

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FILED BY AGJ D.C.

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MICHAEL J. QUILLING, Receiver for
MICROFUND LLC, a Nevada
limited liability company.

Intervening-Plaintiff,

v.

MARK D. TALLEY, and
MARK D. TALLEY, P.C.

Defendants.

00-3041 G BRE

No. _____

JURY DEMAND

**COMPLAINT FOR DAMAGES FOR BREACH
OF CONTRACT, BREACH OF FIDUCIARY DUTY,
PROFESSIONAL NEGLIGENCE, CONVERSION, CIVIL
CONSPIRACY AND VIOLATION OF RACKETEER INFLUENCED
AND CORRUPT ORGANIZATIONS ACT, 18 U.S.C. § 1961, et seq.**

COMES NOW, as Plaintiff, Michael J. Quilling, in his capacity as Receiver for Microfund, LLC and Luxor Capital Markets, Ltd., by and through counsel, and for Complaint against the Defendants, Mark D. Talley and Mark D. Talley, P.C., respectfully states as follows:

JURISDICTION AND VENUE

1. Subject matter jurisdiction of this Court over the matters in controversy is founded on 28 U.S.C. §1331 as this Complaint arises under the laws of the United States. In addition, subject matter jurisdiction may be founded upon 28 U.S.C. §1332, as there is diversity of citizenship between the parties and the matter in controversy exceeds \$75,000.00, exclusive of interest and costs.

2. Venue of this action is proper in this Court pursuant to 28 U.S.C. §1391(a), as a substantial part of the events and omissions giving rise to the claims occurred within this judicial district.

PARTIES

3. Plaintiff, Michael J. Quilling, has been appointed as the Receiver for Microfund, LLC (Microfund), a Nevada limited liability company, in an action styled *Securities and Exchange Commission v. Funding Resource Group, et al.*, civil action no. 3:98-CV-2689-M, pending in the United States District Court for the Northern District of Texas, Dallas Division (the Receivership Action). Luxor Capital Markets, Inc. (Luxor), a Nevis corporation, is an alter-ego of Microfund.

4. Defendant Mark D. Talley (Talley) is a resident of Shelby County, Tennessee. At all relevant times, Talley was attorney for Luxor providing escrow account services to Luxor. Talley and the Law Firm served as attorneys to Luxor and therefore owed it certain legal and fiduciary duties.

5. Defendant Mark D. Talley, P.C. (the Law Firm), is a Tennessee professional corporation engaged in the practice of law. The Law Firm's principal place of business is Shelby County, Tennessee. Talley and the Law Firm served as attorneys to Luxor and therefore owed it certain legal and fiduciary duties.

FACTUAL STATEMENT

6. B. David Gilliland (Gilliland), a resident of Shelby County, Tennessee, was, at all relevant times, the Funds Manager for both Microfund and Luxor.

7. Microfund is a Nevada limited liability company formed in or around April 1997. Microfund purported to operate an investment program designed to produce extremely high yields to investors. As operated by Gilliland, however, Microfund's investment program was simply a Ponzi

scheme. Potential investors were induced to invest in the Microfund investment program based on representations that their money would be fully secured by U.S. Treasury obligations and that their money and securities were to be held by Landfair Custodial Services, Inc. (Landfair), which was represented to be an independent custodian.

8. During the operation of the Microfund investment scheme, Microfund investors' funds were not invested in any actual "trading program." Rather, Gilliland and others used the Microfund investors' money for their own benefit and, when necessary to further the objects of the Ponzi scheme, caused some of the earlier investors to be paid with funds invested by later Microfund investors. As the Microfund Ponzi scheme grew, the number of unpaid Microfund investors also grew.

9. The Microfund Ponzi scheme operated by Gilliland was substantially similar to another Ponzi scheme being run by Gilliland through another entity, Hammersmith Trust, LLC (Hammersmith). In the Hammersmith Ponzi scheme, investors' money was to be used to purchase U. S. Treasury Bills. In addition, the Hammersmith investors' money was to be secured in an account over which an "independent" attorney had dual signatory power. As with the Microfund Ponzi scheme, investors' money and/or T-Bills was not used in any trading programs, but rather was used for Gilliland's and others' personal benefit.

