ORIGINAL

STATE OF TENNESSEE 20TH JUDICIAL DISTRICT CHANCERY COURT	SUMMONS	CASE FILE NUMBER 11-1618-III

2011 NOV 30 PM 4:13

PLAINTIFF	DEFENDANT
STEPHEN R. KERR	BRIAN HEGI, PROPHET EQUITY, LP, and CUMMINGS RESOURCES LLC

TO: (NAME AND ADDRESS OF DEFENDANT)

Cummings Resources LLC
c/o Capitol Corporate Services, Inc.,
Registered Agent
992 Davidson Drive, Suite B
Nashville, Tennessee 37205-1051

- ☐ Certified Mail
- ☐ Davidson Co. Sheriff
- ☐ *Comm. Of Insurance
- ☐ *Secretary of State
- ☐ *Out of County Sheriff
- ☒ Private Process Server
- ☐ Other

*Attach Required Fees

List each defendant on a separate summons.

YOU ARE SUMMONED TO DEFEND A CIVIL ACTION FILED AGAINST YOU IN CHANCERY COURT, DAVIDSON COUNTY, TENNESSEE. YOUR DEFENSE MUST BE MADE WITHIN THIRTY (30) DAYS FROM THE DATE THIS SUMMONS IS SERVED UPON YOU. YOU MUST FILE YOUR DEFENSE WITH THE CLERK OF THE COURT AND SEND A COPY TO THE PLAINTIFF'S ATTORNEY AT THE ADDRESS LISTED BELOW. IF YOU FAIL TO DEFEND THIS ACTION BY THE ABOVE DATE, JUDGMENT BY DEFAULT CAN BE RENDERED AGAINST YOU FOR THE RELIEF SOUGHT IN THE COMPLAINT.

Attorney for plaintiff or plaintiff if filing Pro Se:
(Name, address & telephone number)

Robert J. Mendes, Esq.
Michael R. Ewing, Esq.
MGLAW, PLLC
2525 West End Avenue, Suite 1475
Nashville, Tennessee 37203
615.846.8000

FILED, ISSUED & ATTESTED

NOV 23 2011

CRISTI SCOTT, Clerk and Master
By: **1 Public Square**
Suite 308
Nashville, TN 37201

Deputy Clerk & Master

NOTICE OF DISPOSITION DATE

The disposition date of this case is twelve months from date of filing. The case must be resolved or set for trial by this date or it will be dismissed by the Court for failure to prosecute pursuant to T.R.C.P. 41.02 and Local Rule 18.

If you think the case will require more than one year to resolve or set for trial, you must send a letter to the Clerk and Master at the earliest practicable date asking for an extension of the disposition date and stating your reasons. Extensions will be granted only when exceptional circumstances exist.

TO THE SHERIFF:	DATE RECEIVED
	Sheriff

***Submit one original plus one copy for each defendant to be served.

ADA Coordinator, Cristi Scott (862-5710)

00400702

EXHIBIT A

RETURN ON SERVICE OF SUMMONS

I hereby return this summons as follows: (Name of Party Served) Cummins Resources.

☑ Served Cummins Resources.
~~☐ Not Served~~ Capital Corporate Services Registered Agent

☐ Not Found ________________

☐ Other ________________

DATE OF RETURN: 11-28-11.

By: Randy McClanahan
Sheriff/or other authorized person to serve process

RETURN ON SERVICE OF SUMMONS BY MAIL

I hereby certify and return that on the ________ day of ____________________, 20___, I sent, postage prepaid, by registered return receipt mail or certified return receipt mail, a certified copy of the summons and a copy of the complaint in case ________________ to the defendant ________________________. On the _____ day of ________________________, 20___, I received the return receipt, which had been signed by ____________________________ on the _____ day of ____________________, 20___.

The return receipt is attached to this original summons to be filed by the Chancery Court Clerk & Master.

Sworn to and subscribed before me on this _____ day of ________, 20___.

Signature of ____ Notary Public or ____ Deputy Clerk

My Commission Expires:

Signature of plaintiff, plaintiff's attorney or other person authorized by statute to serve process.

