

II. RESPONSE STATEMENT OF MATERIAL FACTS

2. The Receiver has alleged that Sardaukar was run as a *Ponzi* scheme. Defendant denies that Sardaukar was a *Ponzi* scheme, and the Receiver has failed to prove the same upon his motion. The Defendant further denies that he had any knowledge of any fraudulent activity as alleged in the Receiver's Complaint. See Exhibit A, Declaration of Glenn M. Stark.

3. In fact, the monies received by Glenn Stark were not received directly from Sardaukar or any accounts of Sardaukar or Bradley Stark, but by a bank's cashier's check, and Defendant received them in good faith and for reasonably equivalent value.

4. All exhibits are hereby incorporated by this reference for all purposes.

III. RESPONSE ARGUMENTS AND AUTHORITIES

A. Summary Judgment Standard

5. Because the Receiver has moved for summary judgment, he has to overcome a substantial burden to prevail. In all cases "[s]ummary judgment under Rule 56(c) is proper when the moving party satisfies his burden of showing the absence of a genuine issue as to any material fact." *Golden v. Kentile Floors, Inc.*, 475 F.2d 288, 291 (5th Cir. 1973). "To sustain a grant of summary judgment, the pleadings, depositions, admissions, answers to interrogatories, and affidavits must demonstrate the absence of a genuine issue of material fact." *Esmark Apparel, Inc. v. James*, 10 F.3d 1156, 1159 (5th Cir. 1994) citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). See also *Jones v. Western Geophysical Co. of America*, 669 F.2d 280, 283 (5th Cir. 1982) ("Pursuant to Fed.R.Civ.P. 56, summary judgment may be granted only where the entire record, i.e.,

pleadings, depositions, interrogatories, etc., shows that no genuine issue of material fact exists.”).

6. In addition to this burden on the Receiver, the Court must view all evidence presented in the light most favorable to the non-movant, in this case, the Defendant. See *Hall v. Gillman Inc.*, 81 F.3d 35, 37 (5th Cir. 1996) (“summary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmovant, reflects no genuine issues of material fact.”).

7. The Fifth Circuit has held that “[a] fact is material if it might affect the outcome of the suit under the governing law.” *Harken Exploration Co. v. Sphere Drake Ins. PLC*, 261 F.3d 466, 471 (5th Cir. 2001). Also, “[a]n issue is ‘genuine’ if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party.” *Cooper Tire & Rubber Co. v. Farese*, 423 F.3d 446, 454 (5th Cir. 2005) citing *Hamilton v. Segue Software Inc.*, 232 F.3d 473, 477 (5th Cir. 2000). However, “[t]he trial court has no duty to decide factual issues, only whether there is an issue of fact to be tried.” *Jones v. Western Geophysical Co. of America*, 669 F.2d 280, 283 (5th Cir. 1982) (quoting *Foster v. Swift & Co.*, 615 F.2d 701, 702 (5th Cir. 1980)).

8. Therefore, in order to move for summary judgment, there must be no dispute over material facts. See *Gauck v. Meleski*, 346 F.2d 433, 435 (5th Cir. 1965) (“The summary judgment procedure may not be invoked where there is a bona fide factual dispute between the parties”). More specifically “[d]isputed facts preclude summary judgment if the evidence would allow a reasonable jury to return a verdict for the non-movant.” *McAllister v. Resolution Trust Corp.*, 201 F.3d 570, 574 (5th Cir. 2000).

9. In short, the Receiver has the burden to show that there is no bona fide dispute of material fact in order to prevail on his motion for summary judgment. For the reasons set forth below, the Receiver cannot meet this burden because there remain bona fide disputes of material fact for which a reasonable jury could find for the Defendants. The Receiver has not shown that there is no issue for the trial court to decide.

B. The Receiver Cannot Show that Sardaukar was a Ponzi Scheme

10. The Receiver alleges that Sardaukar was a *Ponzi* Scheme; however, this is not a factual allegation, but rather a legal conclusion by the Receiver. While the Receiver purports to point to evidence of a *Ponzi* scheme, there is no undisputed evidence to establish this opinion.¹

11. The Receiver's allegation that Sardaukar is a *Ponzi* scheme is simply his opinion of the meaning of the purported (and disputed) facts. In addition to disagreeing with the facts and the conclusion of the Receiver, the Defendants point out that "...if opinion evidence is relevant, then the case is simply not one to be determined on motion for summary judgment." *Elliott v. Massachusetts Mut. Life Ins. Co.*, 388 F.2d 362 (5th Cir. 1968).

