

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF New York

ALBERT P. BEHLER

Plaintiff(s),

-against-

KAI-SHING TAO

Defendant(s).

Index No. [redacted]

**Summons**

Date Index No. Purchased: [redacted]

To the above named Defendant(s)

Kai-Shing Tao

Residence address: 1 Hughes Center Drive, Unit 1601, Las Vegas, NV 89169-6738

Business address: Remark Holdings, 3960 Howard Hughes Parkway, Suite 900, Las Vegas, NV 89169

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's attorney within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

The basis of venue is Plaintiff's residence  
which is in New York County

Dated: New York, New York

June 18, 2020

Becker, Glynn, Muffly, Chassin & Hosinski LLP

by /s/ Jesse T. Conan

Jesse T. Conan

Attorneys for Plaintiff

Albert P. Behler

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299 Park Avenue  
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK**

ALBERT P. BEHLER,

Plaintiff,

v.

KAI-SHING TAO,

Defendant.

**COMPLAINT**

Plaintiff, Albert P. Behler (“Behler”), by and through his attorneys, Becker, Glynn, Muffly, Chassin & Hosinski LLP, alleges the following against defendant Kai-Shing Tao (“Shing”):

**NATURE OF THE ACTION**

1. This action arises out of Shing’s breach of an oral agreement between him and his longtime friend, Behler. Shing is a high-wealth individual. Over the years, Shing and Behler have collaborated on a number of ventures together.

2. Shing is the largest shareholder, Chief Executive Officer, and Chairman of the Board of a publicly traded company called Remark Holdings, Inc (“Remark”). In 2012 Shing sought to raise capital for Remark. He reached out to Behler and explained that Remark was undervalued and presented a lucrative investment opportunity.

3. Around that time Shing created and controlled a separate limited liability company called Digipac LLC (“Digipac”). Digipac was created to route friends and family funds to Remark. Shing exerts complete and total control over Digipac.

4. Shing wanted Behler to invest in Remark through his limited liability company. Shing convinced Behler that this would be the best way to make a large equity investment in Remark since purchasing a large number of shares of the thinly traded company on the open

market would cause the shares to skyrocket. The sticking point, for Behler, was the inherent difficulty in liquidating shares of a limited liability company like Digipac.

5. To bring Behler on board, the longtime friends orally agreed that Behler would have the opportunity to exit his Digipac investment (the “Exit Opportunity Agreement”). There were two components to the agreement. First, Shing and Behler agreed that if the price of Remark were to hit \$50/share, he would cause Digipac to sell its shares of Remark and distribute the proceeds (based on Behler’s pro rata share of Digipac) to Behler. And second, Shing and Behler agreed that, within five years, he would provide Behler with an exit opportunity from Digipac based on the value of Digipac’s Remark holdings. In other words, Behler was guaranteed an exit opportunity if the shares of Remark hit \$50/share or five years from the date of his investment.

6. Relying on the Exit Opportunity Agreement, Behler agreed to invest in Remark through Digipac. And in November 2012, at Shing’s direction, Behler wired \$1.5 million to Digipac. The wire instruction provides that it is in reference to “investment into Remark Media.”

7. Also in November 2012, Shing sent Behler a separate subscription agreement between Digipac and Behler. Upon information and belief, Behler never signed the agreement.

8. To acquire shares of Remark, Shing caused Digipac and Remark to enter into a series of promissory notes, convertible at Digipac’s discretion into common stock of Remark. Digipac currently owns 5,246,314 shares, or 19%, of Remark. The trading price of Remark steadily rose following Behler’s 2012 investment, though it never hit \$50/share. In 2017, at the five year anniversary of the Exit Opportunity Agreement, Shing failed to provide Behler the

promised exit opportunity. At the time, shares of Remark were trading at approximately \$9.17/share.

9. On or about January 23, 2018, Behler met with Shing for dinner in person at a Masa restaurant in New York City to confront him about his breach of the Exit Opportunity Agreement and threatened legal action. At the time, Shing acknowledged his breach but stated that he did not want to liquidate Digipac's Remark holdings. To resolve his breach of the Exit Opportunity Agreement, Shing offered to purchase 50% of Behler's stake in Digipac, based on a valuation of Digipac derived from its ownership of Remark shares, with Remark valued at \$20 per share ("Settlement Agreement").