Randy McClanahan

NOTICE OF PERSONAL PROPERTY EXEMPTION

TO THE DEFENDANT(S):

Tennessee law provides a ten thousand dollar ($10,000.00) debtor's equity interest personal property exemption from execution or seizure to satisfy a judgment. If a judgment should be entered against you in this action and you wish to claim property as exempt, you must file a written list, under oath, of the items you wish to claim as exempt with the clerk of the court. The list may be filed at any time and may be changed by you thereafter as necessary; however, unless it is filed before the judgment becomes final, it will not be effective as to any execution or garnishment issued prior to the filing of the list. Certain items are automatically exempt by law and do not need to be listed; these include items of necessary wearing apparel (clothing) for yourself and your family and trunks or other receptacles necessary to contain such apparel, family portraits, the family Bible, and school books. Should any of these items be seized you would have the right to recover them. If you do not understand your exemption right or how to exercise it, you may wish to seek the counsel of a lawyer.

Mail list to: Clerk & Master
1 Public Square
Suite 308
Nashville TN 37201

Please state file number on list.

ATTACH
RETURN
RECEIPT
HERE
(IF APPLICABLE)

CERTIFICATION (IF APPLICABLE)

I, Cristi Scott, Clerk & Master of the Chancery Court in the State of Tennessee, Davidson County, do certify this to be a true and correct copy of the original summons issued in this case.

CRISTI SCOTT, Clerk & Master

By:

D.C. & M.

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE
TWENTIETH JUDICIAL DISTRICT
AT NASHVILLE

FILED
2011 NOV 23 PM 1:36
CHANCERY CT.
DC&M

STEPHEN R. KERR, Plaintiff, v. BRIAN HEGI, PROPHET EQUITY, LP, and CUMMINGS RESOURCES LLC, Defendants.	)	No. 11-1618-III

COMPLAINT OF PLAINTIFF STEPHEN R. KERR

Plaintiff Stephen R. Kerr ("Mr. Kerr") files the following Complaint against Defendants Brian Hegi ("Mr. Hegi"), Prophet Equity, LP ("Prophet Equity"), and Cummings Resources LLC ("Cummings Resources") (collectively, the "Defendants"):

PARTIES, JURISDICTION, AND VENUE

1. Mr. Kerr is a resident and citizen of Davidson County, Tennessee.

2. Mr. Hegi is a resident and citizen of Texas and is a principal and owner of Prophet Equity.

3. Prophet Equity is a limited partnership, organized under the laws of the State of Delaware, with its principal place of business located at 1460 Main Street, Suite 200, Southlake, Texas.

4. 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.

5. This Court has personal jurisdiction over Mr. Kerr because he is a citizen of the State of Tennessee. This Court also has personal jurisdiction over each of the Defendants because they have transacted business and committed certain wrongful acts within this State. *See* Tenn. Code Ann. § 20-2-214.

6. This Court has subject matter jurisdiction over this action, as it shares concurrent general jurisdiction with the Circuit Courts of Tennessee over actions arising in this State, including those over the creation and performance of contracts and declaratory judgments. *See* Tenn. Code Ann. §§ 16-10-101, 106, 113; 16-11-102; and 29-14-102(a).

7. Venue is proper before this Court because a substantial part of the events or omissions giving rise to Mr. Kerr's Complaint occurred within this judicial district. *See* Tenn. Code Ann. § 20-4-102, 104(1).

FACTUAL BACKGROUND

8. Cummings Signs is a fully integrated provider of sign design, manufacturing and installation for businesses located throughout the country. The company has over 60 years of experience in the industry.

9. In 1999, an investment company led by its principals, Mr. Kerr and C. Stephen Lynn ("Mr. Lynn"), purchased the majority of Cummings Signs' stock.

10. Mr. Kerr later became President of Cummings Signs and, due to his efforts, built the company into an enterprise with sales reaching $78 million of annual revenue.

11. By 2010, the effects of the economic recession began to harm Cummings Signs' business. The company began to struggle financially, which lead its senior

secured lender, CapitalSource Finance, LLC ("CapSource"), to limit the amount of its available working capital.

12. The limitation of Cummings Signs' working capital made continued operation of the business very difficult. The company accordingly began to look very hard for possible alternatives, such as acquiring either new financing or new equity, or orchestrating a sale.

13. Indeed, during this time, Mr. Kerr and Mr. Lynn's investment company, which owned Cummings Signs, paid down $4.0 million of the business's debt to CapSource by providing subordinated debt and unsecured loans to the company, and in exchange for preferred stock.

