

FILED IN CLERK'S OFFICE  
U.S.D.C. - Atlanta

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

NOV 12 2010

JAMEN HATTEN, Clerk  
Deputy Clerk

WINTERHAWK ENERGY AND  
DEVELOPMENT CORPORATION,

Plaintiff,

v.

MICHAEL L. ROTHENBERG and  
FOUR FIVE, LLC,

Defendants.

Civil Action No: ~~10~~ CV-3726

JURY TRIAL DEMANDED

**RWS**

COMPLAINT

Plaintiff Winterhawk Energy and Development Corporation ("Winterhawk"), by and through its undersigned counsel, files this Complaint against Defendants Michael L. Rothenberg ("Defendant Rothenberg") and Four Five, LLC ("Four Five") (collectively "Defendants"), alleging and showing the Court as follows:

NATURE OF THE ACTION

1. Winterhawk brings this action and, alternatively, for damages incurred as a result of its participation in a fraudulent investment scheme perpetrated by Defendant Rothenberg and Four Five. On

information and belief, Four Five is a limited liability company formed by Defendant Rothenberg for purposes of perpetrating the fraud alleged herein and Defendant Rothenberg is the sole member and chairman of Four Five.

2. In or around March of 2010, Defendant Rothenberg, who represented that he was an attorney, judge, and financial expert, induced Winterhawk to deposit \$1,350,000.00 in Defendant Rothenberg's attorney trust account for purposes of investing in an alleged "trading platform" or "facility" solicited by Defendant Rothenberg and for which Defendant Rothenberg would act as Winterhawk's agent. Defendant Rothenberg represented the alleged trading platform as a recurring short term high yield investment opportunity involving highly sophisticated international banking concepts and open only to a select group of elite investors.

3. Despite Defendant Rothenberg's representation of significant investment returns within approximately fourteen banking days of Winterhawk's deposit, Winterhawk has received no investment proceeds to date and Defendants are unwilling or unable to return the vast majority of Winterhawk's principal investment. Instead, Defendant Rothenberg has provided numerous and inconsistent excuses for delay, all of which indicate the alleged "trading platform"

is a “private placement” or other Ponzi scheme akin to those employed by various financial con-artists across the country.

4.

5.

6.

7.

### **THE PARTIES**

8. Winterhawk is a corporation organized and existing under the laws of the State of Colorado with its principal place of business located in Evergreen, Colorado. Winterhawk is a privately held energy and development company.

9. Defendant Rothenberg is an attorney, judicial candidate for a seat on the Dekalb County Superior Court, and a citizen and resident of Georgia. Upon information and belief, Defendant Rothenberg may be served with process at his place of business located at 2526 Mt. Vernon Rd. #B345, Dunwoody, Georgia 30338.

10. Four Five is a limited liability company organized and existing under the laws of the State of Delaware. Upon information and belief, Four Five's principal place of business is located in Dunwoody, Georgia and Four Five transacts business in the State of Georgia and within this judicial district. Four Five may be served with process through its registered agent, United States Incorporation Agents, Inc. at 1521 Concord Pike #301, Wilmington, Delaware 19803.

### **JURISDICTION AND VENUE**

11. This is an action for damages in excess of \$75,000.00, exclusive of interest, costs and attorneys' fees.

12. This Court has diversity jurisdiction over this action pursuant to 28 U.S.C. § 1391(a)(1) and (c)(1) because this case involves an actual controversy between a citizen of the State of Colorado and citizens and/or residents of the States of Georgia and Delaware, and the amount in controversy exceeds \$75,000.00, exclusive of interest, costs and attorneys' fees.

13. Venue is proper in this District pursuant to 28 U.S.C. § 1391(a) because Defendants can be found in, reside in, and/or have transacted business in the Northern District of Georgia and many of the alleged acts of Defendants occurred in this District.

### **FACTUAL BACKGROUND**

14. In February 2010, Winterhawk's President, Paul McMenaman ("Mr. McMenaman") was introduced to Defendant Rothenberg at a social function in New York, New York. Following this introduction, Defendant Rothenberg described his relationship with a "trader" or group of elite "traders" who had unique access to short term high yield investment opportunities that were arbitrage based and therefore free of risk.

15. Defendant Rothenberg explained that he was soliciting investment capital to secure the "trader's" ability to execute private international trades and that a key attribute of the trading platform (as distinguished from more routine

investment vehicles involving the purchase and sale of financial instruments) was that investors were only required to demonstrate proof of dedicated funds that would at all times remain in an account controlled by Defendant Rothenberg.