10. Shing never performed.

#### **THE PARTIES**

11. Plaintiff Albert Behler is a citizen of Germany and a resident of New York, NY.

12. Upon information and belief, defendant Kai-Shing Tao is a citizen of China and a resident of Las Vegas, Nevada.

#### **JURISDICTION AND VENUE**

13. Venue is proper as Behler is a resident of New York, New York.

14. This court has personal jurisdiction over Shing pursuant to New York Civil Practice Law and Rules 302(a).

#### **FACTS**

##### **A. The Exit Opportunity Agreement**

15. Behler and Shing met in approximately 2004, at a birthday dinner given by a mutual acquaintance for a mutual friend. Shing at the time was running a hedge fund with his brother. He and Behler hit it off and became close friends.

16. Behler and Shing's friendship continued over the years, and included numerous dinners, meetings, phone calls, emails, and other interactions, as well as engaging in two business ventures together. Their dealings and interactions frequently occurred in New York.

17. In 2012, Shing courted Behler to invest in a company called Remark. Shing was the Chief Executive Officer, Chairman of the Board, and largest shareholder of Remark. Remark traded on the NASDAQ and had done so since mid-June 2003.

18. Shing claimed that Remark's shares were severely undervalued. Shing told Behler that he could invest in Remark "for a song" and that doing so would present the opportunity of a lifetime.

19. Behler concluded that Remark would be a good investment. Specifically, Remark, which was at the time known as Remark Media, Inc., was a "media play" centered on a cornerstone digital destination for internet users (namely, vegas.com), executed via superior digital tactics. Remark's strategy was focused on generating advertising and transaction revenue, and would grow not only the value of the URLs it owned (e.g., vegas.com), but the enterprise value of Remark. Behler believed that the vegas.com URL was valuable and that Remark's strategy was sound.

20. Around this same time, Shing had created a limited liability company called Digipac. Shing created Digipac to route funds from friends and family to Remark. Since Shing controlled and managed Digipac, this allowed him to consolidate his personal control over Remark. Shing pressed Behler to invest in Remark through Digipac.

21. Behler declined. As Digipac was a private company, there would be no easy way for Behler to exit his investment if and when he wanted to sell. Behler insisted on making a direct equity investment in Remark.

22. Shing explained that Behler could not make a large direct investment in Remark at the current share price because the purchase of stock on the open market would cause the share price of the thinly traded company to rise. Further, at the time, Remark needed additional funding, something Behler's purchase of stock on a public exchange would not provide.

23. Shing made a new offer. Shing offered a guaranteed exit opportunity. Specifically, Shing promised that if Behler agreed to make an indirect investment in Remark through Digipac, Shing would allow Behler to cash out his Digipac investment if the publicly traded share price of Remark ever hit \$50/share. He also promised that if the share price never reached \$50/share, Shing would provide Behler the opportunity to cash out within five years of the initial investment. The cash-out would be derived from the value of the Remark shares.

24. In other words, at most, Behler would be locked into his Digipac/Remark investment for five years. Behler accepted Shing's offer in October 2012 and agreed to make a \$3,000,000 investment (the "Exit Opportunity Agreement").

25. Behler performed. Specifically, pursuant to the Exit Opportunity Agreement and in reliance on Shing's promise that Shing would ensure an exit opportunity within five years, Behler invested in Digipac. Behler wired Digipac \$1.5 million on November 26, 2012 and made a subsequent wire of \$1.5 million on October 31, 2013. In total, Behler's held a 24.14% stake in Digipac.

26. Behler and Shing had a long-standing friendship and often conducted business with each other through oral agreements and representations — in effect handshake deals. This one was no different.

27. Digipac invested in Remark through a series of convertible loan agreements, starting in 2012. Following Behler's initial \$1.5 million, Remark's shares began to rise in price.

