

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

R.J. ZAYED, In His Capacity as Court-
Appointed Receiver for Trevor G. Cook,
et al.,

Civil File No. _____

Plaintiff,

v.

COMPLAINT

ARCH INSURANCE COMPANY,
Defendant.

Plaintiff R.J. Zayed (“Plaintiff” or “Receiver”), through his undersigned counsel and for his Complaint against Defendant Arch Insurance Company (“Arch”), states and alleges as follows:

INTRODUCTION

1. This is an action for declaratory judgment pursuant to the Uniform Declaratory Judgments Act, Minn. Stat. § 555.01 *et seq.* and for breaches of contract by Defendant Arch Insurance Company (“Arch”) with respect to a policy of insurance issued by Arch and insuring Mesa Holdings, Inc. (“Mesa”) and L. Edward Baker (“Baker”).

2. An actual controversy of a justiciable nature exists between Plaintiff, as Mesa’s and Baker’s assignee, and Arch regarding whether an insurance policy required Arch to defend Mesa and Baker against claims asserted in a case entitled *Trevor Cook v. L. Edward Baker; Baker Capital LLC; G5 Currency Fund—Institutional Series, LP; G5 Currency Fund—Affiliate Series, LP; Baker 500 Corporation; Mesa Holdings, LLC; Mesa Holdings, Inc.; Mesa Financial Advisors, Inc.; and Mesa Financial Advisors, LLC*, Court File No. 27-CV-09-21495 (“Hennepin County Action”), and to indemnify Mesa

and Baker against stipulated judgments entered against them pursuant to a Stipulation for Settlement and Entry of Judgments Under *Miller v. Shugart* in the Hennepin County Action (“*Miller-Shugart Agreement*”).

JURISDICTION AND VENUE

3. This Court has jurisdiction pursuant to 28 U.S.C. § 1332(a) because there is complete diversity of citizenship between the parties and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

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

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a)(2) because a substantial part of the events giving rise to this claim occurred in Minnesota.

6. Venue is also proper in the District of Minnesota because: (1) the SEC and CFTC proceedings referenced in paragraph 7 are pending in this district and this action is supplemental to it; (2) Receiver was appointed in this district to marshal, preserve, account for, and liquidate the assets subject to the Receivership Orders (defined below); and (3) the assets at issue in this action are receivership assets.

THE PARTIES

7. Plaintiff 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 *United States Securities and Exchange Commission v. Cook et al.*, 09-cv-3333, and *United States Commodity Futures*

Trading Commission v. Cook et al., 09-cv-3332. See 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) (“Receivership Orders”).

8. Pursuant to the Court’s Receivership Orders, Receiver stands in the place of the Receivership Entities and is authorized to pursue all suits which may be brought by the Receivership Entities. See 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).

9. In this litigation, Receiver is acting in his capacity as Receiver for Trevor G. Cook, a Minnesota citizen.

10. Receiver is the assignee of the rights of Mesa and Baker under the insurance policy discussed below.

11. Upon information and belief, Arch is a Missouri corporation with its principal place of business located in Kansas City, Missouri, and does business in the State of Minnesota.

FACTUAL BACKGROUND

A. THE HENNEPIN COUNTY ACTION

12. On August 19, 2009, Cook filed the original complaint in the Hennepin County Action against Baker, Mesa (and Mesa’s predecessor, Mesa Holdings, LLC), and several other entities controlled by or connected to Baker, including Baker Capital LLC;

G5 Currency Fund—Institutional Series, LP; G5 Currency Fund—Affiliate Series, LP; Baker 500 Corporation; Mesa Financial Advisors, Inc.; and Mesa Financial Advisors, LLC (collectively, “the Baker Entities”). The Amended Complaint, filed on October 5, 2009, asserted numerous claims stemming from Cook’s investment of approximately \$3,550,000 million in Mesa, and an additional \$200,000 in certain of the Baker Entities. The claims alleged in the Hennepin County Action include breach of contract, conversion, breach of fiduciary duty, and violation of Minnesota Statutes §§ 80A.40 and 302A.751.

