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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

**SECURITIES AND EXCHANGE
COMMISSION,**

Plaintiff,

-against-

**JOSHUA BURRELL and
ACTIVATED CAPITAL, LLC,**

Defendants.

COMPLAINT

21 Civ. ____ ()

JURY TRIAL DEMANDED

Plaintiff Securities and Exchange Commission (“Commission”), for its Complaint against Defendants Joshua Burrell (“Burrell”) and Activated Capital, LLC (“Activated”) (together, “Defendants”), alleges as follows:

SUMMARY

1. This action concerns fraudulent conduct Burrell carried out through Activated that defrauded at least fourteen investors who invested at least \$6.3 million in Activated’s private real

estate funds (the “Funds”). Approximately \$6.1 million of this amount was invested by twelve investors in the Activated Capital Opportunity Zone Fund II, LLC (“Fund II”).

2. In approximately January 2019, Burrell began marketing investments in the Funds to investors. Defendants made a number of material misrepresentations concerning the Funds and specifically Fund II. First, Fund II’s operating agreement stated that Fund II would purchase properties in the name of the Funds for investment purposes. Instead, however, in many instances, Burrell, through Activated, misappropriated investor funds by purchasing the properties in the names of other Activated entities that Fund II did not own.

3. Second, marketing materials and operating documents contained material misrepresentations concerning the Funds’ payment of distributions to investors. Specifically, Defendants represented that the Funds would pay distributions to investors that would be funded by cash available from operations – that is, income generated by the underlying properties. Instead, the Defendants engaged in Ponzi-like conduct, making distributions to investors that were funded, in part, with investors’ money.

4. Third, marketing materials and operating documents falsely represented that Fund II would have an outside custodian and that Activated’s principals had made significant investments in Fund II. In fact, Fund II had no outside custodian, and Activated’s principals had not made significant investments in Fund II.

5. Finally, Defendants falsely represented to at least one investor that Fund II had “just under” \$20M in assets under management. In fact, at the time, the fund had raised less than \$6 million from investors.

6. In addition, Burrell misappropriated approximately \$100,000 of investor funds, most of which were categorized as “property improvement” expenses.

VIOLATIONS

7. By virtue of the foregoing conduct and as alleged further herein, Defendants have violated Section 17(a) of the Securities Act of 1933 (“Securities Act”) [15 U.S.C. § 77q(a)], and Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”) [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

8. Unless Defendants are restrained and enjoined, Defendants will engage in the acts, practices, transactions, and courses of business set forth in this Complaint or in acts, practices, transactions, and courses of business of similar type and object.

NATURE OF THE PROCEEDINGS AND RELIEF SOUGHT

9. The Commission brings this action pursuant to the authority conferred upon it by Securities Act Sections 20(b) and 20(d) [15 U.S.C. §§ 77t(b) and 77t(d)] and Exchange Act Section 21(d) [15 U.S.C. § 78u(d)].

10. The Commission seeks a final judgment: (a) permanently enjoining Defendants from violating the federal securities laws this Complaint alleges they have violated; (b) ordering Defendants to disgorge all ill-gotten gains and/or unjust enrichment received as a result of the violations alleged herein and to pay prejudgment interest thereon, pursuant to Exchange Act Sections 21(d)(5) and 21(d)(7) [15 U.S.C. §§ 78u(d)(5) and 78u(d)(7)]; (c) ordering Defendants to pay civil money penalties pursuant to Securities Act Section 20(d) [15 U.S.C. § 77t(d)] and Exchange Act Section 21(d)(3) [15 U.S.C. § 78u(d)(3)]; and (d) ordering any other and further relief the Court may deem just and proper.

JURISDICTION AND VENUE

11. This Court has jurisdiction over this action pursuant to Securities Act Section 22(a) [15 U.S.C. § 77v(a)] and Exchange Act Section 27 [15 U.S.C. § 78aa].

12. Defendants, directly and indirectly, have made use of the means or instrumentalities of interstate commerce or of the mails in connection with the transactions, acts, practices, and courses of business alleged herein.

13. Venue lies in this District under Securities Act Section 22(a) [15 U.S.C. § 77v(a)] and Exchange Act Section 27 [15 U.S.C. § 78aa]. Defendants may be found in, are inhabitants of, or transact business in the Southern District of New York, and certain of the acts, practices, transactions, and courses of business alleged in this Complaint occurred within this District. For example, Activated was located in, and Burrell solicited investors from, this District.

DEFENDANTS

14. **Burrell**, age 38, is a resident of New York, NY. He is a founder and managing principal of Activated. He was previously a registered representative associated with a registered broker-dealer from 2016 to 2017, and held Series 7 and 63 licenses. Burrell asserted his Fifth Amendment privilege against self-incrimination during the investigation that preceded this action.

15. **Activated** is a Delaware LLC based in New York, New York. Burrell founded Activated in January 2019, and Burrell has been Activated's managing principal throughout the relevant period. According to marketing materials and fund operating documents, including private placement memoranda, Activated purportedly managed investment funds that would raise funds from investors to acquire properties in "Opportunity Zones" (described below). Between February 2019 and February 2021, Activated raised approximately \$6.3 from fourteen investors.