10. In or around April 1999, Gilliland sent a letter (Microfund Letter), via U.S. mail or facsimile transmission, to all Microfund investors announcing Microfund's intention of entering into a new and more profitable investment program. A copy of the Microfund Letter is attached hereto as Exhibit 1. Microfund investors were asked to authorize the transfer of funds by Landfair to "a bonded attorney's escrow account for the implementation of the transaction." Under the new

program, as outlined in the April 1999 Microfund letter, the investors' money was to held in the attorney's escrow account and then used to purchase "United States Treasury bills in a quantity of no less than one hundred percent (100%) in value." The T-Bills were to be "reserved" for a trading program conducted by an unnamed European trading group.

11. As further inducement to enter into the Luxor transaction, Microfund offered to pay to investors five percent (5%) of the capital that the investors had previously placed with Microfund.

12. By executing the Microfund Letter, investors authorized "Landfair Custodial Services to transfer the gross amount of [the investor's] funds" into an account titled:

First American National Bank
Mark D. Talley Atty. Escrow Account
Account # 8000534866
REF: Microfund/Luxor Capital Transaction.

See Exhibit 1. In addition, the Microfund Letter purported to authorize Microfund to have the use of the T-Bills securing the investor's funds for a period of one year, which use was not limited to the Luxor transaction.

13. Two months earlier, in or around February 1999, Gilliland, as the Fund Manager of Luxor, entered into an agreement with Talley and/or the Law Firm for Talley and/or the Law Firm to serve as attorneys for Luxor. Talley and/or the Law Firm were specifically requested to provide escrow services to Luxor.

14. Talley and/or the Law Firm opened up an escrow account at First American Bank, N.A., for the purpose of receiving funds to be escrowed (the Talley Escrow Account). At the time Talley and/or the Law Firm opened the escrow account, Talley understood that the funds received

from investors were to be used to purchase “authenticated” U. S. Treasury Bills, which would be held in another custodial account.

15. In addition, Talley and/or Gilliland marketed to potential investors the fact that Talley and the Law Firm carried insurance and were “bonded” as an additional security factor protecting the investors’ investment in the Microfund Luxor transaction. Talley and/or Gilliland sent to at least one potential investor an insurance certificate showing the insurance limits for Talley and the Law Firm.

16. In reliance upon the insurance certificate of Talley and the Law Firm sent to them by Talley, the potential investor forwarded funds to the Talley Escrow Account for use in the Microfund Luxor transaction.

17. In or around April 1999, approximately \$1,000,000 was deposited into the Talley Escrow Account at First American. Landfair transferred approximately \$800,000 of the money deposited into the Talley Escrow Account.

18. By the end of April 1999, Talley and/or the Law Firm disbursed approximately all of the \$1,000,000 that had been deposited into the Talley Escrow Account. None of that money, however, was disbursed for the purchase of U.S. Treasury Bills. The investor funds that had been deposited in the Talley Escrow Account were used, *inter alia*, to pay attorneys representing Gilliland in the Receivership Action and to make Ponzi payments to other investors, including Hammersmith investors. In addition, approximately \$200,000 was diverted back to Landfair and approximately \$400,000 was diverted to Hammersmith.

19. Talley, as an experienced attorney, knew or should have known that as an escrow agent, he owed a fiduciary duty to investors whose money had been deposited into his escrow account.

20. Notwithstanding his knowledge that he owed a fiduciary duty for the safekeeping of each investor's funds, Talley routinely and without exception followed the instructions Gilliland gave to him for the withdrawal of funds from the Talley Escrow Account. At Gilliland's direction, Talley authorized the withdrawal of funds from the Talley Escrow Account for purposes other than investment in the Luxor transaction. Talley authorized the use of investor money to pay for Gilliland's personal attorneys. Talley authorized the disbursement of investor funds to other persons and entities without knowing the purpose for such disbursement. Talley authorized these disbursements without making any inquiry into the purpose or nature of the disbursements.