28. For example, while Remark shares were trading at approximately a dollar a share in November 2012 (when Behler first wired \$1.5 million to Digipac), by 2013, Remark shares were trading on the NASDAQ at over \$5 per share.

29. In total, Digipac purchased and held 5,256,315 shares of Remark.

**B. Shing Breaches the Exit Opportunity Agreement**

30. From 2012 through late 2017, Remark's shares fluctuated between \$1.00/share and over \$9.00/share.

31. Behler and Shing had calls and meetings approximately every three months in New York to discuss Remark and Digipac. Behler encouraged Shing to sell Remark while the market was strong, but Shing believed he could develop the company into a multi-billion dollar enterprise and sell it for the \$50 per share price as he had promised.

32. On or about June 28, 2017, Behler met Shing at Aldo Sohm Wine Bar at 151 West 51<sup>st</sup> Street in New York City to discuss the status of his Digipac investment and the impending five-year deadline for Shing to provide Behler with the promised exit opportunity. At the meeting they discussed the value of Remark and Shing's obligation under the Exit Opportunity Agreement which Shing acknowledged.

33. The share price of Remark, however, never hit the \$50/share threshold. Thus, the Exit Opportunity Agreement required Shing to provide Behler the opportunity to cash-out at the five year anniversary of Behler's investment in Digipac. On or about November 27, the closing price of Remark was \$9.15/share. Shing, however, did not, as promised provide Behler the opportunity to exit the Digipac investment based on the \$9.15/share price of Remark.

**Count I**

**(for breach of contract against Shing)**

34. Behler repeats and realleges the preceding paragraphs 1 through 33 as if fully set forth herein.

35. Behler and Shing entered into the Exit Opportunity Agreement in October 2012.

36. The Exit Opportunity Agreement was a valid oral agreement between the parties.

37. Behler performed by investing \$1.5 million in Digipac in November 2012 (and by investing an additional \$1.5 million in October 2013).

38. Shing breached the Exit Opportunity Agreement by not providing Behler with the promised exit opportunity.

39. On the five-year anniversary of Behler's investment (on or about November 27, 2017), the share price of Remark was \$9.15/share. Thus, Shing should have provided Behler the opportunity to exit his Digipac investment based on a Remark share value of \$9.15/share.

40. At the time, Digipac held 5,256,315 shares of Remark. At \$9.15/share, the value of its Remark holdings was \$48,095,282. Moreover, at the time, Behler held a 24.14% interest in Digipac. Thus, Shing should have provided Behler with the opportunity to cash out of his Digipac investment by arranging to buy out his shares for \$11,610,201.10.

41. In denying Behler the promised exit opportunity, Shing also breached the covenant of good faith and fair dealing by denying Behler the essential fruit of the agreement. An opportunity to sell his shares or otherwise exit his Digipac investment based on the actual share value of Remark.

42. Behler seeks an order of specific performance, directing Shing to purchase his Digipac shares for \$11,610,201.10.

43. As a result of Shing's material breaches, Behler has suffered injury and damages in an amount to be determined at trial, but no less than \$11,610,201.10.

**Count II**

**(for Promissory Estoppel)**

44. Behler repeats and realleges the preceding paragraphs 1 through 43 as if fully set forth herein.

45. In order to induce Behler into making an indirect investment in Remark, via Digipac, Shing made two promises. He promised that he would provide Behler the opportunity to exit the Digipac investment if the price of Remark ever hit \$50/share or within five years of his investment. In each case, the value of Behler's Digipac holdings would be derived from the valuation of Digipac's Remark holdings.

46. In reliance on Shing's promises, Behler invested \$3,000,000 in Digipac.

47. Shing knew that Behler, as a longtime friend, would rely on his promise.

48. Behler's reliance was reasonable.

49. Shing did not provide Behler the promised exit opportunity at the five year anniversary of his investment.

50. Behler was injured as he was never able to exit his Digipac investment and the shares of Remark are close to worthless.

51. As a result of Shing's failure to abide by his promise, Behler suffered injury and damages in an amount to be determined at trial, but no less than \$3,000,000

**Prayer for Relief**

WHEREFORE, plaintiff Albert P. Behler demands judgment against defendant as follows:

