UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

R.J. ZAYED, In His Capacity
As Court-Appointed Receiver
For Oxford Global Partners, LLC,
Universal Brokerage FX, and Other
Receiver Entities,

Plaintiff Case No: 013-cv-1896 SRN/SER

v.

David and Dao Allen, Judith Averett, Patricia and Jasper Calandra, Rose Furner, Mark Hanby, Adel ("A.K.") Hilal, Geraldine Jackman, Norma Johnson, Willis Wayne King, Don and Pamela Labbee, Andrew Lyon, Jeffrey Lyon, Jeffrey Maki, Steven Perkins, Richard Plantan, Douglas Reed, David Sherman, John Sterback, Mark Stoltenberg, Jane Wamsley as trustee for the Glen Van Lehn Living Trust, Michael ("Bruce") Wu, Robert and Dianne Birk, Margaret Anderson, Mary Francoeur, George and Shirley Janssen, Joseph Koehnen, and Katherine Sobieck,

Defendants.

MEMORANDUM IN SUPPORT OF THE RECEIVER'S MOTION TO DISMISS COUNTERCLAIM

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INTRODUCTION

On July 15, 2013, Receiver R.J. Zayed filed a complaint against several "winning investors" including Defendants George and Shirley Janssen stemming from their receipt of funds stolen from hundreds of innocent victims of the Trevor Cook Ponzi scheme. On October 23, 2013, the Janssens filed an Answer and Counterclaim. Because the Janssens' "Counterclaim" lacks factual support and fails to provide a clear statement of the relief sought, it should be dismissed.

BACKGROUND

On July 15, 2013, R.J. Zayed, in his capacity as Court-appointed Receiver (the "Receiver") for Trevor Cook, Patrick Kiley, Jason Bo-Alan Beckman, UBS Diversified Growth, LLC d/b/a UBS Diversified, Market Shot, LLC, Oxford Global Advisors, LLC, Oxford Global Partners, LLC, Oxford Global FX, LLC, Oxford FX Growth, L.P., and various other entities controlled by them (the "Receivership Entities") filed a Complaint against several individuals including Defendants George and Shirley Janssen (collectively, the "Winning Investors") to recover funds properly belonging to all the defrauded investors who were victims of Cook's Ponzi scheme. *Complaint*, 13-cv-1896 Docket 1 at 1-2 (Jul. 15, 2013). The Cook Ponzi scheme is discussed in more detail in the Complaint. *Id.* at 2-4, 14-19.

The Janssens' deposited $50,000 in the Ponzi scheme by transferring the money to a Receivership Entity. *Complaint*, 13-cv-1896 Docket 1 ¶ 114. Over time, they received transfers totaling $60,250 from multiple Receivership entities. *Id.* at ¶ 113. They

received the following transfers from Oxford Global Advisors LLC's Wells Fargo account (ending in 5598):

- $1,500 on or around January 7, 2008. *Id.*
- $1,500 on or around April 9, 2008. *Id.*
- $1,500 on or around July 1, 2008. *Id.*
- $52,750 on or around June 5, 2008. *Id.*

George Janssen also received the following checks from a different Receivership Entity, UBS Diversified Growth LLC, drawn on Wells Fargo account (ending in 2710):

- $1,500 on or around July 6, 2007. *Id.*
- $1,500 on or around Octoer 5, 2007. *Id.*

In sum, the Janssens received at least $10,250.00 in fictitious profits. *Id.* at ¶ 114.

On October 23, 2013, the Janssens filed their Answer and Counterclaim. *Answer and Counterclaim for Interpleader*, 13-cv-1896 Docket 77 (Oct. 23, 2013). The Receiver has moved to dismiss that counterclaim.

ARGUMENT

The Janssens' Counterclaim has several flaws, most notably its lack of a legal theory and any factual basis. It fails to state any claim upon which relief may be granted and should be dismissed pursuant to Rule 12(b)(6).

Although courts grant *pro se* litigants leeway in their pleadings, such litigants must still comply with substantive and procedural law. *See, e.g., Williams v. Carter*, 10 F.3d 563, 567 (8th Cir. 1993) ("Pleadings and other documents filed by *pro se* litigants

should be treated with a degree of indulgence, in order to avoid a meritorious claim's being lost through inadvertence or misunderstanding."); *Brown v. Frey*, 806 F.2d 801, 804 (8th Cir. 1986) (citing *Burgs v. Sissel*, 745 F.2d 526, 528 (8th Cir. 1984) (explaining that *pro se* litigants are not excused from compliance with substantive and procedural law)). To survive a motion to dismiss under Rule 12(b)(6), the Janssens' counterclaim must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007).

