall not file the District Court Sanctions Motion seeking sanctions in the District Court against the Trustee or Maxwell or any other similar motion in any forum (excluding the Appellate Sanctions Motion previously filed in the Court of Appeals) or, if KPMG has since filed the District Court Sanctions

[3] For the purposes of this Agreement, a "Final Order" means an order, judgment or other decree that is final for purposes of 28 U.S.C. §§ 158 and 1291 and has not been reversed, stayed, modified, vacated, or amended; and as to which (a) the time to appeal or seek certiorari, review, or rehearing has expired and as to which no appeal or petition for certiorari, review, or rehearing is pending or (b) any right to appeal or to seek certiorari, review or rehearing has been waived.

Motion, KPMG shall withdraw with prejudice the District Court Sanctions Motion with respect to the Trustee and Maxwell with all parties to bear their own attorneys' fees and costs.[4] Nothing herein shall constitute an agreement by KPMG to withdraw the District Court Sanctions Motion against WMJ, nor shall anything herein constitute an agreement by KPMG to withdraw the Appellate Sanctions Motion against Maxwell or WMJ. Nevertheless, in accordance with their obligations to keep the Court of Appeals informed with respect to the pending Appellate Sanctions Motion, upon the entry of a Final Order by the Bankruptcy Court approving this Agreement, the Parties shall file a joint stipulation with the Court of Appeals advising it of this Settlement and the Parties shall use their best efforts to comply with the instructions, if any, of the Court of Appeals.

4. Release of the Trustee. The Parties agree that except for any obligations created by this Agreement and subject to the provisions of paragraphs six and eight herein, KPMG, on behalf of itself as well as its partners, members, officers, directors, employees, agents, servants, representatives, predecessors, successors, shareholders, parents, subsidiaries, past, present and future affiliates, assigns, employees, insurers and attorneys: releases, waives, disclaims and discharges the Trustee and his agents, servants, assigns, predecessors, successors, insurers, attorneys and representatives, and the officers, directors, agents and representatives of any of the foregoing (collectively, the "Trustee Released Parties"), from any and all claims, counterclaims, actions, causes of action, lawsuits, proceedings, adjustments, offsets, contracts, obligations, liabilities, controversies, costs, expenses, attorneys' fees and losses whatsoever, whether in law, in admiralty, in bankruptcy, or in equity, and whether based on any federal law, state law,

[4] Wherever used in this agreement, "attorneys' fees and costs" will be construed to include, but are not limited to, all fees for professional services, expert witnesses and paralegals; internal charges; out of pocket disbursements; and court costs.

common law right of action or otherwise, foreseen or unforeseen, matured or unmatured, fixed or contingent, inchoate or not inchoate, known or unknown, accrued or not accrued based upon wrongful or other acts, omissions, conduct or other matters occurring prior to the date of this Agreement, including, without limitation, matters arising in or relating to the Cases, the Transfers, the Preference Action or the KPMG Adversary. Should the Court of Appeals grant the pending Appellate Sanctions Motion, the Trustee shall have no obligation to make any payments to KPMG and KPMG shall have no right to seek such payment.

5. Release of KPMG. The Parties agree that except for any obligations created by this Agreement, and subject to the provisions of paragraphs six, seven and eight herein, the Trustee and Maxwell, waive, disclaim and discharge KPMG and its partners, members, officers, directors, employees, agents, servants, representatives, predecessors, successors, shareholders, parents, subsidiaries, past, present and future affiliates, assigns, insurers and attorneys, and the officers, directors, agents and representatives of any of the foregoing (collectively, the "KPMG Released Parties"), from any and all claims, counterclaims, actions, causes of action, lawsuits, proceedings, adjustments, offsets, contracts, obligations, liabilities, controversies, costs, expenses, attorneys' fees and losses whatsoever, whether in law, in admiralty, in bankruptcy, or in equity, and whether based on any federal law, state law, common law right of action or otherwise, foreseen or unforeseen, matured or unmatured, fixed or contingent, inchoate or not inchoate, known or unknown, accrued or not accrued based upon wrongful or other acts, omissions, conduct or other matters occurring prior to the date of this Agreement, including,

without limitation, matters arising in or relating to the Cases, the Transfers, the Preference Action or the KPMG Adversary.[5]

6. No Effect On the Parties' Claims Regarding WMJ. The Parties agree that, notwithstanding anything herein to the contrary, no part of this Agreement will have any effect on any claims, counterclaims, actions, causes of action, lawsuits, proceedings, adjustments, offsets, contracts, obligations, liabilities, controversies, costs, expenses, attorneys' fees and losses, that the Parties may hold against WMJ or its officers, partners, directors, employees, agents, servants, representatives, predecessors, successors, members, shareholders, parents, subsidiaries, past, present and future affiliates, assigns, employees and insurers, including, but not by way of limitation, KPMG's right to prosecute the Appellate Court Sanctions Motion and the District Court Sanctions Motion against WMJ or the Parties' rights to object to any application or motion for attorneys' fees filed by WMJ, its attorneys or its testifying experts, or to otherwise seek disgorgement of any attorneys' fees previously awarded to WMJ, its attorneys or its testifying experts.