21. Indeed, although Talley understood that the funds deposited into the Talley Escrow Account were to be used to purchase United States Treasury Bills, Talley knew such securities were not being purchased since he authorized the transfer of investor funds from the Talley Escrow Account to persons and entities that Talley knew or should have known were not going to purchase U.S. Treasury Bills.

22. Talley knew that investors were not getting paid from Microfund's Luxor transaction, or from any other purported trading programs. By virtue of his actions in authorizing the disbursement of approximately \$1,000,000 from the Talley Escrow Account, Talley also knew that investor funds were being used to make Ponzi payments to other investors, to make payments to Gilliland, and to pay Gilliland's attorneys.

23. Talley acting with full knowledge of the pertinent facts and circumstances acted negligently, intentionally, and in concert with Gilliland to convert, waste, divert, and embezzle assets belonging to investors in the Microfund Luxor transaction. Talley materially assisted in the massive fraud perpetrated by Gilliland and others. Talley helped to clothe the fraudulent activities of

Gilliland and others with legitimacy by lending his name and the fact that he carried insurance to the enterprise.

24. In July 1999, Plaintiff Quilling was appointed as a Receiver for Microfund, Landfair, and Hammersmith. (See copy of Order Freezing Assets, Reinstating Appointment of Receiver and Authorizing Expedited Discovery, attached hereto as Exhibit 2). By the terms of this Order, the Receiver is charged with the duty of recovering all assets of Microfund, Landfair, and Hammersmith and is granted broad powers to accomplish such task, including the filing of the instant action.

25. Although the Receiver diligently investigated all facts pertinent to the operation of the Ponzi scheme by Gilliland through Microfund and to ascertain the scope of Talley's involvement with the operation of the scheme, the Receiver did not learn of Talley's tortious acts and that such tortious acts resulted in injury to investors in the Microfund Luxor transaction until on or about November 2, 1999.

26. Gilliland, Talley, and others were recently indicted for their role in perpetrating a massive fraud upon investors and a criminal action is pending in the United States District Court for the Northern District of Florida, Pensacola Division.

CLAIMS FOR RELIEF

COUNT I BREACH OF CONTRACT

27. The allegations of Paragraphs 1-26 are hereby incorporated by reference into this Count of the Complaint, as if set forth verbatim herein.

28. Talley and/or the Law Firm entered into a valid, binding contract to "serve as escrow agent for funds sent by investors to be used in the Microfund Luxor transaction..

29. By committing the foregoing acts, Talley and/or the Law Firm wrongfully breached the agreement to serve as escrow agent for funds sent by investors to be used in the Microfund Luxor transaction.

30. As a result of Talley's and/or the Law Firm's breach of the obligation to act as escrow agent in accord with the terms of the agreement, Microfund, Luxor and investors in the Microfund Luxor transaction have been injured for which the Receiver is entitled to recover damages.

**COUNT II
BREACH OF FIDUCIARY DUTY**

31. The allegations of Paragraphs 1-30 are hereby incorporated by reference into this Count of the Complaint, as if set forth verbatim herein.

32. Talley and/or the Law Firm owed a fiduciary duty to Microfund, Luxor and each investor whose money was deposited in the Talley Escrow Account to faithfully discharge his duties as escrow agent.

33. Talley failed to discharge his fiduciary duties to Microfund, Luxor and each investor in the Microfund Luxor transaction.

34. Investors in the Microfund Luxor transaction that had money deposited in the Talley Escrow Account have been injured by Talley's failure to faithfully discharge his fiduciary duties as escrow agent with the requisite degree of care. The Receiver is charged with the duty of recovering all assets of Hammersmith for eventual distribution to such injured investors and therefore, is entitled to recover damages.

