

DeArmas (“DeArmas” and together “Defendants”), and would respectfully show the Court as follows:

I. SUMMARY

1. In contemplation of the eventual return of assets to investors harmed by the misconduct alleged in *Securities and Exchange Commission v. Albert Fase Kaleta, et al.*, this Court appointed Thomas L. Taylor, III as Receiver for the Receivership Entities to marshal, conserve, hold and, where necessary, operate the assets of the Receivership Estate¹ pending further order of this Court. *Order Appointing Receiver*, ¶ 1. Receiver brought this action against Defendants in order to collect moneys belonging to the Receivership Estate so those funds ultimately could be returned to KCM’s defrauded investors.

2. On April 1, 2009 DeArmas, as President of ProTechnik, executed a Multiple Advance Promissory Note (the “Note”) for \$160,937.50 in principal with KCM. Per the terms of the Note, DeArmas is a personal guarantor, and is “jointly and severally, absolutely and unconditionally” liable in his individual capacity for all money owed to KCM by ProTechnik under the Note.

3. At the institution of the Receivership, ProTechnik had made no payments to KCM on the Note, whether in principal or interest, and was in breach of the Note. After the appointment of the Receiver -- and per the terms of the Note -- demand was made by letter from the Receiver on Defendants to pay amounts due under the Note. Defendants have failed and refused to do so. Receiver brought this action in order to collect moneys belonging to the

¹ Capitalized terms not defined herein shall have the meaning given to them in the *Order Appointing Receiver*, Doc. 7 (as modified by the *Order Modifying Order Appointing Receiver*, Doc. 34) (hereinafter the “Order Appointing Receiver”). Citations to specific paragraphs in the *Order Appointing Receiver* refer to paragraphs in Doc. 7.

Receivership Estate so they ultimately can be returned to KCM's defrauded investors.

4. Alternatively, the money loaned to ProTechnik under the Note unjustly enriched Defendants at the expense of the defrauded KCM investors, and such funds must be disgorged to benefit the Receivership Estate.

5. The Receiver seeks summary judgment against Defendants on his claims for breach of contract in regards to the Note, and alternatively for unjust enrichment, and an award of damages in the amount defined below.

II. SUMMARY JUDGMENT EVIDENCE

6. This Motion for Summary Judgment is based upon the following evidence, listed below and incorporated by reference herein:

Exhibit	Description
A	Affidavit of Receiver Thomas L. Taylor, III
1	Calculation of Interest Owed on the Note
B	Multiple Advance Promissory Note by and between KCM and ProTechnik, Inc. including personal guaranty of Brian DeArmas
C	Notice and Demand Letter from Receiver to Defendants dated February 1, 2010
D	Invoice to Defendants for September 30, 2009 Interest Payment on the Note

III. STATEMENT OF UNDISPUTED MATERIAL FACTS

The Receiver's Appointment in this Case

7. On November 13, 2009 the Securities and Exchange Commission ("SEC") instituted the above styled action against Albert Kaleta and his company KCM, appointing Thomas L. Taylor, III as Receiver over KCM's Records and Assets. *See Docs. 1, 7.*

8. The Court "directed and authorized [Receiver] to ... [i]nstitute such actions or

proceedings to impose a constructive trust, obtain possession, and/or recover judgment with respect to persons or entities who received assets or records traceable to the Receivership Estate.” *Order Appointing Receiver* ¶ 5(c).

9. Since his appointment, the Receiver has investigated the businesses, transactions, assets, liabilities, books, and records of the Receivership Estate. *Receiver's Affidavit*, Exhibit A at ¶ 2. He has also interviewed witnesses, taken depositions, and reviewed all available documents concerning the underlying investment scheme and transfers of investor funds to Defendants. *Id.*

The KCM Investment Scheme

10. The Receiver's investigation has revealed that Kaleta and others engaged in the fraudulent offering of promissory-note securities (the “KCM Notes”) through KCM and other Receivership Entities. *Id.* at ¶ 3.

11. Kaleta made several representations to purchasers of KCM Notes (the “Note Holders”), including (1) that KCM would use the proceeds loaned by the Note Holders (“Proceeds”) to make short-term loans to small businesses; (2) that KCM would only lend Proceeds to credit-worthy entities whose business models Kaleta had fully researched and understood; (3) that Kaleta would perform due diligence to ensure that such entities had the ability to repay KCM; (4) that Kaleta maintained a reserve account to cover Proceed repayments; and (5) that Kaleta personally guaranteed the notes, indicating that he had sufficient personal wealth to repay investors in full. *Id.* at ¶ 4.

