

**THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

LK FINANCE, LLC,)	
)	
Plaintiff,)	
)	Case No. 3:11-cv-01211
v.)	District Judge Nixon
)	Magistrate Judge Griffith
CUMMINGS RESOURCES LLC,)	
)	
Defendant.)	

AMENDED COMPLAINT OF PLAINTIFF LK FINANCE, LLC

Plaintiff LK Finance, LLC ("LK Finance") files the following Amended Complaint against Defendant Cummings Resources LLC ("Cummings Resources"):

PARTIES, JURISDICTION, AND VENUE

1. LK Finance is a limited liability company formed under the laws of the State of Tennessee, with its principal place of business located in Davidson County.
2. Cummings Resources is a limited liability company, organized under the laws of the State of Delaware, and has identified its principal place of business as 1460 Main Street, Suite 200, Southlake, Texas.
3. This Court has personal jurisdiction over LK Finance because the company is a citizen of the State of Tennessee. This Court also has personal jurisdiction over Cummings Resources because it has transacted business and committed certain wrongful acts within this State.
4. This action has been removed from state court by Cumming Resources based on diversity subject matter jurisdiction.

5. Venue is proper before this Court because a substantial part of the events or omissions giving rise to LK Finance's Complaint occurred within this judicial district.

FACTUAL BACKGROUND

6. LK Finance is a consulting and investment firm with specific expertise in brand management, including the manufacture and installation of signs for businesses across the country.

7. Prior to April 22, 2011, Cummings Signs was a full-service sign company with accounts throughout the United States. On that date, however, all of the company's assets were foreclosed upon by CapitalSource Finance, LLC. A new company, Cummings Resources, then purchased those assets out of the foreclosure.

A. The KIA Agreement and the Incentive Compensation Agreement

8. One of the assets Cummings Resources purchased in the transaction was an account with KIA Motors America, Inc. (and certain affiliated entities) ("KIA"), by which Cummings Signs would manufacture and install sign products for KIA at various locations nationwide (the "KIA Agreement").

9. Given the size of this account, the KIA Agreement was a very lucrative engagement for Cummings Resources to acquire. In fact, as of April 21, 2011, KIA already had over \$1.2 million of deposits with Cummings Signs to complete certain projects under the KIA Agreement.

10. To assist with the work required under the KIA Agreement and to ensure that it was completed in a cost-effective manner, Cummings Resources hired LK Finance on April 25, 2011.

11. A true and correct copy of the parties' "Incentive Compensation Agreement," which reflects the terms of that engagement, is attached hereto as Exhibit A.

12. Pursuant to the parties' agreement, LK Finance would assist Cummings Resources with completing the KIA Agreement in exchange for being paid the amount by which "Net Costs" were less than \$600,000.00. See Exhibit A, Section 3, at p. 2.

13. For example, if Net Costs equaled \$200,000.00, LK Finance would be paid \$400,000.00 under the Incentive Compensation Agreement. If the Net Costs equaled \$400,000.00, LK Finance would be paid \$200,000.00.

14. Since being hired, LK Finance has performed all of its obligations to service the KIA Agreement under the Incentive Compensation Agreement.

15. Based on preliminary information received from Cummings Resources, the Net Costs of doing so were around \$230,000.00. LK Finance is accordingly owed approximately, but no less than, \$370,000.00 under the Incentive Compensation Agreement.

16. LK Finance has not, however, received any payment from Cummings Resources for its work in connection with the KIA Agreement.

17. In fact, after multiple attempts to obtain payment, LK Finance has been informed by Cummings Resources that it does not plan to pay anything whatsoever under the Incentive Compensation Agreement.

18. Because Cummings Resources has clearly stated its intention not to compensate LK Finance for the services the company performed in connection with the KIA Agreement, Cummings Resources has anticipatorily breached the Incentive Compensation Agreement.

19. Due to Cummings Resources' breach, LK Finance has suffered significant economic damages to be proven at trial, including but not limited the full value of its services in connection with the KIA Agreement and the agreed upon compensation it was to receive under the Incentive Compensation Agreement. Cummings Resources is liable to LK Finance for those damages, which shall include pre- and post-judgment interest.

B. Workers' Compensation Letter of Credit

20. Prior to the foreclosure and sale of Cummings Signs in April 2011, LK Finance provided a \$150,000.00 Letter of Credit as collateral for the company's workers' compensation insurance policy with The Hartford Financial Services ("The Hartford").

21. At the time of foreclosure sale, Cummings Resources was aware of LK Finance's Letter of Credit and one particular workers' compensation claim made under the policy it secured. That claim was the only such claim that remained opened and was for approximately \$80,000.00 (the "Open Claim").