14. Despite those efforts, CapSource ultimately foreclosed on all of Cummings Signs' assets. Prophet Equity then purchased those assets out of the foreclosure, and Mr. Kerr and Mr. Lynn's investment company lost all of its original investment and the more recent $4.0 million contribution.

15. As one of the material terms of Prophet Equity's interest in Cummings Signs, Prophet Equity insisted that its senior management, including Mr. Kerr, remain employed with the company after the foreclosure sale in order to guide and operate the business for years to follow. The principal at Prophet Equity who was spearheading the deal, Mr. Hegi, said so to Mr. Kerr as soon as the parties began discussing the potential transaction, and Prophet Equity expressed that desire in the Letters of Intent issued to Cummings Signs about the deal. Mr. Hegi and Prophet Equity also relayed that they would retain all of the company's employees after the sale.

16. Mr. Kerr and Cummings Signs selected Prophet Equity over all other potential buyers, in part, because of those terms. Specifically, other investor groups were interested in acquiring Cummings Signs, but Prophet Equity was chosen as the buyer because, in addition to other consideration, it had expressed a need and requirement for Cummings Signs' management and other personnel to remain employed after the sale to operate the business for years to come. The retention of Mr. Kerr and other senior management was one of the material terms of the deal, as was the retention of the company's remaining personnel.

17. Based on Prophet Equity's representations, and in reasonable reliance on them, Mr. Kerr and Cummings Signs agreed to allow Prophet Equity and CapSource to fully pursue the foreclosure sale. That consent made the ultimate execution of the deal much easier, transparent, and secure for Prophet Equity and CapSource.

18. In particular, the consent of Mr. Kerr and Cummings Signs enabled Prophet Equity to conduct extensive due diligence on the company's finances and valuation. Mr. Hegi represented to Mr. Kerr near the time of closing that the total cost of Prophet Equity's due diligence, and its closing expenses, equaled roughly $1 million.

19. Following Mr. Kerr and Cummings Signs' decision to allow the transaction to proceed, Prophet Equity took over all negotiations with CapSource about the valuation – after foreclosure – of the bank's note secured by Cummings Signs' assets. Mr. Kerr and Cummings Signs did not participate in those discussions.

20. Prophet Equity also planned to form a new entity, Cummings Resources, to consummate the deal and operate the business after the sale.

21. To follow up on Prophet Equity's commitment to keep Cummings Signs' management on board after the sale, Mr. Hegi met with Mr. Kerr on April 18, 2011 to discuss the terms of his employment with Cummings Resources. This meeting took place while Mr. Hegi, Prophet Equity and others involved with the transaction were touring Cummings' Signs Dothan, Alabama, plant in anticipation of closing. At this meeting, and pursuant to some follow-up conversations between Mr. Kerr and Mr. Hegi on the details, the following employment terms were offered, accepted, and agreed upon:

a. Mr. Kerr would be President of Cummings Resources for a term of four (4) years;

b. During which time Mr. Kerr would be paid a salary of $190,000.00 per year, which the parties agreed would be paid by Cummings Resources as $170,000.00 per year directly to Mr. Kerr, plus certain regular expenses equal to $20,000.00 annually;

c. Mr. Kerr would receive an annual bonus of up to 50% salary, which Mr. Kerr later suggested and agreed would be 40% in keeping with the maximum bonus allowed for all of the company's key employees;

d. Mr. Kerr would receive 3% of the 5% ownership interest in Cummings Resources that Prophet Equity agreed to grant Cummings Signs' senior management, which would vest over his four (4) year term of employment with the new company: 0% after the first year, 50% after the second, 25% after third, and 25% after the fourth;

e. Mr. Kerr would also be eligible to receive 3% of an additional 5% ownership interest that Prophet Equity agreed to grant Cummings Signs' senior management based on Cummings Resources' performance following the sale;

f. In exchange for these things, Mr. Kerr agreed that he would consent to the foreclosure of Cummings Signs and its subsequent sale to Prophet Equity, would participate in its closing, and would also sign a non-compete agreement that would last for the duration of his four (4) term of employment with Cummings Resources; and

g. Should the Defendants terminate Mr. Kerr's employment prior to the expiration of its four (4) year term, Mr. Kerr would receive a payout equal to the full value of his contract;

22. Also on April 18, 2011, Cummings Resources was formally organized under the laws of the State of Delaware.

23. At the time Mr. Hegi made the offer of employment to Mr. Kerr and they discussed and agreed to its terms, Mr. Kerr understood that Mr. Hegi was speaking on behalf of Prophet Equity and the new company that it would – and actually had – formed: Cummings Resources.