7. No Effect on Maxwell's Claims Regarding Indemnity and Reimbursement. The Parties agree that, notwithstanding anything herein to the contrary, no part of this Agreement will have any effect on Maxwell's rights and claims, if any, for indemnity, reimbursement or similar claims against the Debtors' estates.

8. No Release of Maxwell with Respect to the Appellate Sanctions Motion. The Parties agree that, notwithstanding anything herein to the contrary, nothing in this Agreement shall constitute a release of KPMG's claim against Maxwell arising under or related to the

[5] Notwithstanding anything herein to the contrary, no part of this Agreement will have any effect on the Trustee's rights relating to the South African member firm of KPMG International, with offices at KPMG Crescent, 85 Empire Road, 2193 Parktown, South Africa ("KPMG South Africa"), nor shall anything herein have any effect on any claims, rights or defenses of KPMG South Africa.

Appellate Sanctions Motion, and nothing herein shall be construed as an agreement by KPMG not to pursue the Appellate Sanctions Motion against Maxwell. In addition, no part of this Agreement will have any effect on Maxwell's rights, claims, or defenses relating to the Appellate Sanctions Motion.

9. Agreement not to Assist. The Parties agree that KPMG shall not share information relating to the Debtors' estates with, share strategic advice with, or otherwise assist any third-party that has been a party to, is currently a party to, or is contemplating becoming a party to any adversary proceeding or other litigation with the Debtors' estates, unless subpoenaed and ordered by a court of competent jurisdiction to share such information. KPMG may provide assistance to any third-party in connection with actual or potential claims against WMJ, its attorneys and the testifying experts in the KPMG Adversary, provided however, that nothing in this Agreement shall alter the protections afforded to the Trustee or Maxwell under this Agreement or the protective order entered by the Bankruptcy Court dated February 27, 2003 ("Protective Order").

10. Subpoenas. The Parties agree that KPMG shall provide the Trustee prompt and reasonable notice if a third-party issues a subpoena to KPMG or any of its employees, agents, principals or partners seeking any documents, testimony or information relating to the KPMG Adversary, the Preference Action, or the Cases generally or if the production of such documents, testimony or information is ordered by another court or sought by a litigant to be produced. KPMG shall assist, in good faith, in giving the Trustee a reasonable opportunity to object to the subpoena or to the production. The Trustee may undertake the defense of any such subpoena described above, and if he does so, the costs of such defense will be paid by the Trustee, and not Maxwell individually. In the event that the Trustee elects not to undertake the defense of a given

subpoena, KPMG's production of documents pursuant to such subpoena shall not be deemed a violation of this Agreement or the Protective Order.

11. Conditions Precedent to Execution, Delivery and Performance. The Parties agree that the Parties' execution, delivery, and performance of this Agreement is conditioned upon the entry of a Final Order by the Bankruptcy Court, upon written application and after notice and a hearing, approving this Agreement. The Trustee shall file a motion seeking the Bankruptcy Court's approval of this Agreement pursuant to Fed. R. Bankr. Pro. 9019 within five days of the execution and delivery of this Agreement by all Parties. The Parties may agree to waive the requirement that the time to appeal or seek certiorari, review, or rehearing have expired prior to execution, delivery, and performance by mutual written agreement.

12. Conditions Subsequent to Execution, Delivery and Approval. The Parties agree that subsequent to execution, delivery and entry of a Final Order by the Bankruptcy Court, upon written application and after notice and a hearing, approving this Agreement and as soon as practical, the Trustee shall dismiss the Preference Action with prejudice. Also, KPMG shall not file the District Court Sanctions Motion or, if KPMG has filed the District Court Sanctions Motion, KPMG shall withdraw with prejudice said motion with respect to the Trustee and Maxwell. Also, KPMG shall withdraw with prejudice the Bill of Costs with respect to the Trustee and Maxwell. If the Bill of Costs has already been granted, KPMG shall not seek payment of the Bill of Costs from either the Trustee or Maxwell. All withdrawals and dismissals shall provide that all Parties shall bear their own respective attorneys' fees and costs.

13. Representations and Warranties. The Parties agree that except for any obligations created by or described in this Agreement, each Party represents that it is not aware of any claim, demand or cause of action that it now has that might be made against the other that is not

released by this Agreement. KPMG represents and warrants that it has not filed a petition in any case under Title 11 of the United States Code or similar state law and that no petition for any order for relief under Title 11 of the United States Code or any similar state law has been filed against them. All representations, warranties and undertakings contained in this Agreement shall survive closing.