12. In reality, KCM served no legitimate business purpose, and was only in existence to raise Proceeds to support the Receivership Entities’ principals and affiliate entities. *Id.* at ¶ 5. In fact, KCM's own bank records clearly establish that Proceeds (1) constituted virtually all of

KCM's revenue; (2) were commingled with other Receivership Entity assets and used for expenses not related to any legitimate investment or for purposes not disclosed to investors; and (3) were used to pay investment "returns" to some Note Holders with Proceeds received from other Note Holders. *Id.* at ¶ 6.

13. Furthermore, and in contradiction with representations made to Note Holders, Kaleta and/or KCM (1) did not maintain the promised reserve account; (2) did not perform due diligence to ensure that borrowers had the ability to repay the Proceeds; and (3) loaned Proceeds to non-creditworthy entities that had no reasonable prospect of repaying the loans. *Id.* at ¶ 7. For example, BizRadio and DFFS -- two financially precarious affiliates of Kaleta and KCM -- received the majority of the Proceeds, but had no reasonable prospect of repaying the loans. *Id.* Proceeds were also used to pay the personal expenses of Receivership Entity principals and employees, including Kaleta. *Id.* at ¶ 8.

14. A permanent injunction was ordered against Kaleta by this Court against future violations of various federal securities laws. *See Agreed Judgment*, Doc. 6. Disgorgement and civil penalties have also been ordered against Kaleta, in the amount of \$3,000,000 plus pre-judgment interest, for past violations. *See Final Judgment*, Doc. 73.

15. Kaleta also was barred from association with any investment adviser pursuant to § 203(f) of the Investment Advisers Act of 1940 [15 U.S.C. § 80b-3(f)]. *In the Matter of Albert Fase Kaleta*, SEC Administrative Proceeding File No. 3-13773, *Order Instituting Administrative Proceedings*, Release No. 2983, February 2, 2010.

The ProTechnik Note

16. On April 1, 2009 Kaleta (as president of KCM) and DeArmas (as president of ProTechnik) executed the Note. *See Exhibit B.*

17. The Note was found amongst the books and records of KCM. Other references to the Note, including an invoice for an interest payment due on the Note (the “Invoice”) were found amongst the electronic financial records of the Receivership Entities. The Invoice was found amongst the electronic financial records of the Receivership Entities in an Excel spreadsheet evidencing all promissory notes issued by KCM. *See Exhibit D; Receiver’s Affidavit*, Exhibit A ¶ 9.

18. On February 1, 2010, the Receiver made written demand on Defendants for sums borrowed under the Note. *See Exhibit C; Receiver’s Affidavit*, Exhibit A ¶ 11. Defendants failed to respond to this demand for repayment or tender payment on the Note as demanded by Receiver. *Receiver’s Affidavit*, Exhibit A ¶ 11.

19. Thereafter, the Receiver contacted DeArmas by telephone on several occasions and renewed his demand for repayment of the Note. DeArmas indicated that Defendants would not repay more than \$10,000.00 to KCM notwithstanding its contractual obligation to do so. *Id.* at ¶ 12.

20. The principal on the Note is \$160,937.50. *See Exhibit B.* Interest due on the Note is 24% per annum (the “Note Rate”) and “computed on the basis of a 12-month, 360 day year” and due quarterly. *Id.* An interest calculation per the terms of the Note is attached as Exhibit 1 to *Receiver’s Affidavit*, Exhibit A.

IV. ARGUMENTS AND ANALYSIS

A. Standard for Granting Summary Judgment

21. A party may obtain summary judgment when there is no genuine issue as to any material fact. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986). Whether a fact is “material” rests on the substantive law at issue. “Only disputes over facts that

might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.”

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.*

Stated another way, the Court should award summary judgment where the record, taken as a whole, could not lead a rational jury to find for the non-moving party. *See Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 978 (7th Cir. 1996).

B. Summary Judgment is Appropriate in This Case Because the Undisputed Material Facts Show That The Note is a Valid Contract That Was Breached by ProTechnik

1. Breach of Contract by ProTechnik

22. Under Texas Law, a plaintiff must satisfy four elements to sustain a breach of contract claim: “(1) the existence of a valid contract; (2) that the plaintiff performed or tendered performance; (3) that the defendant breached the contract; and (4) that the plaintiff was damaged as a result of the breach.” *Bridgmon v. Array Sys. Corp.*, 325 F.3d 572, 577 (5th Cir. 2008) (citing *Frost Nat'l Bank v. Burge*, 29 S.W.3d 580, 593 (Tex.App.—Houston [14th Dist.] 2000, no pet.)). A breach occurs when a party fails or refuses to do something he has promised to do. *See Townewest Homeowners Ass'n v. Warner Commc'n Inc.*, 826 S.W.2d 638, 640 (Tex. App.—Houston [14th Dist.] 1992, no writ). Receiver has satisfied all elements, and they are undisputed.

a. The Note is a Valid Contract

23. A promissory note is a contract for an obligation to pay money, and the construction of its terms is controlled by the rules generally applicable to interpreting contracts. *DeClaire v. G&B McIntosh Family Ltd. P'ship*, 260 S.W.3d 34, 44 (Tex. App.—Houston [1st Dist.] 2008) (citing *Dorsett v. Cross*, 106 S.W.3d 213, 217 (Tex. App.—Houston [1st Dist.]