16. During these and subsequent discussions, Defendant Rothenberg advised Mr. McMenemy that participation in the subject investment opportunities typically required minimum investments of multiple millions of dollars but that he was aware of a unique trading program that required only a \$180,000.00 investment.

17. On February 26, 2010, Defendant Rothenberg advised Winterhawk that he had received word from "the trader" that the \$180,000.00 program would close on that date and that there would not be enough time to prepare all of the necessary paperwork to participate in the program.

18. Defendants never identified the "trader" or "traders" they were allegedly working with and sent Winterhawk numerous documents during the course of their relationship warning that participation in the trading platforms was a privilege, not a right, and that "demanding personalities" or excessive questioning or requests for details of the transactions would result in revocation of the right to participate in the trading platform.

19. After advising Winterhawk that it would not be able to participate in the \$180,000.00 trade, Defendant Rothenberg advised that new programs opened every week and that he would inform Winterhawk of available programs the following Monday.

20. On Monday March 1, 2010, Defendant Rothenberg sent Mr. McMenaman correspondence concerning "the trades on offer" that week and advised that the most attractive trade available required the deposit of \$1,350,000.00 into a trust account. Defendant Rothenberg represented that \$350,000.00 would be held as the trader's fee and would be returned at the conclusion of the trade. Defendant Rothenberg further represented returns on the platform as follows:

14 day bullet trade. At the end of 14 days, 5 x the money put in minus 25% in fees for the bank. Can re-enter the bullet 5 times in a row if desired.

Example: 1M in = 5M after 14 days minus 25% so client (you) net 4M

Then can go again. 4M nets 16M. 16M nets 64M. 64M nets 256M etc. etc.

21. After reviewing the alleged trade data, and in reliance on Defendant Rothenberg's representations concerning yield, timing and lack of risk, Mr. McMenaman advised that Winterhawk would wire \$1,350,000.00 to Defendant

Rothenberg the following day and requested and received written confirmation from Defendant Rothenberg that (a) there was no question that Defendants would complete the trade described by Defendant Rothenberg, and (b) Winterhawk's funds (with the exception of the "trader's" fee of \$350,000.00 that would be returned at the completion of the trade) would never leave Defendant Rothenberg's trust account.

22. On or around March 3, 2010, Winterhawk wired \$1,350,000.00 to a bank account represented by Defendant Rothenberg to be his attorney trust account.

23. On March 5, 2010, Defendant Rothenberg advised Winterhawk that all necessary documents associated with the trade had been submitted to the trader for review and compliance.

24. On March 8, 2010, Defendant Rothenberg sent Mr. McMenemy an e-mail that attached a document entitled "Private Capital Investments" that was allegedly provided by "the trader" to describe the process of the trades in detail.

This document emphasizes:

It is a "**privilege**" to be invited to participate in one of our Private Placement Transaction Programs. It is not a "**right**." These programs deliver unparalleled yields in combination with absolutely no program-related risk.

Forfeiting (Trading) transactions are highly privileged “insider” only opportunities which are made available to those who have qualified for participation requirements to include verifiable Proof of Funds (Being under a Humanitarian Charter Fund with special privileges like ours is a prime example). So these types of trading contracts can’t be offered as over-the-counter transactions and you could not go direct to a European institution to participate. Any attempt to circumvent the programs standards and procedures will automatically get the client permanently blacklisted from any future debenture programs.

25. The “Private Capital Investments” document includes no information as to authorship and does not identify the “trader” or any other person or entity controlling or participating in the alleged trading platform.

26. Throughout March 2010, Defendant Rothenberg sent Mr. McMenemy several e-mail updates concerning the status of the alleged trade. On March 12, 2010, Defendant Rothenberg advised that Winterhawk should expect “3 to 5 working days for compliance review and acceptance” and would then receive a trade contract within 24 hours of a phone interview with an unidentified representative of “the trader.” Thereafter the trade would begin “within 5 working days or less, [and] the first bullet commences and runs for 14 days.”

27. On March 26, 2010, Defendant Rothenberg advised that after receiving a fresh proof of funds, the trader would issue a contract for the trade in the first part of the next week.

28. On April 1, 2010, having received no trade contract or other information concerning the alleged trade, a Winterhawk representative, Stewart Lowinger, contacted Defendant Rothenberg concerning the alleged trade to advise that Winterhawk was becoming concerned because the trading platform had, at that point, taken three times longer than represented by Defendant Rothenberg.

29. Defendant Rothenberg responded to Mr. Lowinger's communication by e-mail stating: "How long it takes is not up to me at all, but rather up to the platform." Defendant Rothenberg further stated: "If I get one more call, or one more e-mail from you related to this deal, I will yank Paul and Jack right out of this trade and I will then inform "your clients" that the reason they are not trading is because of your meddling."