I. The Janssens' Counterclaim fails to state any claim upon which relief can be granted.

Federal Rule of Civil Procedure 8 applies to counterclaims as well as complaints. *Reis v. Walker*, 491 F.3d 868, 870 (8th Cir. 2007). Nowhere in the Janssens' Counterclaim do they provide a short and plain statement of a claim showing they are entitled to relief as required by Rule 8(a)(2). The Janssens do not allege the Receiver has committed any sort of misconduct whatsoever, nor do they offer factual allegations that could make any such claim against the Receiver plausible on its face. *See Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Defendants must include at least some factual content that would allow the Court to draw a reasonable inference that the Receiver is liable for some alleged misconduct. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).

a. The Janssens' Counterclaim does not contain a short and plain statement of their claim showing that they are entitled to relief.

The Janssens' Counterclaim does not include any short and plain statements of any claim showing that they are entitled to any relief. Fed. R. Civ. P. 8(a)(2). Paragraph VI

contains some "demands," but even viewing those in the most favorable light, and granting leeway to the Janssens as *pro se* litigants, none of these "demands" are claims entitling them to relief from the Receiver. The Janssens' Counterclaim fails to provide the Receiver and the Court with fair notice of their claims and grounds for relief. *Eckert v. Titan Tire Corp.*, 514 F.3d 801, 806 (8th Cir. 2008).

b. The Janssens' Counterclaim does not contain factual support.

While detailed factual allegations are not required, a counterclaim must include facts with enough specificity "to raise the right to relief above the speculative level." *Twombly*, 550 U.S. at 555; *Benton v. Merrill Lynch Co., Inc.*, 524 F.3d 866, 870 (8th Cir. 2008). Moreover, "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements" will not suffice. *Iqbal*, 566 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). The Janssens' counterclaim does not even rise to that level.

When considering a motion to dismiss under Rule 12(b)(6), the Court must look to the facts alleged in the counterclaim and construe those facts in the light most favorable to the nonmoving party. *See Riley v. St. Louis County of Mo.*, 153 F.3d 627, 629 (8th Cir. 1998). The only "facts" contained in the Janssen Counterclaim are an alleged relationship with Calton and Lefferts (¶ IV) and a summary of the Receiver's complaint (¶ V). *Answer and Counterclaim for Interpleader*, 13-cv-1896 Docket 77 ¶¶ IV-V. These paragraphs, even when taken as true, fail to "raise the right to relief" against the Receiver "above the speculative level."

II. The Janssens' alleged relationship with Calton and Lefferts is irrelevant and they should not be added as parties.

While the Janssens' legal theory is unclear, they seem to believe their alleged relationship with Calton and Kristi Lefferts somehow supports a claim against the Receiver. The Janssens also request that "Calton & Associates, Kristi Lefferts, and its [presumably Calton's] bonding company" be made parties to this litigation. Even if the sparse statements in paragraph IV are taken as true, and viewed in the light most favorable to the Janssens, the relationship between the Janssens and Calton and/or Lefferts does not provide any basis for relief from the Receiver, nor is there any reason to add them (or any bonding companies) as parties.

None of the transfers that underpin the Receiver's claims involve Calton or Lefferts—all transfers argued to be fraudulent transfers (and the source of unjust enrichment) came directly from Receivership Entities to Shirley and/or George Janssen. *See Exhibit A*, 13-cv-1896 Docket 1-1 at 4 (Jul. 15, 2013); *see also Complaint*, 13-cv-1896 Docket 1 ¶ 113. The Janssens' Counterclaim fails to show any common nucleus of operative fact connecting the Receiver's Complaint with whatever claims the Janssens may be trying to assert against Calton and/or Lefferts. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349 (1988) (quoting *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966)).

It is worth noting that the Janssens have not suffered any loss; they are presently "winning investors" who received fraudulent transfers and were unjustly enriched by the Cook Ponzi scheme. Even if the Janssens are forced to return the fictitious profits they

received ($10,250.00), they would still have retained their entire principal ($50,000). This cannot be said of the more than 700 victims who have received only 5.5% of their principal.

Therefore, the Court should reject the Janssens' invitation to add Calton, Lefferts, or Calton's bonding company as parties.

