

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,

v.

3D MARKETING LLC,

Defendant.

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CIVIL ACTION NO. 3:06-CV-0293-L (BD)

ECF

Referred to U.S. Magistrate Judge

**MOTION FOR ENTRY OF JUDGMENT**  
**NUNC PRO TUNC AND BRIEF IN SUPPORT**

TO THE HONORABLE SAM A. LINDSAY, UNITED STATES DISTRICT JUDGE:

COMES NOW, Michael J. Quilling, as Receiver for Sardaukar Holdings IBC and Bradley C. Stark, (“Plaintiff” or “Receiver”) and, pursuant to Fed. R. Civ. P 60(a), files this his Motion for Entry of Judgment Nunc Pro Tunc to correct the Court’s judgment [Dkt. No. 41] entered on March 8, 2007. In support of this motion, the Receiver would respectfully show the Court as follows:

**I.**  
**FACTUAL BACKGROUND**

1. By Order of July 5, 2005, this Court appointed Michael J. Quilling as Receiver for the Defendants and Relief Defendants in *SEC v. Megafund Corporation, et al.* Cause No. 3:05-CV-1328 (N.D. Tex.) (the “SEC Proceedings”). In that capacity, the Receiver filed a Complaint [Dkt. No. 1] against Defendant 3D Marketing, LLC, stating claims for fraudulent transfer and constructive trust and disgorgement. Defendant’s Answer [Dkt. No. 18] denied those claims and stated six affirmative defenses.

2. On November 17, 2006, the Receiver filed his Motion for Summary Judgment [Dkt. No. 23]. The Defendant countered by filing a take-nothing Motion for Summary Judgment on December 7, 2006 [Dkt. No. 27]. After both parties submitted their response and reply briefs, the United States Magistrate Judge issued his Findings and Recommendation [Dkt. No. 37] that the Court should enter summary judgment for the Receiver and against the Defendant for \$150,000.00, along with pre-judgment and post-judgment interest, costs, and reasonable attorneys' fees.

3. On February 14, 2007, Defendant filed objections [Dkt. No. 38] to those findings. The Receiver submitted a reply brief [Dkt. No. 39] on February 20, 2007.

4. On February 28, 2007, this Court entered its Memorandum Opinion and Order [Dkt. No. 40] that (1) overruled the Defendant's objections, (2) accepted the Magistrate Judge's findings as those of the Court, (3) denied the Defendant's take-nothing Motion for Summary Judgment, and (4) granted the Receiver's Motion for Summary Judgment on his claims for fraudulent transfer and constructive trust and disgorgement. That Order awarded \$150,000.00 to the Receiver and imposed a constructive trust on all funds that Sardaukar transferred to the Defendant. It also provided that "[a] final judgment dismissing this case will issue by separate document as required by Fed. R. Civ. P. 58."

5. On March 8, 2007, the Court issued its final judgment [Dkt. No. 41] that confirmed its earlier rulings. In it, the Court again granted all relief on the Receiver's claims but concluded by stating that "this action is dismissed with prejudice." The Receiver submits that this language is overbroad and unintentionally contradicts the final judgment and relief granted to the Receiver on his claims for fraudulent transfer and constructive trust and disgorgement.

6. Therefore, the Receiver respectfully requests that this Court issue a Judgment Nunc Pro Tunc to correct its ruling and avoid any confusion about the disposition of this case.

**II.  
ARGUMENTS AND AUTHORITIES**

The term “dismissed with prejudice,” as it appears in the order of final judgment, conflicts with the Court’s obvious intent to award the Receiver judgment on both of his causes of action. Rule 41(b) of the Federal Rules of Civil Procedure addresses such dismissals entered by the Court:

Unless the Court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule . . . operates as an adjudication upon the merits.

Fed. R. Civ. Proc. 41(b); *see also* 5 MOORE’S FED. PRAC. ¶ 41.11 [2]. (“An action dismissed with prejudice is the equivalent of a dismissal on the merits.”). Res judicata precludes relitigation of claims dismissed with prejudice and, therefore, such dismissals are typically reserved only for sanctionable conduct. *Id.* The Receiver submits that, in this case, the Court clearly intended to enter a judgment on the merits rather than a dismissal on the merits.

The Court may remedy this misstatement by entering a Judgment Nunc Pro Tunc under Rule 60 of the Federal Rules of Civil Procedure. District Courts have the discretion to enter Judgments Nunc Pro Tunc as needed to correct “clerical mistakes” and “errors therein arising from oversight or omission.” Fed. R. Civ. P. 60(a). In its current form, the judgment contains a clerical error or oversight that is clearly inconsistent with the relief awarded to the Receiver. Attached as Exhibit “A” is a proposed Judgment Nunc Pro Tunc that directs the District Court Clerk to list this case as administratively closed—rather than dismissed with prejudice—and affords all other relief granted in the original judgment as it relates to the Receiver’s causes of action.

**III.  
PRAYER FOR RELIEF**

WHEREFORE, PREMISES CONSIDERED, the Receiver respectfully requests that this Court correct the clerical error in its original judgment by entering a Judgment Nunc Pro Tunc and for such other and further relief, general or special, at law or in equity, to which the Receiver may show himself otherwise entitled.

Respectfully submitted,  
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ATTORNEYS FOR PLAINTIFF

**CERTIFICATE OF CONFERENCE**

According to Local Civil Rule 7.1, the undersigned states as follows:

On March 19, 2007, Brent J. Rodine conferred with Stephen C. Schoettmer by telephone. Mr. Schoettmer states that Defendant has no position on the requested relief at this time and reserves the right to oppose it.

/s/ Brent J. Rodine

**CERTIFICATE OF SERVICE**

A copy of this motion will be sent to all interested parties through the Court's electronic filing system.

/s/ Brent J. Rodine