

on July 5, 2005 and interfering with the operation or the receivership". A hearing is presently set on this matter for October 27, 2006 at 9:00 A.M.

2. By Order of June 13, 2006 the Magistrate Judge denied without prejudice the Defendant's prior Motion to Vacate the Show Cause Order of May 22, 2006 and stated in such Order that the pleading could be reurged if the Receiver should seek another show cause hearing. The instant pleading constitutes a reurging of the previous contentions.

3. The Amended Complaint in this case alleges that some \$13.8 million was raised from some 70 investors in Megafund, an entity controlled by Defendant Stanley Leitner. Leitner is alleged to have transferred approximately \$11 million of these funds to Defendant James Rumpf and his company, Defendant C.I.G. pursuant to a joint venture agreement between Leitner and Rumpf. Bradley Stark is not alleged by the SEC to have been a part of these activities at all. Rumpf (C.I.G.) transferred some \$9.5 million to Sardaukar Holdings, IBC, a company associated with Bradley Stark. There are no allegations that Bradley Stark had anything to do with making any representations, or misrepresentations, to any of the 70 investors in Megafund which generated the \$13.8 million. There are no allegations that Stark ever spoke to or met with any of these investors. Stark is not alleged by the SEC to have participated in any of the "lulling activity" set out in the Amended Complaint. From a jurisdictional prospective, there is no allegation that Stark or Sardaukar Holdings were involved, directly or indirectly in the offer or sale of securities to any of the Megafund investors, or that Stark had any indication as to what these investors were told at the time of their investments. From the records on file with the Court, it appears that of the approximately \$9.5 million transferred from C.I.G. to Sardaukar Holdings, IBC, approximately \$9 million has been specifically traced by the Receiver as to the ultimate use of these funds.

4. In his motion for contempt, the Receiver has alleged certain actions on the part of the Starks and/or Sardaukar for which he is seeking sanctions from the Court. First, Pamela Stark is alleged to have been the recipient of a total of \$17,500 (\$13,500 and \$4000) from her husband and she has failed to provide the Receiver with an accounting. Bradley Stark, after receiving notice of the July 5, 2005 Orders herein, is alleged to have received into his bank account at Provident Bank, a total of \$103,696 from Palace Investments, Inc and Michael Tschebaum. The Receiver stated in his Motion that on the day the first Order was signed, July 5, 2005, Bradley Stark sent \$100,000. to Mr. Derek Smith in New York, however there is no allegation that this was done after Stark had notice of the entry or contents of the Order. Bradley Stark is also alleged to have violated preliminary Orders by furnishing an allegedly false declaration with attached records to the Tschebaums which was used as an exhibit by the Tschebaums in a separate action, *Michael Quilling, Receiver for Sardaukar Holdings and Bradley C. Stark v. Hans Tschebaum, Michael Tschebaum, and Palace Investments, Inc.*, Civil Action No. 3:05-CV-1465 (N.D. Tex.). Bradley Stark is also alleged to have violated preliminary Orders in not furnishing an accounting to the Receiver within the proscribed time limits. For all these actions the Receiver is seeking contempt findings by the Court and sanctions imposed.

5. Contempt can be either civil or criminal and the difference lies in the type relief sought and/or the type of sanctions imposed. *United States v. Rizzo* 539 F.2d 458, 462 (5th Cir. 1976). "Sentences for criminal contempt are punitive in their nature and are imposed for the purpose of vindicating the authority of the Court. (citations omitted). Civil contempt on the other hand is to enforce compliance with the court's order (citations omitted)." *Id.* p.463. Although the Receiver couches his Motion as being one for civil contempt (Motion p.7), the

nature of the sanctions sought are clearly punitive, the actions complained of are not subject to coercive civil sanctions and the motion is one seeking criminal contempt. "Civil contempt can serve two purposes. It can be used to enforce compliance with a court's order through coercion, or it can be used to compensate a party who has suffered unnecessary injuries or costs because of contemptuous conduct." *Travelhost, Inc. v. Blandford*, 68 F.3d 958, 961-962 (5th Cir. 1995). The only conduct complained of by the Receiver in his Motion that can be corrected by remedial action, or compliance by either of the Starks, is the furnishing of an accounting to the Receiver. For all the other conduct alleged to have been committed by the Starks in the Motion, punishment is clearly sought by the Receiver for violation of previous Orders: punishment for submitting alleged false documents to the court; punishment for transferring allegedly frozen funds; punishment for interfering with the Receivers duties. In the case of *Lamar Financial Corporation, et al v. Adams*, 918 F.2d 564, 566 (5th Cir. 1990) the court stated:

"A contempt order or judgment is characterized as either civil or criminal depending upon its primary purpose. *Petroleos Mexicanos v. Crawford Enter.*, 826 F.2d at 399; *Port v. Heard*, 764 F.2d 423 (5th Cir. 1985); *In re Dinnan*, 625 F.2d 1146 (5th Cir. 1980); *Smith v. Sullivan*, 611 F.2d 1050 (5th Cir. 1980). **If the purpose of the sanction is to punish the contemnor and vindicate the authority of the court, the order is viewed as criminal.** *Port v. Heard*, 764 F.2d at 426; *In re Dinnan*, 625 F.2d at 1149; *United States v. Rizzo*, 539 F.2d 458 (5th Cir. 1976). If the purpose of the sanction is to coerce the contemnor into compliance with a court order, or to compensate another party for the contemnor's violation, the order is considered purely civil. *Port v. Heard*, 764 F.2d at 426; *In re Dinnan*, 625 F.2d at 1149. **A key determinant in this inquiry is whether the penalty imposed is absolute or conditional on the contemnor's conduct.** *In re Rumaker*, 646 F.2d 870 (5th Cir. 1980); *In re Dinnan*, 625 F.2d at 1149; *In re Stewart*, 571 F.2d 958 (5th Cir. 1978). (emphasis supplied)

"If the primary purpose is to punish the contemnor and vindicate the authority of the court, the order is viewed as criminal." *F.D.I.C. v. LeGrand* 43 F.3d 163, 168 (5th Cir. 1995). The case

cited by the Receiver, *American Airlines, Inc. v. Allied Pilots Ass'n* 968 F.2d 923 (5th Cir. 1992) was a **criminal contempt** action complaining of “past conduct” (submitting false records to the district court similar to the instant case) which the court stated “is not subject to coercive civil sanctions”. The criminal contempt convictions portion of the district court’s holdings were reversed by the Fifth Circuit for not having an independent prosecutor to present the case; that the judge could not be both prosecutor and judge, citing *In re Davidson*, 908 F.2d 1249, 1251 (5th Cir. 1990). Other cases cited by the Receiver are inapposite as well. The case of *SEC v. AMX Int’l, Inc.*, 7 F.3d 71 (5th Cir. 1993) dealt only with a disgorgement order which can be the subject of a civil coercive sanction to compel compliance. In the instant case, as in *American Airlines, supra*, the sanction sought is purely punishment for past conduct. The case cited on page 8 of the Receiver’s Motion, *Santibanez v. Wier McMahon & Co.*, 105 F.3d 234 (5th Cir. 1997) involved both civil and criminal contempt sanctions, however, **the criminal contempt part of the district court’s order was not appealed.** The Court stated, “The 30-day jail sentence, although arguably a criminal contempt for past conduct, is not before us because Thompson did not appeal that portion of the order.” The case of *Lamar Financial, supra*, is instructive in other particulars. This case involved a contempt matter for non-production of records where both coercive and punitive sanctions were imposed by the district court. The contemnor was ordered incarcerated until he produced the records involved to the FDIC and on the same day he produced the records, mooting the civil coercive sanction. However, the district court also ordered as a sanction the payment into the registry of the court the amount of \$10,500. This sanction the Fifth Circuit characterized as criminal in nature since it had a purely punitive nature for past conduct in not producing the records to begin with. This sanction was vacated by

the Fifth Circuit in that the procedural safeguards relating to criminal contempt proceedings were not complied with by the district court.

