

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

|                                 |   |                               |
|---------------------------------|---|-------------------------------|
| SECURITIES EXCHANGE COMMISSION, | ) |                               |
|                                 | ) |                               |
| Plaintiff,                      | ) |                               |
|                                 | ) |                               |
| vs.                             | ) | Civil Action No.: 05-4057-SAC |
|                                 | ) |                               |
| DAVID TANNER, et al.,           | ) |                               |
|                                 | ) |                               |
| Defendants,                     | ) |                               |
|                                 | ) |                               |
| and                             | ) |                               |
|                                 | ) |                               |
| MARGARET F. SPENCER, et al.,    | ) |                               |
|                                 | ) |                               |
| Relief Defendants.              | ) |                               |

**SERVER TO GO, INC.’S CROSS-MOTION AND PRELIMINARY RESPONSE  
AND OPPOSITION TO MOTION OF RECEIVER FOR TURNOVER  
OF PROPERTY AND APPLICATION FOR A SCHEDULING ORDER**

Server to Go, Inc. (“STG”) by and through its undersigned counsel, as and for (a) its cross-motion to dismiss the motion of Receiver *Pendente Lite* Larry E. Cook (the “Receiver”) for turnover of property (the “Motion”) for lack of personal and in rem jurisdiction; (b) its preliminary response and opposition to the merits of the Motion; and (c) its application for the issuance of a scheduling order if the Motion is not dismissed, respectfully states as follows:

**PRELIMINARY STATEMENT**

1. STG is a Delaware corporation based in New York City that is principally engaged in the business of the design, ownership and operation of computer software applications. STG and its affiliated entities presently employ approximately 12 individuals, all

of whom work at STG from its New York City office. Between March 2003 and March 2005, STG received a total of \$5,085,010.00 from a Mr. James Tucker (the "Subject Funds") in exchange for extremely valuable services, labor and materials that it provided, and for an interest in a highly sophisticated and profitable computer program, whose development was funded largely by the Subject Funds. Throughout this two year period and thereafter, STG had no knowledge that Mr. Tucker was involved in the scheme underlying this plenary action.

2. STG cooperated with the Receiver's discovery requests and demonstrated that it had almost completed its development of the computer software whose commercial exploitation would generate many times the amount claimed by this Motion. But the Receiver has ignored these facts and seeks relief based upon erroneous and conclusory allegations regarding STG and its work.

3. This Court should dismiss the Motion for lack of personal and in rem jurisdiction. STG has not conducted any business in Kansas and the funds at issue are in New York. Pursuant to 28 U.S.C. §754, the Receiver was required within ten days of his appointment to file a copy of the Complaint and his order of appointment where the funds are located, the Southern District of New York. Our search indicates that the Receiver failed to make such a filing. Failure to file the necessary copies in the Southern District of New York divests the Receiver of any jurisdiction and control over property located in New York.

4. If the Motion is not dismissed, STG respectfully requests that the Court set a discovery schedule and a hearing date which gives STG time to present its defenses on the merits. The relief the Receiver seeks would bankrupt STG and cause substantial hardship to at least a dozen employees, including their possible loss of employment. Discovery will help establish STG's defenses, including that STG had no knowledge of any wrongdoing by Tucker

and that STG has provided reasonably equivalent value for the money it received from Tucker and therefore there is no fraudulent transfer.

### **FACTS**

5. Paul Pak is the CEO and President of STG. (See Pak Deposition Tr. 9:22-10:13, attached as Ex. A). Mr. Pak, who resides in New York City, has been a software developer for over a decade and specializes in e-commerce related products. (Pak Dep. Tr. 132:24-133:8.) After having completed a small computer software program for Mr. Tucker in 2003, Tucker retained Pak and STG to develop a much larger and sophisticated product. (Pak Dep. Tr. 86:25-87:8, 99:4-21, 118:24-119:6, 131:2-4.) The product that has been in development since 2003 and which is anticipated to be ready for commercial launch by early as year-end, is a sophisticated software application commonly referred to as “EBankCentral.” (Pak Dep. Tr. 39:3-8, 111:20-112:20.) EBankCentral is a state-of-the-art on-line secure payment system that provides, among other things, money management, information management and related tools.<sup>1</sup> (Pak Dep. Tr. 134:8-12.)

6. Tucker immediately recognized the potential in EBankCentral and began funding STG’s research and development. (Pak Dep. Tr. 89:4-90:18, 92:15-22, 95:25-96:20.) Through email and in-person visits between the two, Pak and Tucker agreed for STG to develop the product with Tucker’s investment money and that, once completed, the two would negotiate and reduce to writing a fair profit-sharing agreement. (Pak Dep. Tr. 118:24-119:23, 141:25-143:19.)

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<sup>1</sup> A key feature of the software is security-related, and therefore, STG cannot recite the details of its functionality in this public document. If necessary, STG will provide the Court with a more detailed explanation of the attributes of EBankCentral after the entry of a suitable confidentiality and protective order to be negotiated with the Receiver and “So-Ordered” by this Court.

