

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF TEXAS
 DALLAS DIVISION

MICHAEL J. QUILLING, Receiver for	§	
SARDAUKAR HOLDINGS, IBC and	§	
BRADLEY C. STARK,	§	
	§	
Plaintiff,	§	CIVIL ACTION NO. 3:06-CV-0293-L (BD)
	§	
v.	§	ECF
	§	
3D MARKETING LLC,	§	Referred to U.S. Magistrate Judge
	§	
Defendant.	§	

**REPLY BRIEF SUPPORTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

Michael J. Quilling, as Receiver for Sardaukar Holdings IBC and Bradley C. Stark, ("Plaintiff" or "Receiver") files this his Reply Brief Supporting Plaintiff's Motion for Summary Judgment, in accordance with this Court's Order of November 20, 2006 [Dkt. No. 26], and would respectfully show the Court as follows:

**I.
 INTRODUCTION**

Defendant's Response Brief [Dkt. No. 31] fails to raise a disputed issue of material fact precluding summary judgment in this case. 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). With respect to the Receiver's fraudulent transfer claim, the only material facts are those that relate to (1) whether Sardaukar was operated as a *Ponzi* scheme and (2) whether Sardaukar transferred \$150,000.00 of investor funds to Defendant. *See* Tex. Bus. & Com.

C. § 24.005(a)(1). The Receiver has presented bank records, his declaration, and the Defendant's own admissions as undisputed material facts supporting those elements. *See Brief in Support of Plaintiff's Motion for Summary Judgment* [Dkt. No. 24]; *Appendix to Brief in Support of Plaintiff's Motion for Summary Judgment* [Dkt. No. 25]. Defendant has not challenged the substance of those exhibits or presented an affirmative defense recognized under the Uniform Fraudulent Transfer Act. Furthermore, Defendant's Response Brief completely ignores all case law and evidence supporting the Receiver's claim for constructive trust and disgorgement. Accordingly, as explained more fully below, this case is ripe for summary judgment on the undisputed material facts.

II. ARGUMENTS AND ANALYSIS

A. Defendant's Response Brief Addresses Facts that Are Not Material to the Receiver's Claims.

Defendant's Response Brief [Dkt. No. 31] primarily relies on exhibits that are unrelated to any element of the Receiver's claims for fraudulent transfer or constructive trust and disgorgement. To avoid summary judgment, Defendant must show that there exists a genuine issue of material fact. Fed. R. Civ. P. 56(c). 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").¹ 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. § 24.005.² While creditors must ordinarily prove fraudulent intent in order to 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).

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. Other facts briefed by the Defendant 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). In particular, Defendant's Response Brief offers three exhibits describing a purported loan agreement with L.B. Charitable Trust and claiming that earlier contributions to Brad Stark's Bank of America accounts justified keeping \$150,000.00 of commingled investor funds from Sardaukar's JPMorgan

¹ Defendant's Response Brief completely ignores the Receiver's claim for constructive trust and disgorgement. The substantive law and material facts related to that claim are discussed more fully below in Section B(3).

² The parties 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.

Chase account. *See Declaration of Dean Steeves*, Exhibit “L” [Dkt. No. 32] (App. at 56-57); *Declaration of Tim Ortega*, Exhibit “M” [Dkt. No. 32] (App. at 64-65); *Declaration of Sharon Judith Riebman*, Exhibit “P” [Dkt. No. 32] (App. at 91-92); *see also 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). Those facts, however, do not constitute a defense recognized by the UFTA and are, therefore, immaterial to the Receiver’s claims.³

B. The Undisputed Material Facts Support Summary Judgment on the Receiver’s Fraudulent Transfer Claim.

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

³ Defendant’s Response Brief also includes two other exhibits—Exhibits “N” and “O”—that should be disregarded because Defendant fails to explain how they relate to any fact at issue in this case. *See Southern Gas Co. v. City of Santa Ana*, 336 F.3d 885, 896 (9th Cir. 2003) (unexplained general references are not competent summary judgment evidence); *Amnesty Am. v. Town of West Hartford*, 288 F.3d 467, 470-71 (2d Cir. 2002) (“Rule 56 does not impose an obligation on a district court to perform an independent review of the record to find proof of a factual dispute”).

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's Response Brief does not dispute the substance of those records or challenge their truthfulness. Instead, it simply states that Defendant has "contested [that] allegation in its Answer." *Defendant's Response Brief* [Dkt. No. 31] 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 an expert witness to establish the *Ponzi* scheme's existence. *Defendant's Response Brief* [Dkt. No. 31] at 4. The *Ponzi* scheme is self-evident from the summary of 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.⁴ *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 prevent summary judgment 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.). *See Defendant's Response* [Dkt. No. 30] at ¶ 5. 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

⁴ Defendant mistakenly suggests that the account summary attached to the Receiver's Declaration is hearsay. *See Defendant's Response Brief* [Dkt. No. 31] at 31. That summary, however, is not an out-of-court statement but rather part of the sworn testimony that the Receiver and his accountant prepared in anticipation for this and other related lawsuits. *See* Fed. R. Evid. 801(a), (c) (stating that written assertions set forth in the testimony of a declarant are not hearsay); *Receiver's Declaration*, Exhibit "A" [Dkt. No. 25] at ¶ 6 (App. at 6) (authenticating and incorporating the account summary as subpart 1 of the Receiver's testimony). Defendant has had a copy of the account summary since October 3, 2006 and has not yet raised any challenge to the accuracy of that document or the underlying Receivership Records.