13. Pursuant to the Receivership Orders, the Receiver assumed Cook’s position in the Hennepin County Action.

14. The Hennepin County Action arose from a series of investments by Cook in Mesa, which were based on misrepresentations by Baker, as an officer, director and agent of Mesa. These included misrepresentations regarding the financial strength, assets, and expected income of Mesa. Between September 2008 and June 2009, and in reliance upon Baker’s representations, Cook made multiple investments in Mesa totaling \$3,550,000. One of these investments was in the form of a “Zero Coupon Convertible Promissory Note” issued by Mesa in the amount of \$500,000. Cook also received a stock certificate certifying that he owned 2,889,748 shares of common stock in Mesa related to \$2,000,000 of Cook’s investment. The remaining \$1,050,000 of Cook’s investment in Mesa was in the form of three short-term loans: \$500,000 in February 2009; \$300,000 in May 2009; and \$250,000 in June 2009. Mesa did not repay any portion of these loans.

15. In March 2009, Cook invested an additional \$200,000 into some of the Baker Entities (G5 Currency Fund—Institutional Series, LP, and G5 Currency Fund—Affiliate Series, LP).

16. When Cook learned of Baker’s misrepresentations, Cook demanded that Mesa return all of his investments in Mesa. Mesa and Baker refused.

17. Mesa’s and Baker’s conduct constitute breaches of contract, conversion, breaches of fiduciary duty, and violations of Minnesota Statutes §§ 80A.40 and 302A.751.

18. As a result of the conduct of Mesa and Baker, Receiver suffered damage in excess of \$3,750,000.

B. THE POLICY

19. During all relevant times, Arch provided Directors, Officers & Organization Liability insurance coverage to Mesa and Baker under Policy No. PCD0028465-01 (hereinafter, “Policy”).

20. The term of the Policy is August 1, 2009, to August 1, 2011; the Policy was in full force and effect at all relevant times.

21. Both Mesa, as successor to Mesa Holdings, LLC, and Baker, are insured under the Policy.

22. The Policy has a \$1,000,000 limit of liability, and an “Additional Limit of Liability” of \$500,000 for an Insured Person, such as Baker, for any “Non-Indemnifiable Loss.”

23. Among other things, Arch agreed to provide coverage for Mesa, as an Insured Organization, for (1) “Loss... that such Insured Organization has, to the extent permitted or required by law, indemnified the Insured Persons resulting from a Claim first made against the Insured Persons during the Policy Period... for a Wrongful Act by the Insured Persons” and (2) “Loss... resulting from a Claim first made against such Insured Organization during the Policy Period... for a Wrongful Act by an Insured Organization.”

24. Among other things, Arch also agreed to provide coverage for Baker, as an Insured Person, for a “Non-Indemnifiable Loss... resulting from a Claim first made against the Insured Person[] during the Policy Period... for a Wrongful Act by the Insured Person[].”

25. The Policy defines “Wrongful Act” in the relevant part as any “actual or alleged” (a) “act, error, omission, misstatement, misleading statement, neglect or breach of duty by Insured Persons in their capacity as such or in an Outside Capacity or... by any Insured Organization” or (b) “matter claimed against an Insured Person solely by reason of their serving in such capacity, including service in an Outside Capacity.”

26. Pursuant to the Policy, Arch agreed to undertake the duty to defend any claim against Mesa or Baker for which there is coverage under the Policy.

C. MESA'S AND BAKER'S TENDER OF THE HENNEPIN COUNTY ACTION TO ARCH, AND ARCH'S REFUSAL TO DEFEND AND INDEMNIFY

27. Baker, both individually and as Chairman of Mesa, provided notice of the Hennepin County Action to Arch, requesting coverage for the claim. By letter dated November 6, 2009, Arch acknowledged receipt of the claim.

28. By letter dated June 10, 2010, Arch denied coverage for the Hennepin County Action.

29. Despite requests, Arch has refused to afford Mesa and Baker coverage under the Policy, including a defense in the Hennepin County Action, and failed and refused to participate in any reasonable manner to resolve, settle, or pay for Receiver's claims for the damage arising out of Mesa's and Baker's actions.

D. THE STIPULATION FOR SETTLEMENT AND ENTRY OF JUDGMENT UNDER *MILLER V. SHUGART*

30. In February 2011, Baker and Mesa entered into the *Miller-Shugart* Agreement and a related *Miller-Shugart* Assignment with Receiver. The *Miller-Shugart* Agreement, with the attached assignment, is attached hereto as **Exhibit A**.