30. On April 4, 2010, Defendant Rothenberg advised Mr. McMenaman that he had received word from the trader that the trade terms would be finalized that week and that a projected "pay day" was two and a half weeks from then, "and possibly sooner."

31. On April 12, 2010, Defendant Rothenberg advised that he had met with "the trader" in Asia and the trader had advised that "the obama administration is making it very difficult for Americans to do anything this year and it has taken

even longer. But he did inform me that we are in and accepted, passed compliance and will be trading shortly. And will be paid.”

32. During the parties’ relationship, commencing in or around March 2010, Winterhawk repeatedly advised Defendants of, and presented detailed information concerning, Winterhawk’s intent to expand its ownership position in oil reserves located in Montana, North Dakota and Southern Canada and that Winterhawk was contractually required to provide capital by specified dates in order to exploit this opportunity.

33. By e-mail of April 26, 2010, Mr. McMenemy reminded Defendant Rothenberg that the \$1,350,000.00 provided to Defendants represented the majority of Winterhawk’s operating capital and that he was growing increasingly concerned that Winterhawk would lose its opportunity to expand its oil reserve position if the trade was not completed immediately.

34. Defendant Rothenberg responded the same day and represented that he had received the trade contract over the weekend and that the trade would commence on May 3, 2010. Defendant Rothenberg attached a two page purported “Private Placement Contract” that identified Defendant Rothenberg as “Client” and provides in part:

[T]he Client agrees to make the above Asset [\$1,000,000.00] available to the Platform to secure a line

of credit and generate a minimum "Net Profit" of approximately five times the investment amount of the leveraged line of credit within fourteen (14) banking days.

35. On April 30, 2010, Defendant Rothenberg advised Mr. McMenemy that he had participated in a conference call with "the trader and the 15 other clients who are in the trade" and that the trader confirmed that the trade would commence on May 3, 2010.

36. In mid-May 2010, having received no further information concerning the status of the alleged trade, Mr. McMenemy advised Defendant Rothenberg that Winterhawk had an immediate need for \$100,000.00 working capital and requested that Defendant Rothenberg wire this amount to Winterhawk. Defendant Rothenberg honored this request without objection or providing any warning that this withdrawal could jeopardize the alleged trade that Defendant Rothenberg had represented was in process.

37. On May 18, 2010, Defendant Rothenberg advised that he was concerned that the trader may "ping the account" to confirm that \$1,000,000.00 remained and recommended that Winterhawk return the \$100,000.00 as soon as possible "just to be on the safe side."

38. On May 26, 2010, Defendant Rothenberg advised that he had discovered that the trader had in fact "pinged" the account and discovered that the

balance had dipped below \$1,000,000.00. He further advised that he was pleading with the trader to allow them to continue in the program and that \$100,000.00 would need to be returned to the account immediately. Defendant Rothenberg mentioned that he was considering liquidating some of his own assets for this purpose.

39. Mr. McMenaman responded the same day to advise that he did not understand why removing \$100,000.00 from the account would impact the trade when there remained \$1,250,000.00 in the account as verified previously by Defendant Rothenberg. Defendant Rothenberg responded, stating that “[t]he other money in my account was other client’s money for other cases I handle.”

40. On May 27, 2010, in an apparent effort to appease Mr. McMenaman’s frustration, Defendant Rothenberg advised that he was returning an additional \$100,000.00 as requested by Winterhawk and that he would personally deposit \$200,000.00 to bring the account balance to the required \$1,000,000.00. Defendant Rothenberg further advised that the “trade group is going to allow me to resubmit and has agreed to try and push it through a little faster.”

41. Mr. McMenaman thanked Defendant Rothenberg for this gesture and stated that his personal commitment was very reassuring.

42. On June 9, 2010, Mr. McMenaman requested information as to the status of the alleged trade and advised Defendant Rothenberg that Winterhawk was required to make a \$500,000.00 capital contribution in connection with the oil reserve expansion opportunity on June 20, 2010 and that Winterhawk required either its principal or the investment proceeds to make the required capital call. Mr. McMenaman advised Defendant Rothenberg that if Winterhawk did not make this capital contribution its position would be diluted at a projected cost of multiple millions of dollars.

43. No "trade" has occurred.

44. On information and belief, the "trading platform" represented by Defendant Rothenberg does not and never has existed.

