

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

SECURITIES EXCHANGE COMMISSION )

Plaintiff, )

vs. )

DAVID TANNER, et al., )

Defendants, )

and )

MARGARET F. SPENCER, et al., )

Relief Defendants. )

Civil Action No.: 05-4057-SAC

**MOTION OF RECEIVER *PENDENTE LITE*, LARRY E. COOK, FOR  
TURNOVER OF PROPERTY AND RECORDS OF THE RECEIVERSHIP ESTATE  
TRANSFERRED TO MARK D. ZARUBI, DIVERSIFIED PARTNERS LIMITED F/K/A  
CEDAX LIMITED, SEAFORTH MERIDIAN, LIMITED, AND LAW OFFICES OF  
J.B. "BENTON" MOORE, AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

COMES NOW the Receiver *Pendente Lite* Larry E. Cook (the "Receiver"), by and through his undersigned counsel, and for this Motion for Turnover of Property and Records of the Receivership Estate Transferred to Mark D. Zarubi, Diversified Partners Limited f/k/a Cedax Limited, Seaforth Meridian Limited, and Law Offices of J.B. "Benton" Moore, and Memorandum of Law in Support Thereof, respectfully states as follows:

**Introduction and Summary**

1. The Receiver seeks a turnover order to direct Mark D. Zarubi ("Zarubi"), Diversified Partners Limited f/k/a Cedax Limited ("Cedax"), Seaforth Meridian, Limited ("Seaforth"), and J. B. "Benton" Moore, III ("Moore") to return property of the receivership estate transferred to Zarubi, Cedax, Seaforth, and Moore (collectively, the "Transferees"). As shown more fully below, the Transferees received investor funds from an account at VEF Banka in Riga, Latvia wherein stolen investor funds were pooled. The Transferees did not return

reasonable equivalent value for the investor funds they received, nor have they returned the funds as demanded by the Receiver.

2. The Order Appointing Receiver (Docket # 10) directs all persons to promptly deliver to the Receiver all Receivership Assets and promptly surrender all Receivership Records to the Receiver. The Receiver therefore seeks that this Court direct that the Receivership Assets and Receivership Records in the possession of the Transferees be immediately returned to the Receiver.

### Authorities

3. Federal courts have broad equitable powers enabling them to fashion appropriate ancillary remedies necessary to grant full relief. SEC v. Blatt, 583 F.2d 1325 (5th Cir. 1978); SEC v. Manor Nursing Centers, 458 F.2d 1082, 1103-04 (2d Cir. 1972).

4. This includes the power to impose a receivership, and to direct that all of the proceeds of the fraud be paid to the receiver to preserve the status quo for the benefit of the defrauded investors. Id. at 1104-05.

5. With respect to third parties, both the Commission and the Receiver are entitled to orders directing the return of the stolen investor funds. A court can obtain equitable relief from a non-party regardless of whether that non-party committed any wrongdoing, simply by showing that the non-party has possession of the fraud proceeds and no legitimate claim to them. SEC v. Cherif, 933 F.2d 403, 414, n.11 (7th Cir. 1991); SEC v. Colello, 139 F.3d 674, 679 (9th Cir. 1998). Moreover, courts have jurisdiction to decide the legitimacy of ownership claims made by non-parties to assets alleged to be proceeds from securities laws violations. Cherif, 933 F.2d at 414, n. 11.

6. The Receiver is entitled to the same relief under two theories. The first is constructive trust. United States v. Cannistraro, 594 F. Supp. 62, 72, n.11 (D.N.J. 1988) (“The

courts impose the remedy of constructive trust where, rightfully or wrongfully, a party has obtained property which unjustly enriches him.”), modified on other grounds, 871 F.2d 1210 (3rd Cir. 1989); see also Rollins v. Metropolitan Life Insurance Co., 863 F.2d 1346, 1354 (7th Cir. 1988) (“a constructive trust may be invoked even where the unjustly enriched party is completely blameless”). The second is the applicable fraudulent transfer statutes. E.g., Cunningham, as Trustee for Ponzi v. Brown, 265 U.S. 1 (1924).

### **Facts**

7. As stated in the Securities and Exchange Commission’s (the “Commission”) Complaint (Docket # 1) and Memorandum of Law in Support of Plaintiff’s Application for an *Ex Parte* Temporary Restraining Order, Order Freezing Assets and Other Emergency Relief (the “TRO Motion”) (Docket # 5), the defendants in this matter obtained investor funds by fraud, misrepresentations, and omissions. See Complaint, ¶¶ 17 -23 and TRO Motion, pages 5-7.