F.3d 467, 470-71 (2d Cir. 2002) (requiring “specific record citations” to the supporting evidence). Defendant’s unexplained general reference to other pleadings is not adequate evidence for opposing summary judgment. *See Southern Gas Co. v. City of Santa Ana*, 336 F.3d 885, 896 (9th Cir. 2003).⁵

In short, Defendant offers no competent evidence challenging the *Ponzi* scheme’s existence. Since this is the only material fact that Defendant addresses in its Response Brief, the Receiver’s Motion for Summary Judgment should be granted 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” [Dkt. No. 25] (App. at 14, 16). Defendant admits that those transfers occurred and their source, dates, and amounts are not in dispute. *See, e.g., Declaration of Dean Steeves* [Dkt. No. 32], Exhibit “L” (App. at 56-57). The Receiver submits that these facts further support his fraudulent transfer claim and, therefore, summary judgment is appropriate in this case.

3. Defendant Has Not Challenged the Receiver’s Evidence Showing that the \$150,000.00 Transfer was Impressed with a Constructive Trust.

Despite the requirements of Local Civil Rule 56.4, Defendant fails to set out any elements or legal authorities relating to the Receiver’s constructive trust and disgorgement claim.⁶ The Receiver submits that a constructive trust arises at the moment investor funds are paid into a

⁵ Even if this Court did permit Defendant to “borrow” the entirety 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.

⁶ Defendant’s only statement about the constructive trust and disgorgement claim appears in its Motion for Summary Judgment [Dkt. No. 27]. In it, the Defendant simply concludes 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. It offers no legal or factual basis for this conclusion and has failed to brief the issue entirely.

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 over funds in the JPMorgan Chase account or give Defendant a superior claim to those funds. Equity demands that the full \$150,000.00 be disgorged and returned to the constructive trust’s beneficiaries.⁷

C. The Objections Stated in Defendant’s Response Brief are Unfounded.

Defendant’s Response Brief contains only two paragraphs addressing the substantive issues in this case. *See Defendant’s Reply Brief* [Dkt. No. 31] at 4-5. The rest consists of ten bullet-point “objections” that are unfounded or fail to raise an issue precluding summary judgment. *Id.* at 1-4. Accordingly, Defendant’s objections should be denied or otherwise disregarded in ruling on the Receiver’s Motion for Summary Judgment.

Defendant’s first two objections relate to the Receiver’s factual statements that (1) the SEC has filed suit against Brad Stark and Sardaukar and (2) the Receiver was appointed in those

⁷ 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, under oath, all payments to and from Stark and Sardaukar.

proceedings. *See id.* at 1-2. Those facts (and any citations to the underlying documents) are offered to help explain the Receiver's activities, authority, and personal knowledge of particular facts contained in his Declaration. *See Brief in Support of Plaintiff's Motion for Summary Judgment* [Dkt. No. 24] at 2-3. Obviously, the pleadings themselves were not offered as evidence or for the truth of any matter asserted therein. *Id.* Therefore, the Defendant's objections should be overruled.

The next objection challenges the Receiver's explanation of his activities since being appointed. *Id.* at 2. Defendant, however, admits that "Mr. Quilling is competent to speak to what he did." *Id.* Since this is exactly what appears in the Receiver's declaration, Defendant's objection should be overruled. *See Receiver's Declaration*, Exhibit "A" [Dkt. No. 25] at ¶ 5 (App. at 6).

Defendant next challenges the Receiver's ability to testify about whether Sardaukar was operated as a *Ponzi* scheme. As explained above, the Defendant is mistaken when it claims—without legal authority—that a *Ponzi* scheme can only be established through expert testimony. *See Defendant's Reply Brief* [Dkt. No. 31] at 2. The Receiver's declaration lays out all undisputed facts needed to make that determination. *See Receiver's Declaration*, Exhibit "A" [Dkt. No. 25] at ¶¶ 5-8 (App. at 6-7). Although Defendant claims that the factual predicate is improper, it does not cite any additional facts that the Receiver has failed to address. *See Defendant's Reply Brief* [Dkt. No. 31] at 2. Accordingly, Defendant's objection is without merit and should be overruled.

Defendant also challenges the Receiver's ability to testify that Brad Stark systematically diverted large sums from Sardaukar to personally benefit himself, his friends, and his family. *See id.* The Receiver, however, laid the factual predicate for this statement when describing his investigation into Sardaukar's transactions. *See Receiver's Declaration*, Exhibit "A" [Dkt. No. 25]

at ¶¶ 5-7 (App. at 6-7). Furthermore, that fact is plainly apparent from the summary of Sardaukar's account records—the content of which Defendant does not dispute.

The next four objections merely address semantics and do not present a substantive objection relating to the Receiver's Motion for Summary Judgment. *See Defendant's Reply Brief* [Dkt. No. 31] at 2-4. They should, therefore, be overruled or otherwise disregarded.

Finally, Defendant objects to the Receiver's statement that neither Sardaukar nor its investors received any benefit in exchange for the \$150,000.00 paid to Defendant. *See id.* at 4. The factual predicate for this statement is set forth in the Receiver's Declaration, which expressly incorporates the summary of Sardaukar's JPMorgan Chase account. *See Receiver's Declaration*, Exhibit "A" [Dkt. No. 25] at ¶¶ 6-7 (App. at 6-7). Those account records show that Stark used the JPMorgan Chase account to hold the commingled funds of Sardaukar investors. *See Summary of Sardaukar's Account at JPMorgan Chase*, Exhibit "A-1" [Dkt. No. 25] (App. at 9-21). Defendant did not contribute to this account. *Id.* Instead, Defendant's purported contributions went to Brad Stark's accounts at Bank of America. *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). Stark spent those funds on personal items that did not benefit Sardaukar or its investors. *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" [Dkt. No. 35] (App. at 4-7). To date, these facts remain undisputed and Defendant has offered no evidence to the contrary. Therefore, Defendant's objection should be overruled.