III. Interpleader makes no sense under these facts.

The Janssens' counterclaim is titled as a "counterclaim for interpleader," and this concept is also referenced in paragraph VI(b). But interpleader makes no sense under these facts.

"Interpleader is a procedural device that allows a party holding money or property, concededly belonging to another, to join in a single suit two or more parties asserting mutually exclusive claims to the fund. In this way the stakeholder is freed from the threat of multiple liability." *Wittry v. Northwestern Mut. Life Ins. Co.*, 727 F. Supp. 498, 499-500 (D. Minn. 1989) (citing *Gaines v. Sunray Oil Co.*, 539 F.2d 1136, 1141 (8th Cir. 1976)). The Janssens' invocation of interpleader suggests that they concede they have no right to the $60,250 they received and that they are asking this Court to decide whether the money should go to Calton and/or Lefferts on the one hand or the Receiver on the other.

Recognizing that the Janssens are *pro se*, the Receiver believes it is unlikely that this is what they actually believe or what they intended to convey to the Court. Further, the pleadings and public record give no indication that either Calton or Lefferts have ever asserted any claim to the $60,250 fraudulently transferred to the Jannsens. The Receiver

cannot think of any legal theory whereby such a claim could be made in good faith by either Calton or Lefferts.

Regardless of the Janssens' intent when they so titled their counterclaim, interpleader makes no sense under these facts and this counterclaim should be dismissed.

IV. Paragraph VI(c) of the Janssens' Counterclaim is redundant.

Paragraph VI(c) asks the Court to determine the veracity of the Plaintiff's claims, which is nothing more than asking the Court to rule in their favor on the Receiver's Complaint. The Janssens ask the Court to determine if the Plaintiff is entitled to relief and if the Defendants are entitled to a discharge of liability.

Courts have long held that counterclaims merely restating an issue already before the Court but from the opposite side should be stricken. *See, e.g., Rayman v. Peoples Sav. Corp.*, 735 F. Supp. 842, 851-2 (N.D. Ill. 1990); *Green Bay Packaging Inc. v. Hoganson & Assoc., Inc.*, 362 F. Supp. 78, 82 (N.D. Ill. 1973) (citing *Control Data Corp. v. International Business Machine Corp.*, 306 F.Supp. 839 (D. Minn. 1969) appeal denied 421 F.2d 323 (8th Cir. 1970), aff'd 430 F.2d 1277 (8th Cir. 1970)); *see also* Fed. R. Civ. P. 12(f).

Further, such redundant counterclaims are anathema to judicial economy and should be stricken under Rule 1 to "secure the just, speedy, and inexpensive determination" of this action. Fed. R. Civ. P. 1. Therefore, paragraph VI(c) should be stricken.

V. Parargraph VI(d)'s request for attorney's fees is untimely.

The general rule in this country, the so-called "American Rule" is that each party must pay its own attorney's fees. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). Additionally, counterclaims for attorney's fees and costs are improper and untimely under the Federal Rules. Rule 54 requires claims for attorney's fees to be made by motion after the entry of a judgment. Fed. R. Civ. P. 54(d)(2). The Janssens' request can only be ripe, if ever, after they have succeeded on the merits. Therefore, paragraph VI(d)'s request for attorney's fees should be stricken.

VI. The Janssens' "counterclaim" looks most like an attempt to invoke the affirmative defense of reasonably equivalent value.

The Janssens' did not invoke any affirmative defenses. Though one cannot be sure given the vagueness of the pleading, the Receiver thinks it is most likely that the Janssens intended to raise the affirmative defense of reasonably equivalent value for at least the $50,000 they transferred into the Ponzi scheme.

Labeling something a "counterclaim" does not change its nature. *See Tenneco Inc. v. Saxony Bar & Tube, Inc.*, 776 F.2d 1375, 1379 (7th Cir. 1985) (finding that the "label 'counterclaim' has no magic" and that what "is really an answer or defense to a suit does not become an independent piece of litigation because of its label.").

In their response brief and at the hearing, the Janssens will be able to explain, in plain English, what they were trying to accomplish, and the Court can modify or allow them to modify their pleading accordingly.

CONCLUSION

The Janssens' Counterclaim states no viable legal theory and does not contain the requisite factual allegations to support a claim upon which relief may be granted. Therefore, the Court should dismiss the counterclaim in its entirety.

Dated: November 13, 2013

Respectfully submitted,

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