45. On July 11, 2010, Mr. McMenaman sent Defendant Rothenberg an e-mail stating that he was happy to hear that the "trade" had begun the previous week and also requested that Defendant Rothenberg provide proof that Winterhawk's funds remained in Defendant Rothenberg's account. The following day, Defendant Rothenberg sent Mr. McMenaman a scanned copy of a document purporting to summarize Defendant Rothenberg's accounts at Wachovia bank. The "Summary of Accounts" provides summary information regarding several accounts including accounts with available balances of \$1,000,015.00 and \$26,100,013.06.

46. On or around Monday, July 19, 2010, Defendants wired a Winterhawk affiliate \$350,000.00 per Winterhawk's request and Defendant Rothenberg made additional excuses for delay of the alleged trade but continued to represent that the trade was in progress. Mr. McMenaman advised that Winterhawk required specific information concerning the trade by that Wednesday, July 21, 2010 or, alternatively, demanded return of all Winterhawk funds by Friday, July 23, 2010.

47. Defendants have provided no further information concerning the alleged trade and have failed and refused to return the remainder of Winterhawk's principal "investment" in the amount of at least \$800,000.00.

48.

49.

50.

51.

52.

**COUNT I – FRAUD (Investment Scheme)**  
**(against all Defendants)**

53. Winterhawk restates and incorporates by reference the allegations contained in Paragraphs 1 through 52 above as if set forth fully herein.

54. Defendants, through Defendant Rothenberg, made numerous and repeated representations to Winterhawk, as described above, concerning an alleged

“trading platform” or “trading facility” that, on information and belief, were false and in furtherance of a complex scheme to defraud and damage Winterhawk.

55. On information and belief, no trading platform or facility exists and all documents and correspondence sent to Winterhawk by Defendant Rothenberg that were allegedly prepared by “the trader” were forgeries prepared by or on behalf of Defendants in furtherance of the scheme alleged herein.

56. Defendant Rothenberg made the above representations to Winterhawk knowing that they were false and knowing that Defendants intended to use Winterhawk’s funds for purposes other than the alleged trade.

57. Winterhawk justifiably relied upon Defendants’ fraudulent representations regarding the alleged trading platform to its detriment by, without limitation, depositing \$1,350,000.00 in Defendant Rothenberg’s attorney trust account.

58. Winterhawk has lost numerous business opportunities including, but not limited to, dilution of its position in the oil reserve opportunity described in paragraphs 32-33 and 42 above, which Winterhawk made known and described in detail to Defendant Rothenberg.

59. Defendants exhibited willful misconduct, malice, fraud, wantonness, deceit, oppression, and/or that entire want of care which gives rise to a presumption of conscious indifference to the consequences of their actions.

60. Defendants acted with the specific intent to cause harm to Winterhawk.

61. Winterhawk is entitled to recover uncapped punitive damages pursuant to O.C.G.A. § 51-12-5.1 in an amount sufficient to deter future wrongful conduct as determined by the enlightened conscious of the jury at trial.

**COUNT II – BREACH OF FIDUCIARY DUTY**  
**(against all Defendants)**

62. Winterhawk restates and incorporates by reference the allegations contained in Paragraphs 1 through 61 above as if set forth fully herein.

63. Defendants acted as Winterhawk's agents in connection with the alleged trading platform and an attorney-client relationship existed between Defendant Rothenberg and Winterhawk.

64. As a result of the agency and attorney-client relationships and positions of trust and confidence described above, Defendants owed fiduciary duties of loyalty, care, and good faith to Winterhawk.

65. Defendants breached their fiduciary duties to Winterhawk by, without limitation, making false and fraudulent representations concerning the alleged

trading platform described above and by making repeated false representations designed to address or relieve numerous concerns expressed by Winterhawk regarding the alleged trading platform.

66. As a result of Defendants' breaches of their fiduciary duties, Winterhawk has sustained damages including, but not limited to, an amount equal to all unreturned principal "investment" funds deposited in Defendant Rothenberg's attorney trust account and to the extent of the dilution of Winterhawk's position in the oil reserve opportunity described in paragraphs 32-33 and 42 above, which Winterhawk made known and described in detail to Defendant Rothenberg.

67. Defendants exhibited willful misconduct, malice, fraud, wantonness, deceit, oppression, and/or that entire want of care which gives rise to a presumption of conscious indifference to the consequences of their actions.

68. Defendants acted with the specific intent to cause harm to Winterhawk.

69. Winterhawk is entitled to recover uncapped punitive damages pursuant to O.C.G.A. § 51-12-5.1 in an amount sufficient to deter future wrongful conduct as determined by the enlightened conscious of the jury at trial.

**COUNT III – CONSTRUCTIVE TRUST**  
**(against all Defendants)**

70. Winterhawk restates and incorporates by reference the allegations contained in Paragraphs 1 through 69 above as if set forth fully herein.