14. Assumption of Risk of Misrepresentation or Mistake. The Parties agree that in entering into this Agreement, each Party assumes the risk of any misrepresentation or mistake. If any Party shall subsequently discover that its understanding of the facts or of the law was incorrect, such Party shall not be entitled to any relief in connection therewith, including but not by way of limitation, any alleged right or claim to set aside or rescind this Agreement. This Agreement is intended to be and is final and binding among the Parties hereto, regardless of any mistake of fact or law.

15. Subsequent Discovery. The Parties agree that each Party is aware that it may hereafter discover claims or facts in addition to or different from those it now knows or believes to be true. Nevertheless, except as provided in this Agreement, it is the intention of the Parties to fully, finally and forever settle and release any and all controversies among themselves, and all claims relative thereto, that do now exist or heretofore have existed among them. In furtherance of such intention, the release given herein shall be and remain in effect as the full and complete release of all such matters, notwithstanding the discovery or existence of any additional or different claims or facts relative thereto.

16. Each Party to Bear Own Costs. The Parties agree that each Party shall bear its own attorneys' fees and costs in connection with the preparation, negotiation, review, approval and documentation of this Agreement.

17. Binding Agreement. The Parties agree that each Party understands that this Agreement, once approved by a Final Order of the Bankruptcy Court, is a legally binding contract and agreement that may affect such Party's rights. Each Party represents to the others that it has received legal advice from counsel of its choice regarding the meaning and legal significance of this Agreement and is satisfied with its legal counsel and the advice received from it. Specifically, the Trustee has retained Ronald R. Peterson and Barry Sullivan to be his counsel in this matter, KPMG has retained James R. Figliulo and Michael K. Desmond to represent it and Maxwell has retained Steven B. Towbin to represent him. This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their successors and assigns. Subject to the requirement of a Final Order, each Party executing this Agreement represents to the others that such Party has the full authority and legal power to do so. KPMG represents that it is duly qualified and in good standing in the jurisdiction in which it is organized, and that the execution, delivery and performance of this Agreement has been approved in accordance with its respective organic governance documents. Each Party represents and warrants that it owns and has not assigned or transferred to any other person or entity all such Party's rights and claims as are being altered or otherwise affected by this Agreement. Each Party represents and warrants that it has not pledged, encumbered or hypothecated any of its respective claims against the others.

18. Governing Law and Retention of Jurisdiction. The Parties agree that this Agreement and the transactions contemplated herein shall be governed by the Bankruptcy Code and, to the extent applicable, the laws of the State of Illinois without reference or regard to Illinois' conflict of laws rules. Furthermore, to the fullest extent possible under 28 U.S.C.

§ 1334, the Parties agree that the Bankruptcy Court shall retain exclusive jurisdiction over all matters relating to this Agreement.

19. Entire Agreement. The Parties agree that this Agreement constitutes the entire agreement of the Parties regarding the subject matter of this Agreement. All prior or contemporaneous understandings, oral representations or agreements made among the Parties to the subject matter herein are merged and contained in this Agreement. There are no other agreements, express or implied, among the Parties regarding the subject matter of this Agreement. The Parties represent and warrant that they have not relied upon any promises, agreements, representations, statements or warranties in entering into this Agreement, except those that are expressly set forth herein.

20. No Benefit to Non Parties: The Parties agree that no part of this Agreement is intended to or should be interpreted as conveying any benefit to any entity that is not a Trustee Released Party or a KPMG Released Party.

21. Modification. The Parties agree that this Agreement may be modified only by a writing signed by all Parties. No waiver of this Agreement or of any of the promises, obligations, terms, or conditions hereof shall be valid unless it is written and signed by the Party against whom the waiver is to be enforced.

22. Execution. The Parties agree that this Agreement may be executed and delivered by facsimile, if necessary (with originals to follow), and in any number of counterparts, each of which shall be deemed to be an original as against any Party whose signature appears thereon, and all of which shall together constitute one and the same instrument. At any time following the execution of this Agreement and as requested and required, the Parties shall perform such

acts, execute, deliver or file such instruments, assignments, endorsements and other documents, and do all other things reasonably necessary to implement the terms of this Agreement.

23. Compromise. The Parties agree and acknowledge that this Agreement is the result of a compromise and a decision to settle certain claims and causes of action. The Parties further agree that the execution of this Agreement shall never be construed as an admission by the Parties of any liability, wrongdoing, or responsibility.

Andrew J. Maxwell, in his capacity as Chapter 7 trustee for the bankruptcy estates of marchFirst, Inc., et al. 105 West Adams Street, Suite 3200 Chicago, Illinois 60603 , Trustee [signature] Dated: 6/12/08 **Andrew J. Maxwell, in his personal capacity** [signature] Dated: 6/12/08	**KPMG LLP** [name] STEVEN CARLIN Associate General Counsel [title] 757 Third Avenue NY NY 10017 [address] [signature] Dated: June 12 2008