While it is clear that a district court has the power to issue a criminal contempt sanction for the refusal to comply with a court order,¹ procedures are mandated which protect the contemnor's constitutional rights. *United States v. Rizzo*, 539 F.2d at 463. One such provision is that the contemnor must be given notice that the proceedings are of a criminal nature. Fed.R.Crim.P. 42(b);² *United States v. Rizzo*, 539 F.2d at 463-64. Typically this notice must be explicit. *F.T.C. v. Gladstone*, 450 F.2d 913 (5th Cir. 1971). The Adamases were not given specific notice that the proceeding was a criminal proceeding. The punitive sanction, accordingly, was inappropriate. We must therefore vacate that portion of the sanction attributable to the period from February 22 to March 6 hearing.

There has been no such notice provided in the instant case. In the *LeGrand* case, *supra*, the sanctions imposed for non-production of tax returns to the FDIC and payment of attorney's fees were both civil and criminal in nature. The district court ordered Mr. Roughton, the contemnor, taken into custody for 72 hours *and* until he produced the tax returns. Mr. Roughton produced the records and paid the attorneys fees the same day of the order and was released from custody. The 72 hours custody portion of the order the Fifth Circuit held was punitive in nature, therefore amounted to criminal contempt. That portion of the order was vacated. The Court stated,

The Show Cause Order does not reflect that a criminal proceeding would be conducted. Rule 42(b) of the Federal Rules of Criminal Procedure provides in relevant part:

A criminal contempt ... shall be prosecuted on notice. The notice shall state the place and time of hearing, ... and shall state the essential facts constituting the criminal contempt charged *and describe it as such*. (Emphasis added.)

¹ "A court of the United States shall have the power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as ... [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command." 18 U.S.C. § 401.

² "A criminal contempt ... shall be prosecuted on notice. The notice shall state ... the essential facts constituting the criminal contempt charged and describe it as such." Fed.R.Crim.P. 42(b).

[14] Because the offending conduct could have been eliminated by coercive civil sanctions, notice was required if this was to be a criminal contempt proceeding. *American Airlines, supra*. Because the Order to Show Cause did not describe the proceeding as a criminal contempt proceeding, the notice requirement of F.R.C.P. 42(b) was not followed, and Roughton's due process rights were violated. *Richmond Black Police Officers v. City of Richmond, Va.*, 548 F.2d 123, 127 (4th Cir. 1977). Moreover, no independent prosecutor was appointed, which is another procedural defect.³

6. In the instant case no notice has been given to the Starks that the proceedings on this Show Cause Order would be seeking criminal contempt findings against them. Also, the Motion filed by the Receiver herein characterized the pleading as seeking civil sanctions only when the contents of the pleading are requesting that the Starks be punished for past acts in allegedly violating preliminary orders of the court. Also, there has been no independent prosecutor appointed by the court.


7. Findings in a criminal contempt proceeding must be by the "beyond a reasonable doubt" standard. *United States v. Columbia Broadcasting System, Inc.* 497 F.2d 107 (5th Cir. 1974), *United States v. Rizzo, supra*. Punishment for such a conviction may also include incarceration for a period of time in excess of one year. *United States v. Lach*, 874 F.2d 1543 (11th Cir. 1989) (sentence of 42 months imprisonment on 2 counts of criminal contempt). The length of sentence for contempt of court lies in the sound discretion of the trial court. *United States v. Seavers*, 472 F.2d 607 (6th Cir. 1973). The Fifth Circuit has also classified a conviction for criminal contempt as an "aggravated felony" for deportation purposes when it related to an obstruction of justice type factual situation. *Alwan v. Ashcroft*, 388 F.3d 507 (5th Cir. 2004). Title 18, United States Code, Section 3401 limits the authority of a United States Magistrate

³ In a Rule 42(b) criminal contempt proceeding, the judge may not prosecute the contempt and at the same time act as judge. To do so deprives the defendant of an impartial decisionmaker. *American Airlines, supra*, 968 F.2d at 531.

