

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Case No. 0:13-cv-01896-SRN/SER

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

Plaintiff,

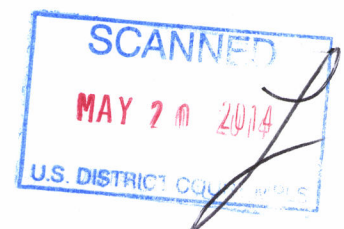
v.

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 OF LAW IN SUPPORT OF
DEFENDANT MARK STOLTENBERG'S MOTION TO DISMISS
AND OPPOSITION TO SUMMARY JUDGMENT
F. R. Civ. P. 12(b)(6)**

COMES the Defendant in the above entitled action, Mark Stoltenberg, and
would show this Court the following:



I. THE STATUTE OF LIMITATIONS HAS EXPIRED AS TO DEFENDANT MARK STOLTENBERG.

The statute of limitations in Minnesota that applies to this cause of action is six (6) years.

However, Defendant is a resident of Arizona, in which case the statute of limitations for the Uniform Fraudulent Transfers Act (UFTA) is four years.

44-1009. Extinguishment of claim for relief

A claim for relief with respect to a fraudulent transfer or obligation under this article is extinguished unless an action is brought:

1. Under section 44-1004, subsection A, paragraph 1 within four years after the transfer was made or the obligation was incurred or, if later, within one year after the fraudulent nature of the transfer or obligation was or through the exercise of reasonable diligence could have been discovered by the claimant.
2. Under section 44-1004, subsection A, paragraph 2 or section 44-1005, within four years after the transfer was made or the obligation was incurred.

Arizona Revised Statutes – Title 44 Trade and Commerce – Section 44-1009 Extinguishment of claim for relief

See e.g., Kendall v Keith Furnace Co., 162 F.2d 1002 (8th Cir. 1947)

(shorter statute of limitations controls).

The Receiver filed his complaint on 7/15/2013 which states as follows on page 27:

103. Defendant Mark Stoltenberg received at least one transfer from a Receivership Entity totaling \$3,500.00. On or around April 2, 2008, \$3,500.00 was transferred to Mark Stoltenberg via check number 1423 drawn on Wells Fargo account ending 2710 held in the name of UBS Diversified Growth LLC.

As the check for \$3,500 was issued on 04/02/2008, there was a time lapse of well over 4 years before the complaint was filed.

II. THE RECEIVER DID NOT DO HIS HOMEWORK.

It strains credibility to believe that an unwitting investor in a Ponzi scheme could take money out without putting anything in. That simply is not what happened.

STATEMENT OF MARK STOLTENBERG

Sometime in late 2005 a friend at work told me about Patrick Kiley¹ and his radio show located in Minneapolis, Minnesota. Patrick Kiley was one of the Ponzi scheme felons convicted in Minneapolis.

Two or three years after closing my account, I learned about the Ponzi scheme through the mail. I found out that certain individuals were convicted due to the scheme. I then received mail from Attorney Joe Kaczrowski (hereinafter, "Mr. Kaczrowski") who was the prosecuting attorney for this scheme. I'm

¹ Per Complaint, page 8:

19. Patrick J. Kiley ("Kiley") was the owner and founder of UBS Diversified and Universal Brokerage FX management, LLC ("Universal Brokerage").

receiving correspondence regarding settlement due to me being a “winning investor.”

Mr. Kaczrowski contacted me by telephone (I believe early in 2012). During that conversation Mr. Kaczrowski told me the only file they had on me was that \$3,500 check. Mr. Kaczrowski did not know when I invested or how much. I told him I was not a “winning investor.”

I.e., the Receiver is proceeding upon an assumption in my case.

ARGUMENT

Apparently this type of conduct is something Receivers engage in on a regular basis. For example:

On August 24, 2004, Kowell and his mother received a letter from Donell. The letter informed Kowell that Wallenbrock had been declared a Ponzi scheme, and that Donell had been authorized by a federal court to recover “profits” paid to investors. The letter stated that of approximately 6,000 investors, only 800 had received payments in excess of their principal investment. The letter claimed that Kowell had invested “the sum of \$.00,” and had received back payments totaling \$69,546.70. Thus, Kowell had allegedly received a “profit” of \$69,546.70. The letter encouraged Kowell “[t]o take advantage of this one-time offer to settle with the Receivership estate for 90% of the profit you received” by mailing a check in the amount of \$62,592.03 (calculated as 90 percent of \$69,546.70). The letter also required Kowell to execute an enclosed Settlement Agreement. It stated in bold letters that “it is imperative that I hear from you within 20 days from the date of this letter,” or else “I will proceed accordingly.”

Donell v. Kowell, 533 F.3d 762, 768 (9th Cir. 2008).

The Receiver’s original demand letter inaccurately informed Kowell that he owed \$69,546.70, and tried to pressure him to mail a check for 90 percent of that amount, or \$62,592.03, within 20 days or face consequences. Because Kowell did not succumb to these tactics and

instead sought protection in federal court, the Receiver was forced to concede that Kowell netted only \$50,431.78.

Id. at 780.

The law concerning a Motion to Dismiss is quite clear:

We review “*de novo* the grant of a motion to dismiss, taking all facts alleged in the complaint as true.” *Owen v. Gen. Motors Corp.*, 533 F.3d 913, 918 (8th Cir. 2008). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). Thus, “although a complaint need not include detailed factual allegations, ‘a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.’” *C.N. v. Willmar Pub. Sch., Indep. Sch. Dist. No. 347*, 591 F.3d 624, 629-30 (8th Cir. 2010) (quoting *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955).

Zutz v. Nelson, 601 F.3d 842, 848 (8th Cir. 2010).

That a “winning investor” never invested and took out \$3,500 (or, for that matter, any amount) is just not a claim to relief that is plausible on its face.

Defendant Mark Stoltenberg is in the process of attempting to contact the author of the \$3,500 check in order to obtain verification from him, something that the Receiver should have at least attempted to do, prior to his filing the claim against this Defendant.

His name and address is:

Patrick J. Kiley
15918-041 FMC
P.O. Box 4000
Rochester, MN 55903

III. THERE ARE SEVERAL PROBLEMS WITH THE MOTION FOR SUMMARY JUDGMENT AS APPLIED TO DEFENDANT MARK STOLTENBERG.

1. There are material facts in dispute—principally that Defendant Mark Stoltenberg paid in what he received back. Page 2, Motion for Summary Judgment.

2. That there is only “one reasonable conclusion” is simply not the case. Page 8, Motion for Summary Judgment.

3. That Defendant Mark Stoltenberg “never made any investment” is simply not true. Page 15 and 24, Motion for Summary Judgment.

4. There is “no evidence” as to Defendant Mark Stoltenberg because the Receiver never made any investigation, Page 27, Motion for Summary Judgment.

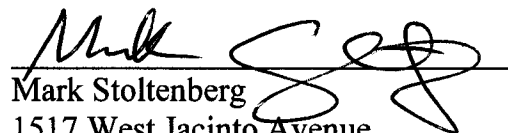
5. Defendant Mark Stoltenberg’s original answers were done pro se.

Hopefully Defendant Mark Stoltenberg’s Motion to Dismiss and Opposition to Summary Judgment with Memorandum in Support will clarify matters.

WHEREFORE, Defendant Mark Stoltenberg moves this Court to dismiss the Complaint against him, *with* prejudice.

Dated: May 17, 2014

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mark Stoltenberg", written over a horizontal line.

Mark Stoltenberg
1517 West Jacinto Avenue
Mesa, AZ 85202
602-295-4527
Pro se