24. Mr. Kerr and the Defendants, therefore, have made and are parties to a contract for Mr. Kerr's employment, the terms of which were agreed to on April 18, 2011.

25. On April 22, 2011, after months of due diligence and negotiations, the foreclosure of Cummings Signs by CapSource, and sale to Prophet Equity, were closed.

26. At the closing, and as a condition of his employment contract with the Defendants, Mr. Kerr signed a *Noncompetition, Nondisclosure, and Nonsolicitation Agreement* with Cummings Resources (the "Non-compete Agreement"), that purports to obligate him not to compete with the company, disclose its confidential business information, or solicit its clients for a period of four (4) years following the sale.

27. The four (4) year term of the Non-compete Agreement was intended to coincide with the length of time Mr. Kerr was to be employed as President of Cummings Resources, as well as the vesting schedule for his ownership interest in the new company.

28. Under no circumstances would Mr. Kerr have signed the Non-Compete Agreement, consented to the sale or participated in its closing, without all the promises made by Prophet Equity, including without limitation the promises made to him under his employment contract with the Defendants.

29. Accordingly, Mr. Kerr's employment contract was specifically discussed by the parties and incorporated into the deal at closing. Mr. Kerr's counsel expressed concern that the employment contract was not, like many other documents material to the deal, reduced to writing and ready for execution, but Mr. Hegi insisted that they should go on with the closing regardless because it would be generated soon and signed by all the parties.

30. From the last week of April through most of July 2011, the terms of Mr. Kerr's employment contact were performed as agreed. Mr. Kerr served as President for Cummings Resources and received direct monthly payments at the rate of $170,000.00 per year, which was higher than the $120,000.00 salary he received prior to the foreclosure sale. Mr. Kerr's agreed-upon monthly expenses were paid by Cummings Resources during these months as well.

31. On July 19, 2011, however, the Defendants fired Mr. Kerr.

32. Mr. Kerr was offered, and declined, a ten-week severance package by the Defendants. Since then, the Defendants have made no attempt to pay him the full value of his employment contract.

33. On account of the Defendants' breach of Mr. Kerr's employment contract, and their intentional failure to follow through on their promises, Mr. Kerr has suffered

significant economic damages for which he is entitled to be compensated by the Defendants.

COUNT I

Breach of Contract

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

35. Pursuant to his negotiations with the Defendants prior to the foreclosure sale of Cummings Signs, Mr. Kerr had a fully enforceable employment contract, whereby he would serve as Cummings Resources' President for a term of four (4) years, be paid an annual salary of $190,000.00 (to be paid by Cummings Resources as $170,000 per year in direct payment to Mr. Kerr, plus approximately $20,000.00 in regular annual expenses), an annual bonus of up to 40% salary, and would be granted a 3% ownership interest in the new company, with an additional 3% depending on its performance. In the event that the Defendants chose to terminate Mr. Kerr's employment prior to the expiration of that four (4) year term, he would receive a payout equal to the full value of his employment contract with the Defendants.

36. In exchange for those terms, and all others between the multiple parties at closing, Mr. Kerr consented to the foreclosure and sale of Cummings Signs to Prophet Equity and executed the Non-compete Agreement, neither of which would have occurred without the promises made by the Defendants in his employment contract.

37. Following the foreclosure sale, Mr. Kerr fully performed his obligations under his employment contract with the Defendants.

38. By terminating Mr. Kerr's employment on July 19, 2011, and by failing to provide him with a payout equal to the full value of his employment, the Defendants breached their contract with Mr. Kerr.

39. Mr. Kerr has suffered significant economic damages on account of the Defendants' breach and is entitled to be compensated for the full value of his employment contract, in addition to any and all other losses that breach has caused. The precise amount of that compensation shall be determined at trial, but shall include pre- and post-judgment interest.