22. Cummings Resources accordingly assumed, as an express term of the foreclosure sale, insurance coverage for the Open Claim. That assumption was made to fulfill the company's obligations on the claim and to protect LK Finance from any draw against the Letter of Credit.

23. A true and correct copy of the Foreclosure Agreement accomplishing the foreclosure and sale of Cummings Signs to Cummings Resources is attached hereto as Exhibit B.

24. Pursuant to Section 2.6(a)(iv) of the Foreclosure Agreement, and the schedule of "Specific Assumed Liabilities" to which it refers, Cummings Resources

assumed \$80,494.00 of Cummings Signs' liability for "[a]ccrued self-insurance for workers' compensation." See Exhibit B, Section 2.6, at p. 12 and Schedule 2.6(a)(iv).

25. In late June 2011, over \$35,000 became chargeable against Cummings Resources on the Open Claim.

26. Cummings Resources, however, refused to pay it.

27. The Hartford was forced to send a demand to Cummings Resources, stating its intention to draw the full amount against LK Finance's Letter of Credit if Cummings Resources did not pay the amount it owed.

28. Despite LK Finance's multiple attempts to communicate with Cummings Resources and confirm its plans to pay, Cummings Resources refused to do as it had promised. Cummings Resources paid none of the charges on the Open Claim, even though that they were part of the insurance liability it expressly assumed in the Foreclosure Agreement.

29. On December 20, 2011, The Hartford drew \$35,621.58 against LK Finance's Letter of Credit.

30. Due to Cummings Resources' refusal to pay its assumed obligations, and to provide the benefit specifically intended thereby, LK Finance has suffered significant economic damages to be proven at trial, including pre- and post-judgment interest.

31. Because LK Finance's Letter of Credit secured workers' compensation coverage for Cummings Resources' liability on the Open Claim, LK Finance's Letter of Credit provided Cummings Resources with a valuable benefit that the company never paid for. Indeed, it ultimately refused to pay for its liability on the Open Claim, resulting in significant economic loss to LK Finance.

32. In such circumstances, it is inequitable—and constitutes unjust enrichment—for Cummings Resources to accept and retain the benefit of LK Finance's Letter of Credit without having to pay for its value.

33. Cummings Resources refusal to pay has caused significant economic damages to LK Finance in an amount to be proven at trial, including pre- and post-judgment interest.

COUNT I

Breach of Contract – Incentive Compensation Agreement

34. LK Finance repeats and re-alleges the averments contained in the foregoing paragraphs as if set out fully herein.

35. April 25, 2011, LK Finance and Cummings Resources entered into a fully enforceable contract – the Incentive Compensation Agreement – whereby LK Finance would assist Cummings Resources with servicing the KIA Agreement and, in exchange, be paid the amount by which Net Costs were less than \$600,000.00. See Exhibit A, Section 3, at p. 2.

36. LK Finance has upheld its end of the bargain, fully performing its obligation to assist Cummings Resources with the completion of the KIA Agreement.

37. Based on preliminary information from Cummings Resources, the Net Costs of completing the KIA Agreement were around \$230,000.00. LK Finance is, therefore, entitled to no less than approximately \$370,000.00 from Cummings Resources under the Incentive Compensation Agreement.

38. Despite LK Finance's full performance, Cummings Resources refuses to pay the company under the contract. In fact, Cummings Resources has expressly

informed LK Finance that it has no plans to pay the company anything under the Incentive Compensation Agreement.

39. By so doing, Cummings Resources has anticipatorily breached the Incentive Compensation Agreement.

40. On account of that breach, LK Finance has suffered significant economic damages and is entitled to be compensated for the full value of the contract, in addition to any and all other losses Cummings Resources' breach has caused. The precise amount of that compensation shall be determined at trial, but shall be no less than approximately \$370,000.00, including pre- and post-judgment interest.

COUNT II

Declaratory Judgment – Incentive Compensation Agreement

41. LK Finance repeats and re-alleges the averments contained in the foregoing paragraphs as if set out fully herein.

42. On April 25, 2011, LK Finance and Cummings Resources entered into a fully enforceable contract – the Incentive Compensation Agreement – whereby LK Finance would assist Cummings Resources with servicing the KIA Agreement and, in exchange, be paid the amount by which Net Costs were less than \$600,000.00. See Exhibit A, Section 3, at p. 2.

43. The exact calculation of Net Costs, therefore, determines how much compensation LK Finance is owed under the contract.

44. Following its full performance, and using Cummings Resources' own preliminary figures, LK Finance believes that the Net Costs were around \$230,000.00, entitling the company to no less than approximately \$370,000.00 from Cummings Resources.

45. Due to its continued refusal to pay, Cummings Resources apparently disagrees with LK Finance's calculation.

46. As a result, a dispute exists as to the amount of compensation LK Finance is owed under the Incentive Compensation Agreement. The resolution of that dispute will substantially affect the rights and property of the parties to this action.

