



2. The Receiver's investigation has revealed that Stark operated a *Ponzi* scheme and fraudulent investment program through Sardaukar, an entity under his sole direction and control. *Id.* at ¶ 6 (App. at 6). In fact, Sardaukar's own bank records clearly establish that: (1) investor funds constituted virtually all of Sardaukar's revenue; (2) those funds were commingled and used for expenses not related to any legitimate investment; and (3) any investment "returns" to earlier contributors were actually *Ponzi* payments from the commingled funds of later contributors. *Id.*; *Summary of Sardaukar's Account at JPMorgan Chase*, Exhibit "A-1" [Dkt. No. 25] (App. at 14, 16). These records show that, as Sardaukar received investor funds, Stark systematically diverted large sums to support an extravagant lifestyle and to personally benefit himself, his friends, and his family. *Receiver's Declaration*, Exhibit "A" [Dkt. No. 25] at ¶ 7 (App. at 6-7).

3. On August 27, 2004, Defendant sent a \$50,000.00 cashier's check to Stark's personal account at Bank of America. *See 3D Marketing Cashier's Check*, Exhibit "B" [Dkt. No. 25] (App. at 23); *Brad Stark's Bank of America Account Statement*, Exhibit "C" [Dkt. No. 25] (App. at 25-34). Defendant then sent a second \$50,000.00 check on February 22, 2005 to another Bank of America account held by Sardaukar. *See 3D Marketing Check*, Exhibit "D" [Dkt. No. 25] (App. at 36); *Sardaukar's Bank of America Account Statement*, Exhibit "E" [Dkt. No. 25] (App. at 38-39). Account records show that Stark used those funds on expenses unrelated to any legitimate investment. *See Brad Stark's Bank of America Account Statement*, Exhibit "C" [Dkt. No. 25] (App. at 25-34); *Sardaukar's Bank of America Account Statement*, Exhibit "E" [Dkt. No. 25] (App. at 38-39); *Sardaukar's Bank of America Account Statements*, Exhibit "O" (App. at 4-7).

4. By April of 2005, Stark sent Defendant two transfers totaling \$150,000.00 from

investor funds that were commingled in Sardaukar's JPMorgan Chase Bank account. *See Summary of Sardaukar's Account at JPMorgan Chase*, Exhibit "A-1" [Dkt. No. 25] (App. at 14, 16).

## II. ARGUMENTS AND ANALYSIS

### A. The Defendant's Motion for Summary Judgment Addresses Facts that Are Not Material to the Receiver's Claims.

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Defendant's Motion for Summary Judgment primarily relies on exhibits that are unrelated to any elements of the Receiver's claims for fraudulent transfer or constructive trust and disgorgement. To prevail on summary judgment, however, Defendant must show that "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c) (emphasis added). A fact is material only if it relates to the substantive law of the parties' claims for relief. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("the substantive law will identify which facts are material"); *Rogers v. Monumental Life Ins. Co.*, 289 F.3d 442, 448 (6th Cir. 2002).

Both parties acknowledge that the substantive elements supporting the Receiver's claim for fraudulent transfer are set forth in § 24.005(a)(1) of the Texas Uniform Fraudulent Transfer Act ("UFTA"). *See Defendant's Summary Judgment Brief* [Dkt. No. 28] at 4. In relevant part, the UFTA provides that:

- (a) A transfer made or obligation incurred by a debtor is fraudulent . . . if the debtor made the transfer or incurred the obligation:
  - (1) with actual intent to hinder, delay, or defraud any creditor of the debtor . . .

Tex. Bus. & Com. C. § 24.005.<sup>2</sup> While creditors must ordinarily prove fraudulent intent in order to

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<sup>2</sup> The parties also agree that the California Uniform Fraudulent Transfer Act contains the same provisions. *See Cal. Civ. C. § 3439 et seq.; Defendant's Summary Judgment Brief* [Dkt. No. 28] at 4.

recover under this provision of the UFTA, that element is automatically established for transfers out of a *Ponzi* scheme. *Quilling v. Gilliland*, Civil Cause No. 3:01-CV-1617 (N.D. Tex. Mar. 6, 2002); *S.E.C. v. Cook*, 2001 WL 256172, \*3 (N.D. Tex. Mar. 8, 2001); *see also, In re Ramirez Rodriguez*, 209 B .R. 424, 434 (Bankr. S.D. Tex.1997); *In re Independent Clearing House Co.*, 77 B.R. 843 (Bankr. D. Utah 1987).