COUNT II

Fraud in the Inducement

40. Mr. Kerr repeats and re-alleges the averments contained in the foregoing paragraphs as if set out fully herein.

41. In the alternative to Count I, the Defendants, by and through Mr. Hegi, knowingly and intentionally misrepresented their intention to employ Mr. Kerr pursuant the terms they negotiated and agreed upon prior to the foreclosure sale of Cummings Signs. Those terms are expressed in Paragraphs 21 and 35 herein.

42. The Defendants made those knowingly false promises with the specific intent to induce Mr. Kerr and all related parties into consenting to the foreclosure sale, participating in its closing, and executing the Non-compete Agreement. The Defendants had no plans, however, to perform them.

43. Relying on the Defendants' misrepresentations, and considering them to be material terms of the deal, Mr. Kerr consented to the foreclosure sale, participated in its closing, and signed the Non-compete Agreement. Had the Defendants been honest

about their intentions concerning Mr. Kerr's employment and not made the misrepresentations they did, Mr. Kerr would not have done any of those things.

44. As a result of the Defendants' fraudulent inducement, Mr. Kerr has suffered significant economic damages, for which he is entitled to be compensated by the Defendants. The precise amount of that compensation shall be determined at trial, but shall include pre- and post-judgment interest.

45. Given the willful and intentional nature of the Defendants' fraudulent conduct, Mr. Kerr is entitled to punitive damages in order to punish them for their wrongful actions and to deter other persons from doing the same or similar things in the future. The precise amount of Mr. Kerr's punitive damages shall be determined at trial.

COUNT III
Declaratory Judgment

46. Mr. Kerr repeats and re-alleges the averments contained in the foregoing paragraphs as if set out fully herein.

47. Mr. Kerr signed the Non-compete Agreement as a part of an overall deal with the Defendants, whereby he would consent to the foreclosure sale in exchange for, among other things, the full value of his employment contract. The value of that contract is set forth in Paragraphs 21 and 35 herein.

48. In the alternative to Count I, Mr. Kerr's execution of the Non-compete Agreement was fraudulently induced by the Defendants, who had no intention to – and ultimately did not – provide him with the value of the employment contract they negotiated and agreed upon prior to the foreclosure sale of Cummings Signs.

49. Accordingly, a dispute exists as to Mr. Kerr's continued obligations under the Non-compete Agreement, the determination of which will substantially affect the rights and property of the parties' to this action.

50. In particular, Mr. Kerr is foregoing other gainful employment and investment opportunities on account of the Non-compete Agreement but is not receiving the full benefit of that bargain. He is also incurring substantial legal expenses to enforce his rights under the agreements he made with the Defendants.

51. After the Defendants breached his employment contract by terminating him without providing a fair value payout, Mr. Kerr and his counsel have requested that he be released from the Non-compete Agreement, which the Defendants have emphatically declined.

52. Due to the Defendants' fraudulent conduct, and Mr. Kerr's reasonable reliance on their knowingly false representations, Mr. Kerr is entitled to a declaratory judgment that the Non-compete Agreement is null and void, and that he is not bound by it. Mr. Kerr is also entitled to the reasonable damages he has incurred in obtaining the Court's declaration.

PRAYER FOR RELIEF

WHEREFORE, Mr. Kerr respectfully requests that this Court provide him with the following relief:

A. Enter judgment in favor of Mr. Kerr, finding Mr. Hegi, Prophet Equity, and/or Cummings Resources liable for:

   i. Breach of Contract, awarding Mr. Kerr all economic damages necessary to compensate him for the value of his employment contract and the losses he has suffered on account of its breach; or

ii. Fraud in the Inducement, awarding Mr. Kerr all economic damages necessary to compensate him for the losses he has suffered on account of the Defendants' action, as well as an award of punitive damages sufficient to punish the Defendants for their willfully fraudulent conduct, such that others will be dissuaded from conducting themselves accordingly in the future; and

iii. Should no contract be found, a Declaratory Judgment, announcing that the Non-compete Agreement is void and unenforceable, that Mr. Kerr is not bound by it, and awarding him the costs he has incurred in obtaining the same;

B. Enter an award of pre- and post-judgment interest in favor of Mr. Kerr on the each and every category of his damages; and

C. Any and all other relief to which Mr. Kerr may be entitled or that this Court may deem just and proper.

Respectfully submitted,

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