31. In the *Miller-Shugart* Agreement, the parties agreed that Cook alleged, and Receiver was prepared to present evidence that, Cook was damaged in the amount of \$200,000 as a result of the breach of contract by G5 Currency Fund—Institutional Series, LP, and G5 Currency Fund—Affiliate Series, LP, and in the amount of \$1,050,000 as a result of the breach of contract by Mesa for certain loans. The parties further agreed that Cook alleged, and the Receiver was prepared to present evidence that, Cook's remaining

damages of approximately \$2,500,000 were the result of conversion, breach of fiduciary duty, and violation of Minnesota Statutes §§ 80A.40 and 302A.751, relating to Cook's investment in Mesa.

32. In the *Miller-Shugart* Agreement, Mesa and Baker further acknowledged that there is a substantial risk that a jury would conclude that they were legally liable to Receiver as a result of Receiver's claims against them.

33. As part of the *Miller-Shugart* Agreement, Mesa and Baker, respectively, assigned to Receiver any and all claims or causes of action they have against Arch relating to the Hennepin County Action, including but not limited to claims that Arch breached its duty to defend and indemnify Mesa and/or Baker, and including any claims for recovery of attorneys' fees and costs.

34. Pursuant to the *Miller-Shugart* Agreement, Mesa stipulated to the entry of judgment against it and in favor of Receiver in the amount of \$1,000,000, plus costs, fees and interest. The Court in the Hennepin County Action entered judgment against Mesa and in favor of Receiver on March 22, 2011. Attached hereto as **Exhibit B** is the Order for Judgment.

35. Pursuant to the *Miller-Shugart* Agreement, Baker stipulated to the entry of judgment against him and in favor of Receiver in the amount of \$500,000, plus costs, fees and interest. The Court in the Hennepin County Action entered judgment against Baker and in favor of Receiver on March 22, 2011. Attached hereto as **Exhibit B** is the Order for Judgment.

36. The United States District Court for the District of Minnesota approved the *Miller-Shugart* Agreement by Order dated March 15, 2011. Attached hereto as **Exhibit C** is the Order dated March 15, 2011.

37. The United States Bankruptcy Court for the District of Minnesota, in the matter of *In re Lynn E. Baker*, BKY 10-44428, also approved the *Miller-Shugart* Agreement by Order dated March 9, 2011. Attached hereto as **Exhibit D** is the Order dated March 9, 2011.

38. In the circumstances present here, the terms of the *Miller-Shugart* Agreement and the judgments entered pursuant thereto were reasonable and prudent, and the *Miller-Shugart* Agreement was not the product of fraud or collusion.

COUNT I
(DECLARATORY JUDGMENT—DUTY TO
DEFEND AND INDEMNIFY MESA)

39. Receiver incorporates herein by reference his allegations in Paragraphs 1 through 38 above.

40. An actual, present and justiciable controversy has arisen and exists regarding Mesa's and Arch's respective rights and duties under the Policy.

41. Receiver seeks and is entitled to a declaration that the Policy provides coverage to Mesa for the Hennepin County Action and, as a result, that Arch is obligated and liable to pay Receiver pursuant to the *Miller-Shugart* Agreement and Assignment:

(a) Mesa's attorneys' fees, costs and expenses incurred in defense of the Hennepin County Action, and the judgment entered against Mesa, plus pre- and post-judgment interest as allowed by law; (b) Receiver's attorneys' fees, costs and expenses incurred in

establishing and enforcing Arch's duty to defend; and (c) any other compensatory, consequential or general damages or amounts allowable under the law.

COUNT II
(DECLARATORY JUDGMENT—DUTY TO
DEFEND AND INDEMNIFY BAKER)

42. Receiver incorporates herein by reference his allegations in Paragraphs 1 through 41 above.

43. An actual, present and justiciable controversy has now arisen and exists regarding Baker's and Arch's respective rights and duties under the Policy.

44. Receiver seeks and is entitled to a declaration that the Policy provides coverage to Baker for the Hennepin County Action and, as a result, that Arch is obligated and liable to pay to Receiver pursuant to the *Miller-Shugart* Agreement and Assignment: (a) Baker's attorneys' fees, costs and expenses incurred in defense of the Hennepin County Action, and the judgment entered against Baker, plus pre- and post-judgment interest as allowed by law; (b) Receiver's attorneys' fees, costs and expenses incurred in establishing and enforcing Arch's duty to defend; and (c) any other compensatory, consequential or general damages or amounts allowable under the law.