2003, no pet.)). The elements of a valid contract are: (1) an offer; (2) an acceptance; (3) a meeting of the minds; (4) each party's consent to the terms; and (5) execution and delivery of the contract with the intent that it be mutual and binding. *Id.* (citing *Prime Prods., Inc. v. S.S.I. Plastics, Inc.*, 97 S.W.3d 631, 636 (Tex. App.—Houston [1st Dist.] 2002, pet. denied)). The determination of offer and acceptance (a meeting of the minds) is based on the objective standard of what the parties said and did and not on their subjective state of mind. *Id.* (citing *Baroid Equipment, Inc. v. Odeco Drilling, Inc.*, 184 S.W.3d 1, 17 (Tex. App.—Houston [1st Dist.] 2005, pet. denied)). The delivery of the note is made for the purpose of giving effect to the instrument according to its terms. *Id.*

24. The execution and delivery of the Note by and between KCM and ProTechnik constitutes a valid offer, acceptance, meeting of the minds, and consent to the Note's terms, wherein KCM would deliver \$ 160,937.50 in principal to ProTechnik, and ProTechnik promised to repay that principal to KCM plus interest at a stated rate. Indeed the Defendants admit to the execution of the Note in their Answer. *Defendants' Answer*, Civil Action No. 4:10-cv-01189, Doc. 4 ¶ 3. Delivery can be presumed because the Note was found amongst the books and records of KCM. *Receiver's Affidavit*, Exhibit A ¶ 9.

25. Accordingly, the Note is a valid contract under Texas law, is binding on the parties thereto, and is subject to a cause of action for its breach.

b. KCM Performed Under the Note, ProTechnik Breached the Note, and KCM Suffered Damages as a Result of ProTechnik's Breach

26. KCM tendered the principal amount to ProTechnik as per the terms of the Note, and ProTechnik took possession of the principal amount of money loaned under the Note, as is evidenced by the Invoice. *See Exhibit D.*

27. After KCM tendered the Note principal to ProTechnik, Defendants breached the Note by failing to make any payments, either in interest or principal, as called for in the Note. Such payments were due quarterly starting on July 1, 2009, and/or “upon demand.”²

28. Demand was made by the Receiver’s firm on Defendants to commence payments on the Note to the Receivership Estate, by letter and over the telephone. Exhibit C; *Receiver’s Affidavit*, Exhibit A at ¶¶ 11, 12. Defendants failed to make any payments on the Note to the Receivership Estate. *Receiver’s Affidavit*, Exhibit A ¶ 11.

29. As a result of the aforementioned breach, the Receivership Estate has suffered damages in the amount of the principal and interest owed on the Note. The interest calculation per the terms of the Note computes to \$ 87,442.71 through July 6, 2011, plus \$ 107.29 per day thereafter until judgment. *Receiver’s Affidavit*, Exhibit A ¶ 13. As of the filing of this Motion, damages on the breach of contract equate to:

Category	Amount
Principal	\$ 160,937.50
Interest through July 6, 2011	\$ 87,442.71
Total	\$ 248,380.21
plus \$ 107.29 per day until judgment	

2. Summary Judgment is Appropriate in This Case Because the Undisputed Material Facts Show That The Note was Individually Guaranteed By DeArmas

30. A guaranty creates a secondary obligation whereby the guarantor promises to answer for the debt of another and may be called upon to perform once the primary obligor has

² “Interest shall be payable upon demand or, if no demand is made, quarterly on the first day of each quarter, commencing with the first day of the quarter following the initial advance hereunder until all principal and interest hereunder have been fully paid, and shall be fully paid at the maturity.” Exhibit B at 1.

failed to perform. *Dann v. Team Bank*, 788 S.W.2d 182, 183 (Tex. App.—Dallas 1990) (citing *Republic Nat'l Bank v. Northwest Nat'l Bank*, 578 S.W.2d 109, 114 (Tex. 1978)); *Garner v. Corpus Christi Nat'l Bank*, 944 S.W.2d 469, 475 (Tex. App.—Corpus Christi 1997, writ denied). To recover under a guaranty, a plaintiff “must show proof of (1) the existence and ownership of the guaranty contract, (2) the terms of the underlying contract by the holder, (3) the occurrence of the conditions upon which liability is based, and (4) the failure or refusal to perform the promise by the guarantor.” *Marshall v. Ford Motor Co.*, 878 S.W.2d 629, 631 (Tex. App.—Dallas 1994); *see also Byrd v. Estate of Nelms*, 154 S.W.3d 149, 157 (Tex. App.—Waco 2004, pet. denied).