**COUNT III
NEGLIGENCE**

35. The allegations of Paragraphs 1-34 are hereby incorporated by reference into this Count of the Complaint, as if set forth verbatim herein.

36. As attorney and escrow agent acting on behalf Microfund, Luxor, and investors in the Microfund Luxor transaction, Talley and the Law Firm owed a duty to act honestly, in good faith, and with reasonable care in performing his duties as an attorney and escrow agent.

37. Talley and the Law Firm breached the duty of reasonable care owed to Microfund, Luxor, and the investors in the Microfund Luxor transaction by failing to adequately perform the duties as escrow agent, by failing to perform any due diligence into the propriety of the Microfund Luxor transaction, by facilitating the Microfund Ponzi scheme, by assisting Gilliland and others in their fraudulent and criminal activities when Talley and the Law Firm knew such activities were fraudulent and criminal, by failing to direct Gilliland to stop such fraudulent activities, by failing to inform investors that they were being defrauded, and by failing to report such fraudulent and criminal activities to the appropriate regulatory agencies. Rather, Talley and the Law Firm abandoned all professional responsibilities owed to Microfund, Luxor, and the investors in the Microfund Luxor transaction and joined Gilliland and others in misappropriating investors' money in the operation of the fraudulent Microfund Ponzi scheme.

38. By acting with full knowledge of the pertinent facts and circumstances set forth herein and in concert with Gilliland and others, in a scheme to convert, waste, divert, and embezzle assets belonging to investors in the Microfund Luxor transaction, Talley and the Law Firm acted

unreasonably and recklessly and breached the duty of care to Microfund, Luxor, and the investors in the Microfund Luxor transaction.

39. Talley's failure to discharge his duties as an attorney and as escrow agent directly and proximately caused the investors' loss of money invested in the Microfund Luxor transaction. Talley's failure to discharge the duties he owed to Microfund, Luxor, and the investors in the Microfund Luxor transaction directly and proximately led to the establishment of a Receivership and the end of Microfund and Luxor as viable, legitimate entities.

40. The Law Firm knew of and participated in Talley's service to Microfund, Luxor, and the investors in the Microfund Luxor transaction as escrow agent.

41. As a result of Defendants' negligence, Microfund, Luxor, and the investors in the Microfund Luxor transaction have suffered damages for which the Receiver is entitled to recover.

COUNT IV CONVERSION

42. The allegations of Paragraphs 1-41 are hereby incorporated by reference into this Count of the Complaint, as if set forth verbatim herein.

43. Talley received funds constituting investors' principal and deposited these funds into the Talley Escrow Account.

44. The funds deposited in were disbursed by Talley, as escrow agent, at the direction of Gilliland. Talley failed to assure himself that the disbursement of investors' funds were for the purchase of U.S. T-bills or other appropriate investment purpose prior to causing the disbursement of such funds. Talley disbursed investors' funds on behalf of Gilliland and for Gilliland's use and benefit.

45. Talley misappropriated or converted such funds constituting investors' principal for Gilliland's use and benefit.

46. As a result of Talley's action in converting investors' principal to the use and benefit of Gilliland, investors in the Microfund Luxor transaction have been damaged for which the Receiver is entitled to recover.

**COUNT V
CIVIL CONSPIRACY**

47. The allegations of Paragraphs 1-46 are hereby incorporated by reference into this Count of the Complaint as if set forth verbatim.

48. Talley agreed and conspired with Gilliland and others to market and operate a fraudulent Ponzi scheme disguised as an investment program.

49. Talley, Gilliland and others took overt actions in furtherance of the conspiracy to bilk investors of at least One Million Dollars (\$1,000,000) through operation of a fraudulent Ponzi scheme.

50. As a result of the actions of Talley, Gilliland and others, the investors in the Microfund Luxor transaction lost at least \$1,000,000, which the Receiver is entitled to recover.

**COUNT VI
VIOLATION OF RACKETEER INFLUENCE
AND CORRUPT ORGANIZATIONS ACT, 18 U.S.C. § 1961, et seq.**

51. The allegations of Paragraphs 1-50 are hereby incorporated by reference into this Count of the Complaint, as if set forth verbatim herein.