12. The very linchpin of the Receiver's argument is that Sardaukar was a *Ponzi* scheme. Without being able to show the existence of a *Ponzi* scheme, however, the

¹ The Receiver also points to rulings in other cases; however, those cases did not involve this Defendant and I have not had an opportunity to respond thereto. Lack of constitutional due process should prevent their application to this case. In effect, the Receiver, in this action, is attempting to adjudge a third party (Bradley Stark) as being guilty of running a *Ponzi* scheme. This amounts to a declaratory judgment against a person who is not a party to this action. It is not appropriate for the Receiver to seek a judgment of liability against a third party in this way. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (stating generally that party is not bound by a judgment in personam in a litigation in which he is not designated as a party or as to which he has not been made a party by service of process); *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 248 (1998) citing *Bacon v. Walden*, 186 Mich. 139, 144, 152 N.W. 1061, 1063 (1915) ("Defendant was not a party to [the prior injunctive] suit and was not as a matter of law affected or bound by the decree rendered in it").

Receiver has no other basis to claim that the Defendant was involved with any fraudulent transfer. The Receiver simply presupposes the existence of a *Ponzi* scheme and uses this assumption as the basis for his argument.

13. Even the Receiver's own evidence, taken in the light most favorable to the Defendant, does not establish the existence of a *Ponzi* scheme. The Receiver's purported "Statement of Undisputed Material Facts" is overpopulated with statements that are neither facts nor undisputed. Some examples include legal conclusions that there was a "fraudulent investment program" and unsupported allegations of purported promises and "squandering." See Receiver Brief at ¶ 1.

14. The Receiver's Brief at ¶ 4 says only that investor funds constituted "virtually" all of Sardaukar's revenue, and that those funds were commingled with others. Thus, the Receiver's brief and evidence fail to give any definitive indication of a *Ponzi* scheme, especially taken in the light most favorable to the Defendant. Again, the Receiver has simply made a legal conclusion based on alleged facts which must be taken in the light most favorable to the Defendant. If the Receiver is basing his allegation that a *Ponzi* scheme existed on his opinion of the facts, then summary judgment is not appropriate. If the Receiver is simply attempting to infer the existence of a *Ponzi* scheme to the Court, then the receiver has not overcome his burden of showing that there is no bona fide dispute as to material facts, and again, summary judgment is not appropriate because the intent and existence of a *Ponzi* scheme are the material facts to the Receiver's case, and these facts and others are subject to bona fide disputes.

C. The Funds Transferred are Not Fraudulent Transfers Under the Texas Business and Commerce Code's Uniform Fraudulent Transfers Act

15. Section 24.009 of the Uniform Fraudulent Transfers Act reads as follows:

A transfer or obligation is not voidable under Section 24.005(a)(1) of this code against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

Tex. Bus. & Com. Code §24.009

16. As stated herein and in the attached Exhibit A, the funds were received in good faith and for reasonably equivalent value.

17. Defendant also was not the immediate transferee of the funds alleged to come from Sardaukar. The \$87,280.00 was received by a cashier's check, not directly from any accounts of Sardaukar or Bradley Stark. Section 24.009 of the Uniform Fraudulent Transfers Act reads in relevant part "A transfer or obligation is not voidable under Section 24.005(a)(1) of this code...against any subsequent transferee or obligee." Even assuming *arguendo* that Sardaukar originally provided the money in question, and further assuming *arguendo* that Sardaukar was a *Ponzi* scheme, Section 24.009 relieves me of any liability as taking from a subsequent transferee.

18. Because the Receiver has provided no evidence at all of any intent to defraud, and because the Receiver cannot meet his burden to show that the existence of a *Ponzi* scheme is not subject to a bona fide dispute, the Receiver simply cannot prevail in a motion for summary judgment against the Defendant.

D. The Defendant's Good-Faith Acceptance for Reasonably Equivalent Value Raises Issues of Material Facts

19. The Receiver's MSJ infers that the Defendant did not take the funds in good faith and for reasonably equivalent value. The Receiver appears to allege that the

transfers would not fall under the protection of Tex. Bus. & Com. Code §24.009. Any such allegation would not be accurate, and to address any such allegation, the Defendant herein show that there is a dispute of the facts which the Receiver uses as a basis for his inference.

i. The Funds Were Exchanged for Reasonably Equivalent Value

20. The transfers at issue in this case constitute repayment of loans Defendant personally gave to Bradley Stark prior to repayment. The \$87,280.00 Defendant received did not include any interest or penalty payment; it was merely repayment of principal.