8. As further stated in the Complaint and TRO Motion, one of the vehicles by which the defrauded investors “invested” in Capital Enhancement Club was by transferring funds to an account in Riga, Latvia. See TRO Motion, page 8.

9. At the time of the filing of the Complaint, the Commission was aware that at least some of the defrauded investor funds were transferred to an account at VEF Bank in Riga, Latvia (the “VEF Bank Account”). See, Blair Dec. (Docket #6), ¶¶ 12, 24, and Exhibit K to Blair Dec.

10. The Court’s May 4, 2005 Temporary Restraining Order (Docket # 9) found, *inter alia*, that there is good cause to believe investor funds and assets obtained by Defendants and Relief Defendants have been and will be misappropriated.

11. In addition, the Court held a Preliminary Injunction hearing on May 17, 2005. Other than relief defendant Dynamic Environmental Solutions, no one challenged the entry of the Court’s May 18, 2005 Preliminary Injunction Order (Docket # 29). The Preliminary

Injunction Order, *inter alia*, found the Commission had demonstrated a prima facie case that Defendants used improper means to obtain investor funds and assets and that the Commission had presented sufficient evidence to demonstrate that a receiver is appropriate to marshal and preserve the assets for the benefit of the investors.

12. The Receiver has since obtained a copy of the March 28, 2005 “Capital Enhancement Club Newsletter” which, in part, informs investors: (i) Capital Enhancement Club recommends investors transfer funds to Capital Enhancement Club via the Cedax account at VEF Bank; and (ii) provides instructions for transferring funds to Cedax’ account at VEF Bank. A true and correct copy of the March 28, 2005 Newsletter is attached hereto as **Exhibit A**.

13. As reported in the Receiver’s Preliminary Report (Docket # 55), the Receiver and the Commission have identified approximately \$4,194,023 in off-shore accounts, with most of that amount located at VEF Bank and Krajbanka, both in Riga, Latvia. The Receiver has since learned from Latvian authorities that the equivalent of US\$3,015,703 is held in Cedax’s VEF Bank account.

14. The Receiver has reviewed voluminous bank records and other documents and has determined that at least \$13,103,204 of investor funds were transferred by CEC investors to the VEF Bank Account between August 2003 and May 3, 2005. Attached hereto as **Exhibit B** is a true and correct accounting by the Receiver of investor funds known to have been transferred to the VEF Bank Account.

15. In reviewing documents and conducting various witness interviews, the Receiver has determined the VEF Bank Account is held in the name of Diversified Partners Limited, f/k/a Cedax Limited. The Receiver has further determined that Mark D. Zarubi is the principal signatory of Diversified Partners Limited formally known as Cedax Limited. Attached hereto as

**Exhibit C** is a true and correct copy of an Affidavit of Zarubi (the “Zarubi Affidavit”) attesting to this fact.

16. Pursuant to the Zarubi Affidavit, Zarubi purports to operate Cedax as a business serving the “high risk processing and data mining industry.” Zarubi Affidavit, ¶ 3.

17. The \$3,015,703 presently held in Cedax’s VEF Bank account is directly traceable to the defrauded investors’ funds deposited there. Accordingly, the Receiver seeks an Order directing Cedax and Zarubi to return of the \$3,015,703 in Cedax’s VEF Bank account to be held for the benefit of the defrauded investors.

18. Further, pursuant to the Zarubi Affidavit, Zarubi confirms that approximately \$9 million of Cedax funds were subsequently invested in Seaforth. Zarubi Affidavit, ¶ 2.

19. Seaforth has informed the Receiver that between December 21, 2004 and May 9, 2005, Cedax, upon the instruction of Cedax’s principal signatory, Zarubi, invested a total equivalent of US\$9,409,000 in Seaforth. Seaforth further informed the Receiver that the \$9,409,000 originated from Cedax’s account at VEF Bank and that the investor funds transferred to Seaforth via Cedax’s VEF Bank account have subsequently been deposited in one or more Seaforth accounts or funds in the United Kingdom and Switzerland. A true and correct copy of the Declaration of John C. Friedrich, the Managing General Partner of Seaforth Meridian Management, LLC, the general partner of Seaforth Meridian Limited, confirming Seaforth Meridian Limited received \$9,409,000 from Cedax’s VEF Bank account is attached hereto as

**Exhibit D.**

20. Seaforth has further confirmed it is holding the equivalent of US\$8,998,513 from Cedax’s VEF Bank account which it will turnover to the Receiver upon the appropriate Order of this Court. See Friedrich Dec., ¶ 5.