52. This Count arises under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961, *et seq.*

53. Microfund, Luxor, the Law Firm and Hammersmith are enterprises within the meaning of 18 U.S.C. § 1961(4) which are engaged in, or the activities of which affect, interstate commerce. Numerous fraudulent misrepresentations were made to investors in the Microfund Ponzi scheme and the Hammersmith Ponzi scheme in fraudulent letters and/or facsimile transmissions from Gilliland and others participating in the schemes.

54. The fraudulent misrepresentations as set forth above represent a scheme and artifice to defraud each of the investors which scheme and artifice was facilitated by use of the United States Mail. Such scheme and artifice was caused by Gilliland, Talley and others, and constitutes mail fraud within the meaning of 18 U.S.C. § 1341 and/or wire fraud within the meaning of 18 U.S.C. § 1343.

55. Such mail fraud constitutes racketeering activity as defined in 18 U.S.C. § 1961(1)(B).

56. Gilliland, Talley, and others made multiple fraudulent misrepresentations to investors for purposes of defrauding each of them. Such multiple fraudulent misrepresentations constitute a pattern of racketeering activity within the meaning of 18 U.S.C. § 1961(5).

57. Gilliland, Talley, and their agents, associates, employees, and representatives have conducted, and have conspired to conduct, the affairs of Microfund, Luxor, and Hammersmith through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c) and (d).

58. As a direct and proximate result of said violations of 18 U.S.C. § 1962(c) and (d), investors have suffered actual damages as a result of injury to their business and property for which the Receiver is entitled to recover.

59. The Receiver is entitled to a judgment for treble damages, together with all costs of this action, including reasonable attorney's fees, pursuant to 18 U.S.C. § 1964(c).

REQUESTS FOR RELIEF

WHEREFORE PREMISES CONSIDERED, Plaintiff request the following relief:

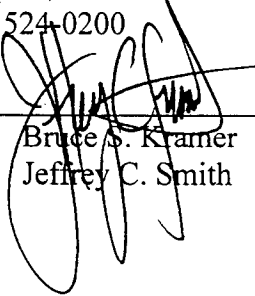
- a) Issuance of an immediate Restraining Order, Preliminary and Permanent Injunction restraining and enjoining Defendants, directly or indirectly, and their agents and/or servants, or anyone in concert with them, from withdrawing, concealing, disbursing, dissipating, or otherwise disposing of any funds held in any accounts of Talley, freezing Defendants' bank accounts and/or investment accounts, including any offshore banking or investment accounts, affirmatively directing Defendants to provide a current financial statement to Plaintiff, and requiring the Defendants to repatriate all assets outside of the United States to the territory of the United States;
- b) Judgment against Defendants Talley and the Law Firm, for compensatory damages under each Count hereof in an amount to be proven at trial;
- c) Judgment against Defendants Talley and the Law Firm, for punitive damages under Counts II, III, and IV in an amount to be proven at trial for Defendants' intentional, fraudulent, malicious and/or reckless conduct;
- d) Judgment against Defendants Talley and the Law Firm under Count VI for treble damages suffered by reason of injury to its business and property as a result of Defendants' violations of 18 U.S.C. § 1962(c) and (d), as proven at trial, pursuant to 18 U.S.C. § 1964(c).
- e) All costs of this action, including without limitation reasonable attorney's fees pursuant to 18 U.S.C. § 1964(c).
- f) Prejudgment and post judgment interest to the fullest extent permitted by law; and

g) All such other relief, both equitable and legal, deemed appropriate by the Court.

PLAINTIFF REQUESTS A JURY TO DETERMINE ALL JURY ISSUES.

Respectfully submitted,

BOROD & KRAMER, P.C.
245 Wagner Place, Suite 350
Memphis, TN 38103
(901) 524-0200

By: 
Bruce S. Kramer (7472)
Jeffrey C. Smith (16295)