7. Pak received monthly advances from Tucker and provided him with progress reports on the development of the software. (Pak Dep. Tr. 140:19-21.) To date, the software is more than 95% completed with only minor issues left to be resolved. (Pak Dep. Tr. 96:21-97:03.) STG believes that there is a strong market for its EBankCentral software which will produce revenues far in excess of what the Receiver demands in this Motion.

8. At no time did Tucker ever disclose to Pak, or anyone else at STG, that the funds he was advancing were subject to any adverse claims or that they were in any way obtained through fraudulent means. (Pak Dep. Tr. 176:8-11, 174:14-25.)

9. In January 2006, the Receiver served STG with a subpoena duces tecum. STG produced responsive documents and the Receiver deposed Mr. Pak on February 8, 2006.

## **ARGUMENT**

### **I. THIS COURT LACKS JURISDICTION OVER STG**

10. The Receiver does not even attempt to explain the basis for this Court's jurisdiction over STG. The funds at issue are in New York, STG is based in New York, and all of the events related to the transfer of funds to STG happened in New York and St. Maarten. There is no nexus at all to Kansas. Neither Mr. Pak nor STG reside, own property or conduct any business in Kansas.

11. To assert jurisdiction, the Receiver had to have complied with 28 U.S.C. § 754 which provides that the Receiver, "shall, within ten days after the order of his appointment, file copies of the complaint and such order of appointment in the district court for each district in which property is located. The failure to file such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district." (emphasis added).

12. Our review of the docket indicates that the Receiver never filed the complaint and his order of appointment there. He therefore has no jurisdiction over STG. See SEC v. Vision Communications, Inc., 74 F.3d 287 (D.C. Cir. 1996) (dismissing SEC enforcement action where receiver failed to comply with filing requirements of 28 USC § 754).

**II. THE MOTION IS BASED UPON  
ERRONEOUS AND DISPUTED ALLEGATIONS**

13. A summary judgment for turnover of property can only be granted where the facts are not in dispute. See Morrow v. Clayton, 326 F.2d 36, 47 (10<sup>th</sup> Cir. 1964). Here, STG disputes the Receiver's conclusory allegations that STG "did not receive reasonable equivalent value for the investor funds it received."

14. In fact, the evidence will show that STG (i) did not have actual or constructive knowledge of any alleged fraud, and (ii) provided value in exchange for the Subject Funds in good faith, which would provide a complete defense to the Motion. See, e.g. Coriell v. Hudson, 563 F.2d 978, 982 (10<sup>th</sup> Cir. 1977); Uniform Fraudulent Transfer Act ("UFTA"), K.S.A. § 33-208(b); *McCain Foods USA, Inc. v. Central Processors, Inc.*, 61 P.3d 68, 80 (D. Ka. 2002)(recognizing that, under UFTA, "transfers to persons who took in good faith and for a reasonably equivalent value are not voidable.")<sup>2</sup>

15. Accordingly, if the Motion is not dismissed on jurisdictional grounds, the Court should enter a scheduling order that provides STG with a reasonable opportunity to prepare its defenses.

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<sup>2</sup> Moreover, even if the Receiver succeeds in claiming a right to Server To Go's funds, the Receiver may only retrieve the lowest intermediate balance from Server To Go's bank accounts. Where trust funds are commingled with non-trust funds, the intermediate balance rule permits the trust beneficiary to "retrieve the lowest balance recorded after the funds were commingled." *Foster v. Kinzler*, 275 F.3d 924, 927 (10<sup>th</sup> Cir. 2001); *Columbia Gas Systems Inc. v. Official Comm'n. Of Unsecured Creditors of Columbia Gas Transmission Corp.*, 997 F.2d 1039, 1063-1064 (3<sup>rd</sup> Cir. 1993).

16. So far, discovery has been a one way street. The Receiver has deposed Mr. Pak and received STG's documents. STG requires documents from the Receiver that demonstrate that the funds transferred by Tucker were those tainted by the fraud alleged by the SEC. Additionally, STG will need to depose Mr. Tucker and other investors to demonstrate where the funds advanced to STG originated and whether those investors were aware at the time that the funds were being advanced towards the development of the EBankCentral software. Finally, STG will have to retain experts to prove the technical aspects and viability of the EBank Central software and its commercial value, if this is disputed.

17. STG respectfully suggests the following schedule starting from the date of the Court's decision on the Motion:

|                                |                   |
|--------------------------------|-------------------|
| Document Requests served:      | 20 days           |
| Documents Produced:            | 50 days           |
| Depositions Noticed and Taken: | 100 days          |
| Expert Reports Exchanged by:   | 120 days          |
| Expert Depositions Taken:      | 150 days          |
| Pre-Hearing Briefs due:        | 180 days          |
| Hearing date:                  | To be determined. |

There are many sharply disputed facts at issue here that must be fully developed and legal principles fully briefed before this matter would be ready for adjudication. It would be a gross injustice for the Court to entertain the Motion on the merits where the Receiver alone has been allowed to conduct discovery.

DATED: March 31, 2006

Respectfully submitted,

s/ Terrance M. Summers

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**Certificate of Service**

I hereby certify that on this 31<sup>st</sup> day of March, 2006, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

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I further certify there were no non-CM/ECF participants to serve by mail.

s/ Terrance M. Summers  
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