21. The \$8,998,513 presently held by Seaforth is directly traceable to the defrauded investors' funds deposited first into Cedax's VEF Bank account and subsequently transferred to Seaforth. Accordingly, the Receiver seeks an Order directing Seaforth to return the \$8,998,513 in investor funds in Seaforth's possession from Cedax's VEF Bank account to be held for the benefit of the defrauded investors.

22. Seaforth has further informed the Receiver that between May 13, 2005 and June 10, 2005, and at the instruction of Zarubi, Seaforth transferred the sum of \$514,516.18 (out of the \$9,409,000 million of investor funds Zarubi transferred from Cedax to Seaforth) to: Equitable Holdings Limited, c/o J.B. "Benton" Moore III Trust Account at Bank of America branch located at 912 Garnet Ave, San Diego, CA, routing number 121000358, account number 2565501442. See Friedrich Dec., ¶ 3.

23. The Receiver has determined that J.B. Moore is an attorney licensed in the state of California. In addition, Zarubi informed the Receiver during a witness interview that Equitable Holdings Limited is Zarubi's company which Zarubi uses for real estate transactions. In addition, the Receiver has obtained a report indicating Zarubi is a control person of Equitable Holdings, Limited. A true and correct copy of this report is attached hereto as **Exhibit E**. The Receiver seeks also seeks an Order directing Moore to provide an accounting of the \$514,516.18 in investor funds first transferred to Seaforth and then to Moore.

### **Argument**

#### **I. Turnover of Property of the Receivership Estate**

24. On the facts as known to the Receiver, the funds received by Zarubi, Cedax and/or Seaforth need to be returned to the Receivership Estate. The money Zarubi and Cedax obtained from the investors in the course of CEC's securities fraud never equitably became their money. Instead Zarubi and Cedax merely had the money in its possession as a constructive

trustee, the same as any thief. Similarly, when Zarubi and/or Cedax transferred a portion of the money to Seaforth nothing changed. The money (\$3,015,703 in Cedax's VEF Bank account and an additional \$8,998,513 presently held by Seaforth) still equitably belongs to the fraud victims. Neither Seaforth nor Cedax/Zarubi have a legitimate claim to the investor funds. Therefore the investor funds should be returned to Larry Cook, as Receiver, to be marshaled and preserved for the benefit of the investors as directed by the Court's Preliminary Injunction Order. In addition, Zarubi, Cedax, and Seaforth should be ordered to turnover all records, documents, correspondence, and bank records of those entities so that the Receiver may further complete his duties in determining the nature and amount of investor funds transferred to these entities.

## **II. Turnover of Records of the Receivership Estate**

25. The Receiver is also entitled to an accounting of the \$514,516.18 Zarubi and/or Cedax transferred from Cedax's VEF Bank account, first to Seaforth, and then to Moore. Again, the money Cedax and Zarubi obtained from the investors in the course of CEC's securities fraud never equitably became their money. Instead Zarubi and Cedax merely had the money in its possession as a constructive trustee. Similarly, when Zarubi and/or Cedax transferred a portion of the money to Moore nothing changed. Pursuant to the Order Appointing Receiver, Moore is required to provide the Receiver with an accounting as to the status and/or dissipation of the \$514,516.18 he received from Cedax/Zarubi via Seaforth.

### **Conclusion**

WHEREFORE, the Receiver respectfully requests the Court enter an Order:

- (i) Directing Mark D. Zarubi, or any person to whom he entrusted investor funds, to immediately return to the Receiver all investor funds in his possession, including, but not limited to, all funds in the name of Diversified Partners Limited f/k/a Cedax Limited in an amount not less than \$3,015,703, or the current equivalent of any foreign funds in Diversified Partners Limited f/k/a Cedax Limited accounts at VEF Bank, Krajbanka, or any other financial institution;