47. LK Finance is accordingly entitled to a declaratory judgment, deciding what the Net Costs were in completing the KIA Agreement, and what compensation LK Finance is owed under the Incentive Compensation Agreement as a result. LK Finance is further entitled to the reasonable costs incurred in obtaining the Court's declaration.

COUNT III

Third Party Beneficiary – Workers' Compensation Letter of Credit

48. LK Finance repeats and re-alleges the averments contained in the foregoing paragraphs as if set out fully herein.

49. As an express term of the foreclosure and sale of Cummings Signs, Cummings Resources specifically assumed the company's workers' compensation coverage for the Open Claim. Pursuant to Section 2.6(a)(iv) of the Foreclosure Agreement, and the schedule of "Specific Assumed Liabilities" to which it refers, Cummings Resources assumed \$80,494.00 of liability for "[a]ccrued self-insurance for workers' compensation." See Exhibit B, Section 2.6, at p. 12 and Schedule 2.6(a)(iv).

50. That assumption was made with full knowledge that LK Finance had provided a Letter of Credit to secure the company's workers' compensation coverage and was specifically intended to protect LK Finance from any draw against that Letter of Credit.

51. When Cummings Resources refused to pay any of the charges it subsequently owed on the Open Claim and \$35,621.58 was drawn against LK Finance's Letter of Credit, Cummings Resources failed to provide the benefit to LK Finance specially intended by the parties in the Foreclosure Agreement.

52. On account of that failure, Reconstruction Partners has suffered significant economic damages in an amount to be proven at trial. That amount shall be at least \$35,621.58 and shall include pre- and post-judgment interest.

COUNT IV

Unjust Enrichment – Workers' Compensation Letter of Credit

53. LK Finance repeats and re-alleges the averments contained in the foregoing paragraphs, other than those in Count III, as if set out fully herein.

54. Because LK Finance's Letter of Credit secured workers' compensation coverage for Cummings Resources' liability on the Open Claim, LK Finance's Letter of Credit provided Cummings Resources with a valuable benefit that the company never paid for. Indeed, it ultimately refused to pay any of the amount it was charged on the Open Claim, which resulted in a draw of \$35,621.58 against LK Finance's Letter of Credit.

55. In the alternative to County III, it is inequitable—and constitutes unjust enrichment—for Cummings Resources to accept and retain the benefit of LK Finance's Letter of Credit without having to pay for its value.

56. Cummings Resources refusal to pay has caused significant economic damages to LK Finance in an amount to be proven at trial. That amount shall be at least \$35,621.58 and shall include pre- and post-judgment interest.

PRAYER FOR RELIEF

WHEREFORE, LK Finance respectfully requests that this Court provide it with the following relief:

- A. Enter judgment in favor of LK Finance, finding Cummings Resources liable for Breach of Contract, awarding LK Finance all economic damages necessary to compensate it for the full value of the Incentive Compensation Agreement with Cummings Resources, as well as any other losses the company has suffered on account of its breach;
- B. Enter a Declaratory Judgment, announcing that the Net Costs of completing the KIA Agreement were no more than \$230,000.00 and that LK Finance is accordingly entitled to no less than \$370,000.00 as compensation from Cummings Resources under the Incentive Compensation Agreement;
- C. Enter a judgment favor of LK Finance, finding Cummings Resources liable for:
 - i. Third Party Beneficiary, awarding LK Finance all economic damages necessary to compensate it for the full value of the benefit it was intended to receive under the Foreclosure Agreement, as well as any other losses LK Finance suffered on account of Cummings Resources' failure to perform its obligations; or, in the alternative
 - ii. Unjust Enrichment, awarding LK Finance all economic damages necessary to compensate it for the full value of the benefit it conferred to Cummings Resources by providing the Letter of Credit that secured the company's workers' compensation coverage, as well as any other losses LK Finance has suffered on account of Cummings Resources' failure to perform its obligations;
- D. Enter an award of pre- and post-judgment interest in favor of LK Finance on each and every category of its damages;
- E. Enter an award of costs incurred by LK Finance in obtaining the Court's Declaratory Judgment;
- F. Enter an award of costs, and discretionary costs, in favor of LK Finance pursuant to Tenn. R. Civ. P. 54.04; and
- G. Any and all other relief to which LK Finance may be entitled or that this Court may deem just and proper.

Respectfully submitted,

s/ Michael R. Ewing

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ATTORNEYS FOR PLAINTIFF

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CERTIFICATE OF SERVICE

Pursuant to Local Rule 5.01, it is hereby certified that a true and correct copy of the foregoing was served upon the following Filing Users via the Electronic Case Filing System on this the 3rd day of January, 2012:

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s/ Michael R. Ewing

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