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More Legal Trouble for Former Lafayette Loan Businesses

By Cathy Tyson

The tangled legal fallout of a series of limited investment partnerships based in Lafayette continues to unfold. Most recently, the U. S. Department of Labor filed a complaint in December 2014 alleging that Bar-K Inc., Walter Ng and former Orinda pediatrician Bruce Horwitz engaged in activities that violated the Employee Retirement Income Security Act.

The complaint alleges that Ng, Horwitz and entity Bar-K Inc., "as fiduciaries to the plan, engaged in transactions and activities that violated the Employee Retirement Income Security Act of 1974," said Deputy Regional Director of Public Affairs with the U.S. Department of Labor Jose Carnevali. Specifically, plaintiff - The Department of Labor - claims that defendants "imprudently invested" the plan assets in two mortgage pools, Mortgage Fund '08 and RE Loans LLC, which collected the investors' funds and loaned the money to homebuyers and developers. In exchange, investors received interest from the loan proceeds. As many borrowers were unable to repay the loans, the pools became unable to repay investors. Both Mortgage Fund '08 and RE Loans LLC filed for bankruptcy protection in 2011.

A consent judgment issued by Judge Jeffrey White on Jan. 6 regarding this matter notes defendant Bruce Horwitz neither admits nor denies the allegation, but settled the matter for \$30,718.

Similarly, the judge ruled that "as a direct and proximate result of the breaches of fiduciary duties" Walter Ng caused plan losses of \$1,310,252 and is judged in that amount.

What started as cash flow issues snowballed with the help of a collapsing real estate market, which ultimately led to the father and son, Walter and Kelly Ng, along with business associate Horwitz being accused of scheming 1,500 investors out of more than \$700 million.

Prior to the Department of Labor's case, the Securities and Exchange Commission filed suit; it announced earlier this year that the managers of Mortgage Fund, LLC have agreed to resolve fraud charges against them. The SEC alleged managers made false claims about fund performance, reassuring investors that everything was fine, while nearly half of the RE Loan portfolio was delinquent or in default, and even more loans were underwater in Mortgage Fund '08 with 74 percent delinquencies in 2008.

According to the SEC, "In the settlement, Kelly Ng, Horwitz, and The Mortgage Fund, LLC will pay a total of \$5,205,367 and Kelly Ng and Walter Ng will be barred from the securities industry." The SEC filed a complaint against the Ngs, Horwitz and the firm in federal court in Oakland, Calif. in 2013, alleging that they defrauded investors in their real estate fund called Mortgage Fund '08 LLC by secretly using its assets to rescue an older, rapidly collapsing fund called R.E. Loans, LLC. Having pled guilty to 20 counts of structuring cash transactions to avoid bank reporting requirements, Kelly Ng is currently serving an 18 month sentence at the medium security federal penitentiary in Lompoc, Calif.

In addition to the SEC's case, there is the Jones v. Armanino LLP class action filed on behalf of investors in RE Loans LLC and Mortgage Fund '08. Armanino LLP, formerly known as Armanino McKenna, was an independent auditor, who plaintiffs allege did not properly conduct its audit, which resulted in financial statements that omitted and misstated important facts that misled investors. While Armanino denies it did anything wrong, the matter was resolved with the creation of a settlement fund of \$3,325,000 for the benefit of settlement class members.

The California Superior Court in Alameda County consolidated three separate class actions into one for pre-trial purposes; it was filed on Nov. 8, 2013. The complaint alleges aiding and abetting, breach of fiduciary duty, liability for securities fraud and common law fraud, negligent misrepresentation and more. The defendant moved for summary judgment recently, to get the case thrown out, "which the judge denied, so litigation is going forward," said attorney Mark Chavez of Chavez & Gertler LLP. He mentioned that depositions will start this spring.

What turned out to be their downfall started with a reasonable concept - Bar-K was created in the mid-1970s to loan money to local developers, and the business at that time was profitable. RE

Loans debuted in 2002, but within a few short years everything began to fall apart. A request for comment from the Ngs' lawyer at Swanson and McNamara was not returned.

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