FACTS

A. BACKGROUND

16. The Funds purport to invest in “Opportunity Zones,” a community development program established by the Tax Cuts and Jobs Act of 2017.

17. Opportunity Zones are economically distressed communities in which certain new investments are eligible for preferential tax treatment under the tax code, and were designed to spur economic development and job creation in distressed communities. Through this program, investors who have capital gains through the sale of an asset like stock or real estate can receive tax benefits if that gain is rolled into an investment in an Opportunity Zone within a certain time.

18. Activated sold investors limited partnership interests in the Funds it managed, which were securities.

19. Between February 2019 and February 2021, fourteen investors invested a total of approximately \$6.3 million in limited partnership interests of the Funds.

20. In the Funds’ operating documents, Activated represented to investors that their money would be used to make real estate investments in Opportunity Zones.

21. Approximately twelve of Activated’s fourteen investors invested in Fund II, representing investments of more than \$6.1 million.

22. After speaking to potential Fund II investors about the investment opportunity, Defendants would generally direct them to an “Investor Portal” which contained additional information, including a Private Placement Memorandum (“PPM”) for Fund II.

B. DEFENDANTS MISAPPROPRIATED FUND II ASSETS TO PURCHASE PROPERTIES IN THE NAME OF OTHER ENTITIES

23. Fund II’s operating agreement required Defendants to purchase properties in the names of Fund II.

24. Instead, Burrell – the only signatory on Activated’s bank accounts used to purchase the properties – caused Activated to use Fund II investor funds to purchase properties in the names of different Activated entities. These Activated entities were not owned by Fund II or its investors.

25. For example, from January 2020 to March 2020, Activated used approximately \$1.7 million of investor funds to purchase thirteen properties in Chester County, PA and placed them in the name of “Activated Fund Holdings LLC.”

26. According to Activated Fund Holdings, LLC’s Operating Agreement, the entity was owned by Activated Capital, LLC and two other individuals associated with Activated who were not investors in Fund II.

27. As another example, from March 2020 to October 2020, Activated used approximately \$1.4 million of investor funds to purchase eight properties and placed them in the name of “Activated New Heritage Coatesville LLC.” Neither Fund II nor its investors are owners of Activated New Heritage Coatesville LLC.

28. After misappropriating investor assets to purchase the properties, Burrell then used the properties as collateral to obtain bank loans.

29. Specifically, in December 2020, Burrell obtained a loan of more than \$1 million on behalf of Activated Fund Holdings LLC, which was secured by eleven properties that had been paid for with investor money.

30. After obtaining the loan, he instructed the bank to wire money to investors, making approximately \$218,000 in purported “distributions” to investors, and a \$108,000 redemption to one investor, from the loan proceeds.

31. In May 2021, Burrell obtained another loan, in the amount of \$330,000, on behalf of Activated New Heritage Coatesville LLC, which was secured by one property that had been purchased with investor money.

C. DEFENDANTS' ENGAGED IN PONZI-LIKE CONDUCT IN MAKING DISTRIBUTIONS

32. Defendants represented that the Funds would target paying investors an annual distribution, generally 8%, that would be funded by income generated by the underlying properties.

33. Specifically, the PPM for Fund II represented that “[Activated] shall cause [Fund II] to distribute net available cash from operations (if net available cash from operations are available).”

34. Fund II’s PPM cautioned that Activated “expect[s] that our cash flow from operations available for distribution will be lower in the initial stages until we have raised significant capital and made substantial investments.”

35. Activated made distributions to investors that were purportedly based on the income generated from investments in real estate properties.

36. The Funds’ investors understood that the distributions Activated made came *solely* from income earned from the real estate investments.

37. In fact, the distributions did not come solely from net available cash from operations.

38. Indeed, through at least approximately February 25, 2021, total cash available from operations was insufficient to meet the targeted distributions.

39. Rather than lowering distributions, as allowed by the Funds’ operating documents, Defendants engaged in Ponzi-like conduct, making distributions to investors that

were funded, in part, with investors' money.

40. For example, from October 2019 through approximately February 2021, Activated made distributions of approximately \$472,000 in purported preferred returns to investors.

41. During that same period, however, the properties had generated only approximately \$210,000 in income, representing only about 44% of the distributions made.

42. Because the income from those properties was not sufficient to pay the distributions made to investors, Burrell, through Activated, made quarterly distributions funded in part by other investors' money and the bank loan described above.

43. Nowhere did Defendants disclose to investors or prospective investors that sources other than income from the properties were being used to make distributions to investors.

44. The representations in the PPM were material to investors. As Defendants knew, or were reckless in not knowing, these representations were false.

D. DEFENDANTS MISREPRESENTED THAT FUND II WOULD HAVE AN OUTSIDE, THIRD-PARTY CUSTODIAN

45. In letters signed by Burrell, Activated represented to investors and prospective investors that Fund II would have an outside, third-party custodian. This representation was material to investors.

46. Many of the letters state:

The fund will be custodied through [Custodian]. [Custodian] is an affiliate of [Large Clearing Provider], the industry's largest clearing provider, with a 70-year track record, capital that exceeds regulatory minimums and more than \$1 trillion in assets under custody.

47. Other letters to investors claimed that Fund II would be custodied at a large commercial bank.

48. In fact, as Defendants knew or were reckless in not knowing, Fund II did not have an outside, third-party custodian.

E. DEFENDANTS MISREPRESENTED THE EXISTENCE OF A PROPRIETARY INVESTMENT IN, AND ASSETS UNDER MANAGEMENT OF, FUND II

49. Defendants made material misrepresentations regarding the existence of a proprietary investment in Fund II and the AUM of Fund II.

50. The Fund II Subscription Booklets that Burrell sent to investors represented that “Activated Capital and Partners have made a significant investment to incubate the Fund.”

51. As Defendants knew or were reckless in not knowing, this representation was false.

52. At the time this document was sent to at least five investors, as Defendants knew or were reckless in not knowing, neither Activated Capital nor Burrell had made an investment in Fund II.

53. Finally, in April 2020, while soliciting an investor for Fund II, Burrell falsely told another individual involved with Activated that Fund II’s assets under management were “just under” \$20 million knowing that the false information would be, and was, in fact, conveyed by that individual to the investor.

54. At the time of that representation, Defendants knew or were reckless in not knowing, that Fund II had raised less than \$6 million from investors.

55. The investor invested \$250,000 in Fund II.

F. BURRELL MISAPPROPRIATED FUNDS, MOST UNDER THE GUISE OF “EXPENSE REIMBURSEMENTS,” AND THEN “PROPERTY IMPROVEMENT” EXPENSES

56. During the period from March 2019 to February 2021, Burrell directed the transfer of more than approximately \$100,000 in investor funds to his personal bank account.

57. Burrell directed payments from the Fund II account to his personal bank account, often in a round-dollar amount of \$5,000.

58. Approximately \$56,000 of these payments were originally described as “expense reimbursements” in Activated’s internal accounting documents.

59. When Activated’s accountant asked Burrell for detail about the expense reimbursement, Burrell re-characterized the payments in internal accounting documents as “property improvement” expenses.

60. There is no evidence that Burrell used the money to make property improvements for the Funds’ properties.

FIRST CLAIM FOR RELIEF
Violations of Securities Act Section 17(a)
(Burrell and Activated)

61. The Commission re-alleges and incorporates by reference here the allegations in paragraphs 1 through 60.

62. Defendants Burrell and Activated, directly or indirectly, singly or in concert, in the offer or sale of securities and by the use of the means or instruments of transportation or communication in interstate commerce or the mails, (1) knowingly or recklessly have employed one or more devices, schemes or artifices to defraud, (2) knowingly, recklessly, or negligently have obtained money or property by means of one or more untrue statements of a material fact or omissions of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, and/or (3) knowingly, recklessly, or negligently have engaged in one or more transactions, practices, or courses of business which operated or would operate as a fraud or deceit upon the purchaser.

63. By reason of the foregoing, Defendants Burrell and Activated, directly or

indirectly, have violated and, unless enjoined, will again violate Securities Act Section 17(a) [15 U.S.C. § 77q(a)].

SECOND CLAIM FOR RELIEF
Violations of Exchange Act Section 10(b) and Rule 10b-5 Thereunder
(Burrell and Activated)

64. The Commission re-alleges and incorporates by reference here the allegations in paragraphs 1 through 60.

65. Defendants Burrell and Activated, directly or indirectly, singly or in concert, in connection with the purchase or sale of securities and by the use of means or instrumentalities of interstate commerce, or the mails, or the facilities of a national securities exchange, knowingly or recklessly have (i) employed one or more devices, schemes, or artifices to defraud, (ii) made one or more untrue statements of a material fact or omitted to state one or more material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, and/or (iii) engaged in one or more acts, practices, or courses of business which operated or would operate as a fraud or deceit upon other persons.

66. By reason of the foregoing, Defendants Burrell and Activated, directly or indirectly, singly or in concert, have violated and, unless enjoined, will again violate Exchange Act Section 10(b) [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully requests that the Court enter:

I.

A Final Judgment permanently enjoining Burrell and Activated, and their agents, servants, employees and attorneys and all persons in active concert or participation with any of them from violating, directly or indirectly, Securities Act Section 17(a) [15 U.S.C. § 77q(a)], and

Exchange Act Section 10(b) [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5];

II.

A Final Judgment ordering Defendants to disgorge all ill-gotten gains and/or unjust enrichment received directly or indirectly, with pre-judgment interest thereon, as a result of the alleged violations, pursuant to Exchange Act Sections 21(d)(5) and 21(d)(7) [15 U.S.C. §§ 78u(d)(5) and 78u(d)(7)];

III.

A Final Judgment ordering Defendants to pay civil monetary penalties under Securities Act Section 20(d) [15 U.S.C. § 77t(d)] and Exchange Act Section 21(d)(3) [15 U.S.C. § 78u(d)(3)]; and

IV.

Granting any other and further relief this Court may deem just and proper.

JURY DEMAND

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff demands that this case be tried to a jury.

Dated: New York, New York
November 12, 2021

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