- (ii) Directing Mark D. Zarubi, or any person to whom he entrusted records, documents, correspondence, and/or bank records of Diversified Partners Limited f/k/a Cedax Limited to turnover such documents and records to the Receiver;
  - (iii) Directing Diversified Partners Limited f/k/a Cedax Limited, or any person to whom it entrusted investor funds, to immediately return to the Receiver all investor funds in its possession, including, but not limited to, all funds in the name of Diversified Partners Limited f/k/a Cedax Limited in an amount not less than \$3,015,703, or the current equivalent of any foreign funds in Diversified Partners Limited f/k/a Cedax Limited accounts at VEF Bank, Krajbanka, or any other financial institution;
  - (iv) Directing Diversified Partners Limited f/k/a Cedax Limited, or any person to whom it entrusted records, documents, correspondence, and/or bank records of Diversified Partners Limited f/k/a Cedax Limited to turnover such documents and records to the Receiver;
  - (v) Directing Seaforth Meridian Limited, to turnover the equivalent of US\$8,998,513.00, representing investor funds transferred to Seaforth via Cedax;
  - (vi) Directing Seaforth Meridian Limited, or any person to whom it entrusted records, documents, correspondence, and/or bank records of Seaforth Meridian Limited to turnover such documents and records to the Receiver;
  - (vii) Directing attorney J.B. Moore, III to immediately provide the Receiver with an accounting of all funds transferred to him by Mark D. Zarubi, James Tucker, and/or Diversified Partners Limited f/k/a Cedax Limited, including, but not limited to the \$514,516.18 in investor funds transferred to Moore from Seaforth between May 13, 2005 and June 10, 2005; and
26. For such other and further relief as the Court deems just and appropriate.

Dated: July 21, 2005

Respectfully submitted,

Lathrop & Gage L.C.

By: /s/ Brian M. Holland

Kenneth L. Weltz KS #9134  
Brian M. Holland KS #19989  
10851 Mastin Blvd., Bldg. 82, Ste. 1000  
Overland Park, KS 66210-1669  
Telephone: 913.451.5100  
Telecopier: 913.451.0875

Attorneys for Larry E. Cook, Receiver

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**Relief Defendants. )**

**Civil Action No.: 05-4057-SAC**

**SUMMARY OF EXHIBITS**

The following exhibits in reference to the Receiver's Motion For Turnover of Property of the Receivership Estate, are available upon request:

- 1. Exhibit A: March 28, 2005 CEC Newsletter
- 2. Exhibit B: Accounting of investor funds transferred to VEF Bank account.
- 3. Exhibit C: Affidavit of Mark D. Zarubi
- 4. Exhibit D: Declaration of John C. Friedrich
- 5. Exhibit E: Report of Mark Zarubi as manager or member of Equitable Holdings, LLC

Respectfully submitted,

Lathrop & Gage L.C.

By: /s/ Brian M. Holland

Kenneth L. Weltz KS #9134  
 Brian M. Holland KS #19989  
 10851 Mastin Blvd., Bldg. 82, Ste. 1000  
 Overland Park, KS 66210-1669  
 Telephone: 913.451.5100  
 Telecopier: 913.451.0875

Attorneys for Larry E. Cook, Receiver

**CERTIFICATE OF SERVICE**

I hereby certify that on this 21st day of July, 2005, I electronically filed the foregoing, with the Clerk of the Court for the District of Kansas, Topeka Division, by using the CM/ECF system which will send a notice of electronic filing to the following CM/ECF participants:

Timothy P. Davis, SEC;

Christopher M. Joseph and Stephen M. Joseph, Counsel for Spencer Defendants;

Roger N. Walter, Local Counsel for Relief Defendant Vectra Resources, LLC; and

Randall J. Forbes and Kevin M. Fowler; Counsel for Relief Defendant Dynamic Environmental Solutions.

Thomas S. Haney, Counsel for Defendant David Tanner.

I further certify that I mailed the foregoing document and the notice of electronic filing by depositing a correct copy thereof in the United States mail, first class, postage prepaid and addressed to the following non-CM/ECF participants:

Michael Bachner  
Robert L. Herskovits  
Bachner & Herskovits, PC  
26 Broadway, Suite 2310  
New York, NY 10004  
Counsel for Defendant Tanner and  
Mark D. Zarubi

Christopher Bebel  
440 Louisiana, Suite 900  
Houston, TX 77002  
Co-Counsel for Relief Defendant Vectra  
Resources, LLC

Omnibus LLC  
c/o Rox Anne Wark, Registered Agent  
7380 S. Eastern Ave, #124-279  
Las Vegas, NV 89123  
Relief Defendant

Richard P. Kringen  
10120 SW 10th Ave.  
Topeka, KS 66615  
Defendant

J.P. Catuzzi  
67 Wall Street  
22nd Floor F1  
New York, NY 10005-3111  
Counsel for Seaforth Meridian, Ltd.

J.B. Moore, III  
1804 Garnet Ave, #419  
San Diego, CA 92109

/s/ Brian M. Holland  
An attorney for Larry E. Cook,  
Receiver