Judge to try criminal matters to misdemeanor offenses which would preclude the trial of a criminal contempt matter where the possible sentence could exceed one year confinement. Further, if confinement in excess of six months is possible, a jury trial is required. *United States v. Marshall*, 371 F.2d 42 (2nd Cir. 2004). "As the government concedes, a defendant has a right to a jury trial before being sentenced to a prison term of more than six months for criminal contempt." *Id.* p.48

Wherefore, since it is clear that the Receiver is seeking punitive sanctions against the Starks for past conduct in allegedly violating portions of prior court orders in this matter for which coercive civil sanctions do not apply, the procedural safeguards relating to criminal contempt hearings have not been complied with, and for the additional reasons set out herein relating to the magistrate's statutory authority to try criminal contempt matters and the constitutional right of Defendants Sardaukar Holdings, Bradley Stark and Pamela Stark to a trial by jury, it is respectfully requested that this Show Cause Order be vacated.

Respectfully submitted,

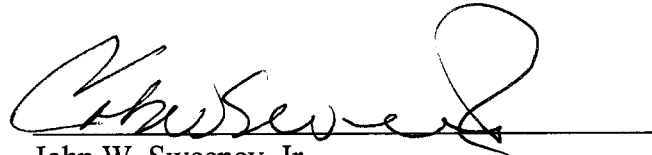
By: 
John W. Sweeney, Jr.
State Bar No. 19570500
Charles M. Meadows, Jr.
State Bar No. 13886700

MEADOWS, OWENS, COLLIER, REED,
COUSINS & BLAU, L.L.P.
901 Main Street, Suite 3700
Dallas, Texas 75202
(214) 744-3700 Telephone
(214) 747-3732 Facsimile

ATTORNEYS FOR DEFENDANT
BRADLEY C. STARK and
RELIEF DEFENDANT PAMELA C. STARK

CERTIFICATE OF CONFERENCE

I hereby certify that on August 4, 2006, I conferred with Michael Quilling, the Receiver, concerning the foregoing pleading. Mr. Quilling stated that he was opposed to the granting of this Motion.



John W. Sweeney, Jr.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document was served on all counsel of record in accordance with the Federal Rules of Criminal Procedure on the 24th day of August, 2006, via the method specified below:

Steve J. Korotash
U.S. Securities & Exchange Commission
Fort Worth Regional Office
801 Cherry Street, Suite 1900
Fort Worth, TX 76102
ATTORNEY FOR SECURITIES
and EXCHANGE COMMISSION

VIA REGULAR U.S. MAIL

Eric Werner
U.S. Securities & Exchange Commission
Fort Worth Regional Office
801 Cherry Street, Suite 1900
Fort Worth, TX 76102
ATTORNEY FOR SECURITIES and
EXCHANGE COMMISSION

VIA REGULAR U.S. MAIL

Stephen Webster
U.S. Securities & Exchange Commission
Fort Worth Regional Office
801 Cherry Street, Suite 1900
Fort Worth, TX 76102
ATTORNEY FOR SECURITIES and
EXCHANGE COMMISSION

VIA REGULAR U.S. MAIL

Scott Russell Baker
Law Office of Scott R. Baker
10830 N. Central Expressway
Suite 475, LB 4
Dallas, TX 75231-1050
ATTORNEY FOR STANLEY A. LEITNER

VIA REGULAR U.S. MAIL

Steven M. Smoot
Smoot Law Firm
4545 Mt. Vernon
Houston, TX 77006
ATTORNEY FOR CIG, LTD. and
JAMES A. RUMPF

VIA REGULAR U.S. MAIL

Philip D. Collins
Philip D. Collins & Associates
2626 Cole Avenue, Suite 510
Dallas, TX 75204
ATTORNEY FOR CIG, LTD. and
JAMES A. RUMPF

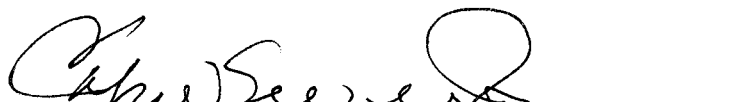
VIA REGULAR U.S. MAIL

Michael J. Quilling
Quilling Selander Cumiskey &
Lownds
2001 Bryan Tower
Suite 1800
Dallas, TX 75201
RECEIVER

VIA REGULAR U.S. MAIL

Brent Jason Rodine
Clark B. Will
D. Dee Raibourn, III
Quilling Selander Cumiskey &
Lownds
2001 Bryan Tower
Suite 1800
Dallas, TX 75201
RECEIVER

VIA REGULAR U.S. MAIL



John W. Sweeney, Jr.

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