

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

R.J. ZAYED, IN HIS CAPACITY)
AS COURT-APPOINTED RECEIVER)
FOR TREVOR G. COOK, ET AL.,)

Plaintiff,)

v.)

MICHAEL P. KABAREC, AS)
TRUSTEE UNDER MICHAEL P.)
KABAREC DECLARATION OF)
TRUST,)

Defendant)

Civil Action

File No.: _____

COMPLAINT

For its Complaint against Defendant, Plaintiff states and alleges as follows:

THE PARTIES

1. Plaintiff R.J. Zayed (“the Receiver”) was appointed as Receiver for the Estates of Trevor G. Cook, Patrick J. Kiley, and various entities controlled by them (“the Receivership Entities”) by the United States District Court for the District of Minnesota, Chief Judge Michael J. Davis presiding, on November 23, 2009 in the cases of *SEC v. Cook et al.*, 09-cv-3333, and *CFTC v. Cook et al.*, 09-cv-3332. Order Appointing Receiver, SEC Docket No. 13 (Nov. 23, 2009); *Ex Parte* Statutory Restraining Order, CFTC Docket No. 21 (Nov. 23, 2009); Second Amended Order Appointing Receiver, SEC Docket No. 68 (Dec. 11, 2009); Order Continuing Appointment of the Temporary Receiver, CFTC Docket No. 96 (Dec. 11, 2009).

2. Pursuant to the Court's Receivership Orders, the Receiver stands in the place of the Receivership Entities and is authorized to pursue all suits which may be brought by the Receivership Entities. Second Amended Order Appointing Receiver, SEC Docket No. 68 at 3 (Dec. 11, 2009); Order Continuing Appointment of the Temporary Receiver, CFTC Docket No. 96 at 4 (Dec. 11, 2009).

3. The Receivership Entities include Oxford Global FX, LLC, and "every other corporation, partnership, trust and/or entity (regardless of form) which is directly or indirectly owned by or under the direct or indirect control of Cook or Kiley, or any individual working in concert with any of the Defendants." Second Amended Order Appointing Receiver, SEC Docket No. 68 at 2 (Dec. 11, 2009); Complaint, SEC Docket No. 1 at 1; *see also Ex Parte* Statutory Restraining Order, CFTC Docket No. 21 at 7 (Nov. 23, 2009).

4. In this litigation, the Receiver is acting in his capacity as Receiver for Oxford Global FX ("Oxford"), a Minnesota Receivership Entity which was under the direct control of Trevor G. Cook ("Cook").

5. Defendant is Trustee of an Illinois trust organized and existing pursuant to the laws of the State of Illinois. On information and belief, Defendant is an Illinois citizen.

JURISDICTION AND VENUE

6. This is an action for breach of a contract under which Plaintiff is a third-party beneficiary and unjust enrichment.

7. This Court has original jurisdiction under 28 U.S.C. § 1332 because the amount in controversy exceeds \$75,000.00 and this action is between citizens of different states. Moreover, Defendant consented to the exclusive jurisdiction of the U.S. District Court sitting in the District of the State of Minnesota in connection with any dispute arising out of the subject contract. (Ex. A at 6.)

8. This Court also has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 754, 1692, 1367 and Federal Rule of Civil Procedure 4(k)(1)(C).

9. Venue is proper in this district under 28 U.S.C. § 1391(b) because on information and belief a substantial part of the events giving rise to the claim occurred in Minnesota and because Defendant consented to venue in Minnesota in connection with any dispute arising out of the subject contract. (Ex. A at 6.)

10. Venue is also proper in the District of Minnesota because (1) the SEC and CFTC Proceedings referenced above are pending in this district and this action is supplemental to it; (2) the Receiver was appointed in this district to marshal, preserve, account for, and liquidate the assets subject to the Receivership Orders; and (3) the assets at issue in this action are Receivership Assets.

FACTS

The Investor Note and Security Agreement

11. Mesa Holdings, Inc. (“Mesa”) issued a Zero-Coupon Convertible Promissory Note to Oxford on or about September 8, 2008 (“the Investor Note”). A true and correct copy of the Investor Note is attached hereto as Exhibit B.

12. The Investor Note obligated Mesa to make a series of payments to Oxford from September 9, 2009 to August 31, 2013.

13. Oxford transferred \$500,000 to Mesa as consideration for the Investor Note. The \$500,000 was deposited in a Mesa bank account on September 9, 2008.

14. The \$500,000 consideration paid by Oxford to Mesa consisted of the proceeds of a Ponzi scheme operated by Trevor Cook. Oxford was an entity used by Cook in furtherance of the Ponzi scheme. Thus, the \$500,000 paid by Oxford to Mesa consisted of money taken from defrauded investors. (*See United States v. Trevor Gilson Cook*, No. 10-cr-00075, Docket No. 7 (April 13, 2010).

15. Oxford invested an additional \$2,000,000 in Mesa on October 2, 2008, in exchange for shares of Mesa stock. This money also consisted of money taken from defrauded investors.

16. Mesa used the proceeds of the Investor Note and equity investments like Oxford's to purchase investment advisor firms ("the Purchased Firms").

17. Mesa sold notes similar to the Investor Note in various amounts to thirteen investors in addition to Oxford ("the Investor Noteholders") and combined the proceeds of those notes with the proceeds from Oxford's Investor Note to buy the Purchased Firms.

18. Oxford's Investor Note was initially secured by cash pursuant to the terms of a Security Agreement dated September 8, 2008 ("the Security Agreement"). A true and correct copy of the Security Agreement is attached hereto as Exhibit C.

19. Pursuant to the terms of the Security Agreement, Mesa was authorized to substitute at its discretion Oxford's security interest in cash under the Investor Note with a pro rata share of the stock of the Purchased Firms ("Pooled Stock") to the extent those shares were not encumbered under the terms of another security agreement.

20. Mesa did, in fact, substitute Oxford's cash security interest for a pro rata share of Pooled Stock.

21. On information and belief, Oxford's pro rata share of the Pooled Stock is 23%.

The Stock Purchase Agreement, Seller Note, and Escrow Agreement

22. Prior to October 8, 2008, Defendant was the sole shareholder and owner of Kabarec Financial Advisors, Ltd. ("KFA"). KFA was and is a financial practices corporation and investment advisor organized and existing under the laws of Illinois, with a principle place of business located at 220 North Smith Street, Suite 200, Palatine, IL 60067.

23. Pursuant to a Stock Purchase Agreement executed on or about October 8, 2008, Defendant transferred all KFA stock to Mesa (1,000 shares) in exchange for \$2,216,871 as follows: \$375,365 in cash at closing and the balance in various promissory notes, including a Zero Coupon Convertible Promissory Note in the aggregate amount of \$390,686 ("the Seller Note"). A true and correct copy of the Stock Purchase Agreement is attached hereto as Exhibit D.

24. Mesa paid Defendant the cash due at closing in two separate wire transfers: \$100,000 on October 8, 2008, and \$275,365 on October 14, 2008. This money came

from Oxford's investment in Mesa. Prior to Oxford's investment in Mesa on October 2, 2008, Mesa did not have sufficient funds in its account to make these payments.

25. On or about October 1, 2008, Defendant also entered into a Seller Note Pledge and Escrow Agreement ("Escrow Agreement"). A true and correct copy of the Escrow Agreement is attached hereto as Exhibit A.

26. Pursuant to the Escrow Agreement, Mesa pledged 100% of the KFA stock acquired pursuant to the Stock Purchase Agreement as security for payments due from Mesa to Defendant under the Seller Note. Defendant received a first priority security interest in 51% of the KFA stock and received a security interest subordinate to the Investor Noteholders in the remaining 49% of the stock.

27. The stock was deposited with Escrowee Stark & Stark, who was also a party to the Escrow Agreement.

28. Pursuant to the Escrow Agreement, Defendant had the right, following written demand, to immediate possession of 51% of the KFA stock upon Mesa's default under the Seller Note. Defendant also had the right to repossess the remaining 49% of the KFA stock if it made payments totaling \$375,365 ("the Payback Amount") to the Investor Noteholders pursuant to the payback schedule defined in the Escrow Agreement.

29. Thus, as of on or about October 8, 2008, KFA was a Purchased Firm and 49% of its stock was Pooled Stock.

Mesa's Defaults

30. Mesa sent a letter to Oxford dated July 28, 2010, acknowledging default on the Investor Note and enclosing an updated Schedule of Pledges and Pooled Stock ("the

Updated Schedule”). According to the Updated Schedule, Oxford’s pro rata share of the Pooled Stock is 23%. A true and correct copy of this letter and the Updated Schedule is attached as Exhibit E.

31. On information and belief, Mesa also defaulted on the notes issued to the other Investor Noteholders on or before July 28, 2010.

32. On information and belief, Mesa also defaulted on Defendant’s Seller Note on or before July 28, 2010.

33. On July 28, 2010, Mesa notified Escrowee Stark & Stark that it did not object to the delivery of 51% of Mesa’s shares of KFA to the Defendant.

34. On August 23, 2010, the Receiver made a formal demand for his collateral through a letter to Escrowee Stark & Stark.

Defendant’s Breach

35. Defendant has purported to exercise his right under the Escrow Agreement to buy back the KFA shares in the Pooled Stock through letters to Plaintiff dated December 27, 2010, and March 25, 2011. True and correct copies of these letters are attached hereto as Exhibits F and G.

36. Defendant has stated that he, rather than Stark & Stark, is acting as escrow agent for the KFA shares in the Pooled Stock. Thus, on information and belief, Defendant is holding all 1,000 shares of KFA stock, including those pledged to Oxford as collateral for the Investor Note.

37. Defendant has acknowledged his obligation to pay Plaintiff, as Receiver for Oxford, \$10,372 per quarter for two years, totaling \$85,860 and representing 23% of the Payback Amount, in order to acquire the KFA Pooled Stock pledged to Oxford.

38. Defendant has further stated that he has “tendered” the first two payments to Plaintiff.

39. Defendant has not transferred any payments to Plaintiff, as Receiver for Oxford; instead, Defendant has asserted an “offset” against the funds owed to Oxford based on an alleged lack of consideration for the Investor Note. Defendant asserts that Oxford’s security interest is unenforceable because the consideration paid to Mesa by Oxford for the Investor Note consisted of money stolen from other people.

40. Defendant has further asserted that he will not pay Plaintiff, as Receiver for Oxford, any of the contractually defined future payments based on the same alleged lack of consideration.

41. Defendant has not transferred to Oxford or to Plaintiff, as Receiver for Oxford, Oxford’s pro rata portion of the KFA Pooled Stock.

42. Defendant has no legitimate basis for its refusal to pay Plaintiff, as Receiver for Oxford, under the terms of the Escrow Agreement or for having taken possession of the KFA stock pledged to Oxford as collateral on the Investor Note.

43. Oxford provided Mesa with \$500,000 as consideration for the Investor Note. Defendant is not party to the Investor Note and has no standing to dispute the sufficiency of Oxford’s consideration. Moreover, normal in pari delicto prohibitions are inapplicable to a Receiver. “The appointment of the receiver remove[s] the wrongdoer

from the scene.” *Scholes v. Lehman*, 56 F.3d 750, 754 (7th Cir. 1995). Now that Oxford is not controlled by Cook, it is entitled to the money owed to it not for the benefit of Cook but of the innocent investors who are the creditors of Oxford.

COUNT ONE: BREACH OF CONTRACT

44. Plaintiff incorporates all paragraphs above as if stated herein.

45. As described more fully above, Defendant is a party to the Escrow Agreement, pursuant to which he is obligated to pay the Investor Noteholders the contractually defined payback amount of \$375,365 according to their pro rata share in order to acquire the 49% of KFA stock pledged to the Investor Noteholders.

46. As described more fully above, Oxford provided consideration to Mesa for the Investor Note in the form of \$500,000.

47. As described more fully above, Oxford’s Investor Note is secured by the 49% of KFA stock pledged to the Investor Noteholders.

48. As described more fully above, Oxford’s pro rata share of the KFA stock is 23%.

49. Plaintiff, as Receiver for Oxford, is a third-party beneficiary under the Escrow Agreement.

50. Defendant’s refusal to pay Plaintiff, as Receiver for Oxford, his pro rata share of the Payback Amount (totaling \$85,860) constitutes a material breach of the Escrow Agreement.

COUNT TWO: UNJUST ENRICHMENT

51. Plaintiff incorporates all paragraphs above as if stated herein.

52. As described more fully above, Defendant was paid for his shares of KFA stock with cash at closing that came through Mesa directly from Oxford's investments in Mesa.

53. Oxford's investments in Mesa, which were used to pay Defendant for his shares of KFA stock, actually consisted of money taken from defrauded investors in Cook's Ponzi scheme.

54. Defendant has been unjustly enriched by receiving the cash at closing consisting of money taken from defrauded investors in the Cook Ponzi scheme and then taking possession of that same stock, which was pledged to Oxford (and thus those defrauded investors) as collateral for Oxford's Investor Note, without making the contractually-defined payments to Oxford (and the defrauded investors) for it. In essence, Defendant has been paid for the stock by the defrauded investors without actually giving up the stock to which those investors—and not Defendant—are entitled.

55. Defendant's retention of the KFA stock pledged to Oxford without making the contractually required payments to Plaintiff, as Receiver for Oxford, violates fundamental principles of justice, equity, and good conscience.

56. The doctrine of unjust enrichment and the principles of law and equity require that Defendant make payment for the shares of KFA stock pledged to Oxford to Plaintiff, as Receiver for Oxford, for equitable distribution to the creditors of Oxford who are defrauded investors in the Cook Ponzi scheme.

REQUEST FOR RELIEF

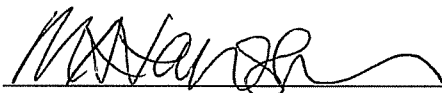
WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in Plaintiff's favor and against Defendant as follows:

1. An Order holding that Defendant has breached the Escrow Agreement, under which Plaintiff, as Receiver for Oxford, is a third-party beneficiary; or in the alternative, that Defendant was unjustly enriched by taking possession of the KFA stock pledged to Oxford without re-paying Plaintiff, as Receiver for Oxford, for the stock.
2. An Order that Plaintiff is entitled to recover from Defendant monetary damages in the amount of \$85,860.
3. Such other and further relief, including, without limitation, monetary relief, attorney's fees, and costs, which the Court may deem just, equitable, and appropriate under the circumstances presented.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff hereby demands a jury trial as to all issues so triable.

Dated: April 26, 2011



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