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Therefore, the only facts material to the Receiver's fraudulent transfer claim relate to (1) whether Sardaukar made a transfer of funds and (2) whether Sardaukar was operated as a *Ponzi* scheme. All other facts are extraneous and should be disregarded when ruling on summary judgment. *Anderson*, 477 U.S. at 248 ("irrelevant or unnecessary" factual disputes are not to be considered), *citing* 10A Wright & Miller, FED. PRAC. & PROC. § 2725 at 93-95 (1983). Defendant goes to great lengths describing its loan agreement with L.B. Charitable Trust and its belief that earlier contributions to Brad Stark's Bank of America accounts justified keeping the \$150,000.00 of commingled investor funds from Sardaukar's JPMorgan Chase account. *See 3D Marketing Cashier's Check*, Exhibit "B" [Dkt. No. 25] (App. at 23); *Brad Stark's Bank of America Account Statement*, Exhibit "C" [Dkt. No. 25] (App. at 25); *3D Marketing Check*, Exhibit "D" [Dkt. No. 25] (App. at 36); *Sardaukar's Bank of America Account Statement*, Exhibit "E" [Dkt. No. 25] (App. at 38); *Declaration of Dean Steeves*, Exhibit "L" [Dkt. No. 29] (App. at 56-57); *Declaration of Tim Ortega*, Exhibit "M" [Dkt. No. 29] (App. at 64-65). Those facts, however, do not challenge either element of the Receiver's claim or assert a recognized defense under the UFTA. Instead, Defendant simply offers immaterial testimony that cannot support a summary judgment ruling in its favor.

**B. When Viewed in Light Most Favorable to the Receiver, the Undisputed Material Facts Do Not Support Summary Judgment for the Defendant.**

**1. Defendant Offers No Competent Evidence Challenging the Ponzi Scheme's Existence.**

The Receiver has already submitted his declaration explaining why the *Ponzi* scheme is self-evident from Sardaukar's account records. *Receiver's Declaration*, Exhibit "A" [Dkt. No. 25] at ¶¶ 6-7 (App. at 6-7); *Summary of Sardaukar's Account at JPMorgan Chase*, Exhibit "A-1" [Dkt. No. 25] (App. at 9-21). Those account records conclusively show that: (1) investor funds constituted virtually all of Sardaukar's revenue; (2) those funds were commingled and used for expenses not related to legitimate investments; and (3) what funds remained were commingled and used to pay "returns" to earlier investors. *Receiver's Declaration*, Exhibit "A" [Dkt. No. 25] at ¶ 6 (App. at 6). Without question, this constitutes a classic *Ponzi* scheme and the Court may enter summary judgment on that issue. Black's Law Dictionary 1180 (7th ed.); *see, e.g., Quilling v. Gilliland*, Cause No. 3:01-CV-1617 (N.D. Tex. Mar. 6, 2002) (establishing a *Ponzi* scheme through summary judgment in an ancillary proceeding).

Defendant has not disputed these records or challenged their truthfulness. Instead, it simply states that the *Ponzi* scheme "has been denied by 3D Marketing in its Answer." *Defendant's Summary Judgment Brief* [Dkt. No. 28] at 4. This, however, is not competent evidence for purposes of summary judgment. *See* Fed. R. Civ. P. 56(e) (parties must offer affidavits or other sworn testimony and may not rest upon their pleadings).

Defendant is also mistaken in stating that the Receiver must offer "opinion and expert testimony" to establish the *Ponzi* scheme's existence. *Defendant's Summary Judgment Brief* [Dkt.

No. 28] at 4. The *Ponzi* scheme is self-evident from Sardaukar's account records and this Court has twice relied on those records in making its own determination that Sardaukar was operated as a *Ponzi* scheme. See *Quilling v. Tschebaum*, Cause No. 3:05-CV-1465 (N.D. Tex. Jul. 21, 2006); *Quilling v. Schonsky*, Cause No. 3:05-CV-2122 (N.D. Tex. Dec. 19, 2006).