COUNT III
(BREACH OF CONTRACT—MESA)

45. Receiver incorporates herein by reference his allegations in Paragraphs 1 through 44 above.

46. Mesa is an insured under the Policy.

47. Mesa has performed all of its obligations under the Policy, including but not limited to providing Arch notice of the Hennepin County Action. To the extent that Arch claims any such obligations have not been performed, Mesa's performance was excused and/or waived by Arch or otherwise has not caused prejudice to Arch.

48. The Policy provides coverage for the judgment entered against Mesa with respect to the Hennepin County Action, as well as Mesa's defense expenses incurred in defending itself against the Hennepin County Action, and no valid exclusion applies.

49. Arch has breached its obligations under the Policy by failing to provide a defense to Mesa against the Hennepin County Action, and by failing to indemnify Mesa against the judgment entered in the Hennepin County Action.

50. As a result of Arch's breach of contract, Mesa and, ultimately, Receiver, have been damaged in the amount of: (a) Mesa's attorneys' fees, costs and expenses incurred in defense of the Hennepin County Action, and the judgment entered against Mesa, plus pre- and post-judgment interest as allowed by law; (b) Receiver's attorneys' fees, costs and expenses incurred in establishing and enforcing Arch's duty to defend; and (c) any other compensatory, consequential or general damages or amounts allowable under the law.

COUNT IV
(BREACH OF CONTRACT—BAKER)

51. Receiver incorporates herein by reference his allegations in Paragraphs 1 through 50 above.

52. Baker is an insured under the Policy.

53. Baker has performed all of his obligations under the Policy, including but not limited to providing Arch notice of the Hennepin County Action. To the extent that Arch claims any such obligations have not been performed, Baker's performance was excused and/or waived by Arch or otherwise has not caused prejudice to Arch.

54. The Policy provides coverage for the judgment entered against Baker with respect to the Hennepin County Action, as well as Baker's defense expenses incurred in defending himself against the Hennepin County Action, and no valid exclusion applies.

55. Arch has breached its obligations under the Policy by failing to provide a defense to Baker against the Hennepin County Action, and failing to indemnify Baker against the judgment entered in the Hennepin County Action.

56. As a result of Arch's breach of contract, Baker and, ultimately, Receiver, have been damaged in the amount of: (a) Baker's attorneys' fees, costs and expenses incurred in defense of the Hennepin County Action, and the judgment entered against Baker, plus pre- and post-judgment interest as allowed by law; (b) Receiver's attorneys' fees, costs and expenses incurred establishing and enforcing Arch's duty to defend; and (c) any other compensatory, consequential or general damages or amounts allowable under the law.

CONCLUSION

WHEREFORE, Plaintiff respectfully requests that this Court provide:

1. A declaration that:
 - (a) Arch was obligated to defend Mesa against the Hennepin County Action, and is obligated to pay to Receiver pursuant to the *Miller-*

Shugart Agreement and Assignment Mesa's attorneys' fees and other expenses incurred in defense of the Hennepin County Action;

- (b) Arch is liable for Receiver's attorneys' fees and costs in establishing Arch's obligations under the Policy; and
- (c) Arch is obligated to indemnify Mesa for the amount of its *Miller-Shugart* settlement with Receiver and the judgment entered in the Hennepin County Action.

2. A declaration that:

- (a) Arch was obligated to defend Baker against the Hennepin County Action, and is obligated to pay for Baker's attorneys' fees and other expenses incurred in defense of the Hennepin County Action;
- (b) Arch is liable for Receiver's attorneys' fees and costs in establishing Arch's obligations under the Policy; and
- (c) Arch is obligated to indemnify Baker for the amount of its *Miller-Shugart* settlement with Receiver and the judgment entered in the Hennepin County Action.

3. An award for Receiver and against Arch for all damages sustained as a result of Arch's breach of its contract with Mesa, including but not limited to the amount of the judgment entered against Mesa in the Hennepin County Action and the attorneys' fees, costs and expenses incurred by Mesa in the Hennepin County Action and by Receiver in establishing and enforcing coverage;

4. An award for Receiver and against Arch for all damages sustained as a result of Arch's breach of its contract with Baker, including but not limited to the amount of the judgment entered against Baker in the Hennepin County Action and the attorneys' fees, costs and expenses incurred by Baker in the Hennepin County Action and by Receiver in establishing and enforcing coverage;

5. An award for Receiver and against Arch for pre- and post-judgment interest; and

6. Such other relief as the Court deems just and equitable.

DEMAND FOR A JURY TRIAL

Receiver demands a jury trial on all claims so triable.

Dated: May 20, 2011

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