71. Winterhawk provided funds to Defendants as its agent and/or attorney for the specific purpose of investment in the alleged trading platform described herein.

72. Defendants repeatedly represented that, with the exception of \$350,000.00 that would be returned at the completion of the alleged trade, Winterhawk's funds would never be removed from Defendant Rothenberg's attorney trust account.

73. On information and belief, rather than using the funds only in connection with the alleged trading platform, Defendants have used Winterhawk's funds for some other purpose.

74. On information and belief, Winterhawk's funds have been removed from Defendant Rothenberg's attorney trust account.

75. By removing Winterhawk's funds and using those funds for any purpose other than in connection with the alleged trading platform, Defendants exercised complete control and dominion over Winterhawk's funds such that

Defendants have been unjustly enriched to the extent of those funds and have converted those funds for their own use and benefit.

76. Winterhawk is therefore entitled to the imposition of a constructive trust over all unreturned investment funds paid to Defendants.

**COUNT IV –**

**(against all Defendants)**

77. Winterhawk restates and incorporates by reference the allegations contained in Paragraphs 1 through 76 above as if set forth fully herein.

78.

79.

80.

81.

82.

83.

84.

**COUNT V –**  
**(against all Defendants)**

85. Winterhawk restates and incorporates by reference the allegations contained in Paragraphs 1 through 84 above as if set forth fully herein.

86.

87.

88.

89.

90.

91. Defendants exhibited willful misconduct, malice, fraud, wantonness, deceit, oppression, and/or that entire want of care which gives rise to a presumption of conscious indifference to the consequences of their actions.

92. Defendants acted with the specific intent to cause harm to Winterhawk.

93. Winterhawk is entitled to recover uncapped punitive damages pursuant to O.C.G.A. § 51-12-5.1 in an amount sufficient to deter future wrongful conduct as determined by the enlightened conscious of the jury at trial.

**PRAYER FOR RELIEF**

WHEREFORE, Winterhawk prays that the Court award the following relief:

- a) That process issue and be served upon Defendants to appear and answer this Complaint as provided by law;
- b) That the Court waive usual procedures and enter an immediate judgment in favor of Winterhawk and against Defendants, jointly and severally,
- c) That the Court award attorneys' fees pursuant to O.C.G.A. § 13-6-11 based upon Defendants' stubbornly litigious conduct that has caused Winterhawk unnecessary trouble and expense;
- d) That Winterhawk be awarded its actual and compensatory damages plus applicable pre-judgment and statutory interest incurred as a result of

Defendants' fraudulent conduct and breaches of fiduciary duties;


- e) That Winterhawk be awarded punitive damages pursuant to O.C.G.A. § 51-12-5.1 and as otherwise provided by law to redress Defendants' fraudulent activities and breaches of fiduciary duties;
- f) That the Court impose a constructive trust on all unreturned "investment" funds received by Defendants;
- g) That Winterhawk recover all costs and expenses of this litigation, including attorneys' fees and expenses as provided by law;
- h) That a trial by jury be had on all issues so triable; and
- i) That Winterhawk be granted such other and further relief as is just and proper.

Respectfully submitted this 12<sup>th</sup> day of November, 2010.

KILPATRICK STOCKTON LLP  
1100 Peachtree Street  
Suite 2800  
Atlanta, Georgia 30309-4528

Telephone: (404) 815-6500  
Facsimile: (404) 815-6555

mkaeding@kilpatrickstockton.com  
jmclarry@kilpatrickstockton.com



Michael A. Kaeding  
Georgia Bar No. 405779  
Jason D. McLarry  
Georgia Bar No. 141229

*Attorneys for Plaintiff Winterhawk Energy  
and Development Corporation*

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

WINTERHAWK ENERGY AND  
DEVELOPMENT CORPORATION,

Plaintiff,

v.

MICHAEL L. ROTHENBERG and  
FOUR FIVE, LLC,

Defendants.

Civil Action No. \_\_\_\_\_

JURY TRIAL DEMANDED

**EXHIBIT A to COMPLAINT**

**FILED UNDER SEAL  
PURSUANT TO COURT ORDER**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

WINTERHAWK ENERGY AND  
DEVELOPMENT CORPORATION,

Plaintiff,

v.

MICHAEL L. ROTHENBERG and  
FOUR FIVE, LLC,

Defendants.

Civil Action No. \_\_\_\_\_

JURY TRIAL DEMANDED

**EXHIBIT B to COMPLAINT**

**FILED UNDER SEAL  
PURSUANT TO COURT ORDER**