Finally, Defendant attempts to disprove the *Ponzi* scheme by broadly incorporating all pleadings and evidence from the Defendants' Response Brief in *Quilling v. Stark*, Cause No. 3:05-CV-1976 (N.D. Tex.). Summary judgment evidence, however, must be specific and include citations to the particular fact or statement on which the Defendant relies. See Local Civil Rule 56.3(a)(3); *Amnesty Am. v. Town of West Hartford*, 288 F.3d 467, 470-71 (2d Cir. 2002) (requiring "specific record citations" to the supporting evidence). Unexplained general references to other pleadings will not support a finding of summary judgment. *Southern Gas Co. v. City of Santa Ana*, 336 F.3d 885, 896 (9th Cir. 2003).<sup>3</sup>

In short, Defendant offers no competent evidence challenging the *Ponzi* scheme's existence and fails to show why a reasonable jury would necessarily agree with Defendant on that issue. Since this is the only material fact that Defendant raises in its Motion for Summary Judgment, it should be denied on that ground alone.

**2. Defendant Admits Receiving the \$150,000.00 that Brad Stark Transferred from the Commingled Funds of Sardaukar Investors.**

Bank records clearly show that Defendant received \$150,000.00 from the commingled funds of Sardaukar investors. See *Summary of Sardaukar's Account at JPMorgan Chase*, Exhibit "A-1"

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<sup>3</sup> Even if this Court does permit Defendant to broadly incorporate all of John and Barbara Stark's Response Brief, that evidence should be disregarded as speculative and unfounded for the reasons stated in the Receiver's Reply Brief in that case. See *Receiver's Reply Brief* [Dkt. No. 46] (3:05-CV-1976) at 3-4.

[Dkt. No. 25] (App. at 14, 16). Defendant admits that those transfers occurred and their source, dates, and amounts are not in dispute. *See Declaration of Dean Steeves* [Dkt. No. 29], Exhibit “L” (App. at 60-61). The Receiver submits that these facts further support his fraudulent transfer claim and, therefore, Defendant’s motion should be denied.

**3. Defendant Disregards All Evidence Showing that the \$150,000.00 Transfer was Impressed with a Constructive Trust.**

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Despite the requirements of Local Civil Rule 56.3, Defendant fails to set out any elements or legal authorities relating to the Receiver’s constructive trust and disgorgement claim.<sup>4</sup> The Receiver submits that a constructive trust arises at the moment investor funds are paid into a fraudulent investment scheme. *See United States v. Fontana*, 528 F.Supp. 137, 146 (S.D.N.Y. 1981) (“Where the title to property is acquired by one person under such circumstances that he is under a duty to surrender it, a constructive trust immediately arises”), *quoting* 5 A. Scott, LAW OF TRUSTS § 462.4 (3d ed. 1967). As explained above, account records show that Defendant received \$150,000.00 from investor funds commingled in Sardaukar’s JPMorgan Chase account. *See Summary of Sardaukar’s Account at JPMorgan Chase*, Exhibit “A-1” [Dkt. No. 25] (App. at 14, 16). Those funds were impressed with a constructive trust at the moment they arrived in Sardaukar’s account and the trust remained in place from that point forward. The fact that Defendant may have made unrelated deposits in Brad Stark’s Bank of America accounts does not dissolve the investors’ constructive trust or give Defendant a superior claim to those funds. Equity demands that the full

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<sup>4</sup> Instead, Defendant’s motion simply asserts that “in light of the fact that there is no fraudulent transfer, there can be no claim for a constructive trust or disgorgement . . .” *Defendant’s Motion for Summary Judgment* [Dkt. No. 27] at 4.

\$150,000.00 be disgorged and returned to the constructive trust's beneficiaries.<sup>5</sup>

### III. CONCLUSION

In short, Defendant cannot show that it is entitled to summary judgment on the material facts when viewed in light most favorable to the Receiver. Even though the material facts are undisputed in this case, Defendant's motion cites no legal authority showing that it will prevail on those facts. To the contrary, the Receiver has offered uncontroverted evidence to support every element of his claims. Accordingly, a reasonable jury can—and should—find that Sardaukar fraudulently transferred \$150,000.00 of investor funds to Defendant and that those funds were at all time imposed with a constructive trust.

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<sup>5</sup> Equitable disgorgement would still leave Defendant and L.B. Charitable Trust with a remedy to recover funds that they purportedly contributed to Brad Stark—they could file investor claim forms with the Receiver that fully document all payments to and from Stark and Sardaukar.



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### CERTIFICATE OF SERVICE

On the 22nd day of December, 2006 a true and correct copy of this pleading was sent to the following through the Court's electronic filing system:

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