21. The Receiver has presented no evidence that Defendant's prior loan was not reasonably equivalent value for the payment Defendant received. The absence of any evidence presented by the Receiver to show that these funds were not exchanged for reasonably equivalent value shows, at a minimum, that there is a bona fide dispute of material fact.

ii. The Defendant took the Funds in Good Faith

22. In addition to receiving the funds in exchange for reasonably equivalent value, the Defendant took the funds in good faith. The Defendant had (and has) no knowledge of any alleged attempts by Bradley Stark to defraud any creditors. See Exhibit A. Even assuming *arguendo* that Bradley Stark had been operating a *Ponzi* scheme, it is still necessary for the Receiver to show that the Defendant had knowledge of any alleged *Ponzi* scheme or any other alleged fraud. See *Texas Life Ins. Co. v. Goldberg*, 184 S.W.2d 333 (Tex. Civ. App.-Waco Dec 07, 1944) ("...incumbent on [plaintiff] to establish by evidence and secure a finding not only that [the father] executed

the deed to his son with intent to hinder, delay and defraud his creditors but that his son had notice of such intent.”).

23. As stated in the attached Declaration of Glenn M. Stark, all the funds that the Receiver now wishes to avoid were taken in good faith. See Exhibit A hereto. The Receiver has not shown that any *Ponzi* scheme existed, nor has he shown that the Defendant had any knowledge of any fraudulent activity on the part of Sardaukar. Indeed, given the implied allegations that dozens if not hundreds of parties were defrauded prior to suit, the Receiver’s own evidence lacks the dozens or hundreds of affidavits of any of the allegedly defrauded investors. In short, the Receiver has not provided any evidence that the Defendant did not take the funds in good faith.

24. Taken in the light most favorable to the Defendant, the evidence provided by the Receiver and provided by the Defendant, at the very least, creates a bona fide dispute of a material fact. In reality, the Receiver has shown no evidence, whatsoever that the Defendant had any knowledge of an alleged *Ponzi* scheme. The Receiver has not yet met his burden to show the existence of a *Ponzi* scheme in the first instance; however, the Defendant also has shown that Defendant took the funds in good faith and for reasonably equivalent value as further evidence that many material facts alleged by the Receiver are, at a minimum, subject to a bona fide dispute, and there clearly are issues for trial.

IV. CONCLUSION

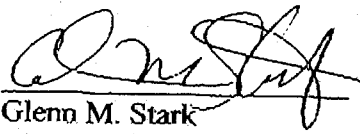
25. For the reasons set forth above, the Receiver is not entitled to summary judgment. The Defendant has shown that the existence or non-existence of a *Ponzi*

scheme is a disputed material fact in this case, and that Defendant took by subsequent transferee and for reasonably equivalent value and in good faith.

26. For all of these reasons, the Receiver's motion for summary judgment should be denied.

Dated March 28, 2007

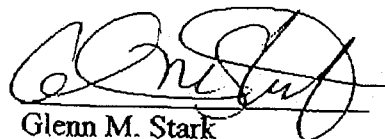
Respectfully Submitted,



Glenn M. Stark
In Propria Personam

CERTIFICATE OF SERVICE

I certify that on March 28, 2007 a true and correct copy of the foregoing was served via regular mail to counsel for the Plaintiff at the address below.



Glenn M. Stark

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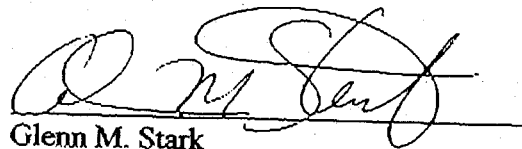
COUNSEL FOR THE PLAINTIFF

which money was taken in good faith by me from the offering bank, not from Sardaukar or from Brad Stark.

4. The transfer at issue in this case constituted repayment of loans I personally gave to Bradley Stark prior to repayment. The \$87,280.00 I received did not include any interest or penalty payment; it was merely repayment of principal and was taken in good faith.

5. I reserve the right to amend this declaration as necessary or appropriate.”

On this 28th day of March 2007, I hereby declare, pursuant to 28 U.S.C. §1746, under penalty of perjury, that the foregoing statements are true and correct to the best of my knowledge.

A handwritten signature in black ink, appearing to read "Glenn M. Stark", written over a horizontal line.

Glenn M. Stark