31. DeArmas signed the Note in his capacity as President of ProTechnik; however he also signed the note in his individual capacity as a guarantor. The Note states in pertinent part:

PERSONAL GUARANTEE

The undersigned agrees to assume personal liability for and agree to guaranty payment of any and all amounts owed to [KCM]. Therefore, by virtue of your execution of this agreement, **in your individual capacity, you jointly and severally, absolutely and unconditionally, guaranty the prompt and punctual payment and performance when due of any amounts owed to [KCM].** You further agree that this is a continuing guaranty applicable to and guarantying any and all indebtedness, obligations and/or liabilities of every kind, whether now existing or hereafter arising, and all renewals, extensions and rearrangements of such indebtedness, including, without limitation, any and all amounts of principal, interest, attorneys' fees, costs of collection and other amounts owing on or in connection with this Note.

Exhibit B at 2 (emphasis added).

32. The performance of payment under the Note was demanded by Receiver per the Note’s terms, and ProTechnik (acting through DeArmas) failed and refused to make those payments, in breach of the Note. *Receiver’s Affidavit*, Exhibit A ¶¶ 11, 12. As a guarantor in his

individual capacity, DeArmas is jointly and severally liable to the Receivership Estate for “any amounts owed” by ProTechnik to the Receivership Estate. He has failed to honor his contractual obligation upon demand by Receiver. *Id.*

3. Alternatively, Summary Judgment is Appropriate in This Case Because the Undisputed Material Facts Show That The Note Unjustly Enriched the Defendants

33. Alternatively, if the Note is found not to be a valid contract, the Note principal has unjustly enriched the Defendants at the expense of the defrauded KCM investors, and it would be inequitable to allow them to retain such a windfall.

34. Unjust enrichment is an equitable remedy under Texas law:

The phrase "unjust enrichment" is used in law to characterize the result or the failure to make restitution of benefits received ... [and] is sometimes defined as the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. A right of recovery under unjust enrichment is essentially equitable and does not depend upon the existence of a wrong.

Fun Time Centers, Inc. v. Continental Nat'l Bank, 517 S.W.2d 877, 884 (Tex.Civ.App.—Tyler 1975) (internal citations omitted). Furthermore “[a] party may recover under the unjust enrichment theory when one person has obtained a benefit from another by fraud”

Heldenfels Bros., Inc. v. Corpus Christi, 832 S.W.2d 39, 41 (Tex. 1992).

35. Virtually all of KCM’s revenue consisted of Proceeds, obtained from Note Holders through the fraud perpetrated by Kaleta through KCM. *Receiver’s Affidavit*, Exhibit A ¶¶ 3 – 8. The funds received by Defendants under the Note, evidenced by the Invoice, are likewise Proceeds. *Id.* ¶ 10.

36. To allow Defendants to retain those Proceeds at the expense of defrauded Note

Holders would be manifestly unjust. Accordingly, Receiver asks the Court to order those Proceeds received by Defendants, plus pre- and post-judgment interest, to be returned to the Receivership Estate.

V. RELIEF REQUESTED

Under Rule 56 of the Federal Rules of Civil Procedure, the Receiver respectfully requests that this Court enter judgment in favor of the Receivership Estate and against the Defendants because the undisputed material facts entitle Receivership Estate to the following as a matter of law:

- (1) a judgment declaring that the Note is a valid and binding contract under Texas law, that ProTechnik received \$160,937.50 in principal under the Note, that Defendants are jointly and severally liable for all principal and interest due under the Note, and that Defendants pay all moneys due under the Note to the Receivership Estate in the amount of \$ 248,380.21 as of the filing of this Motion, plus other pre- and post-judgment interest;
- (2) alternatively, a judgment declaring that Defendants received \$160,937.50 of Proceeds, which unjustly enriched them to the detriment of Note Holders, and Defendants must disgorge those Proceeds (including pre- and post-judgment interest) for the benefit of the Receivership Estate; and
- (3) a judgment awarding the Receiver such other and further relief, general or special, at law or in equity, to which he is justly entitled.

July 6, 2011

Respectfully submitted,

By: /s/ Thomas L. Taylor, III
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COURT-APPOINTED RECEIVER FOR KALETA
CAPITAL MANAGEMENT, INC., ET AL.

CERTIFICATE OF SERVICE

On July 6, 2011, I electronically submitted the forgoing document with the clerk of court for the U.S. District Court, Southern District of Texas, using the electronic case filing system. I hereby certify that I have provided copies to all counsel of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/
Thomas L. Taylor III