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

MICHAEL J. QUILLING, Receiver for Megafund Corporation and Lancorp Financial Group, LLC,	§	
Plaintiff,	§	Civil Action No. 3:06-CV-0959-L (BD)
v.	§	**ECF**
GARY McDUFF, Individually and d/b/a SOUTHERN TRUST COMPANY and FIRST GLOBAL FOUNDATION, ROBERT REESE, Individually and d/b/a EXCEL FINANCIAL, INC., and SHANNON McDUFF, Individually and d/b/a SECURED CLEARING CORP.,	§	**Referred to the U.S. Magistrate Judge**
Defendants.	§	

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF HIS MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Michael J. Quilling, the court-appointed Receiver for Megafund Corporation and Lancorp Financial Group LLC, ("Plaintiff" or "Receiver") in accordance with Local Civil Rule 7.1(f) and this Court's Order of October 23, 2006 [Dkt. No. 32], hereby files this reply brief in support of his Motion for Partial Summary Judgment [Dkt. No. 29] and would respectfully show the Court as follows:

I. ARGUMENTS AND ANALYSIS

A. Defendant's Response Brief Presents Arguments that are Wholly Unrelated to Plaintiff's Motion for Partial Summary Judgment and Relies on Unsupported and Inadmissible Evidence.

Defendant has presented this Court with a Response Brief that, for the most part, has nothing

to do with Plaintiff's Motion for Partial Summary Judgment. First, Defendant seeks "estoppel of summary judgment" based on the allegation that "Petitioner has no subject matter controversy or properly established jurisdiction." *Defendant's Response Brief* [Dkt. No. 36] at 3-4. Defendant goes on to accuse the Receiver of committing criminal conversion as well as attempting to collect information from Defendant without a "valid control number." *Defendant's Response Brief* [Dkt. No. 36] at 2-5. Finally, Defendant insists the Receiver is "in default" for failing to respond to his demands for information contained in Defendant's Challenge of Jurisdiction and Commercial Affidavit of Truth.[1] *Id.* at 11-12.

The Receiver submits that these issues have nothing to do with the motion currently before the Court and that Defendant's response brief should be stricken or otherwise disregarded. This Court has already ruled on subject matter jurisdiction, making Defendant's brief both unnecessary and unwarranted. *See Order,* Oct. 23, 2006 [Dkt. No. 33]. Furthermore, his other accusations are not recognized defenses barring summary judgment under the Federal Rules of Civil Procedure. *See, e.g.,* Fed. R. Civ. P. 56.

This Court should also strike or disregard Defendant's exhibits for falling well short of the standards required by the Federal Rules of Evidence. Three of those exhibits (Exhibits "D", "F", and "G") are unverified letters that do not constitute competent affidavits under Rule 56 of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 56(e) (requiring that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be

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[1] On August 18, 2006, the Court issued an Order construing those pleadings as a Motion to Dismiss for Lack of Subject Matter Jurisdiction under Fed. R. Civ. P. 12(b)(1). *Order*, Aug. 18, 2006 [Dkt. No. 19]. As ordered, the Receiver responded on September 12, 2006. *Plaintiff's Response to Defendant Gary McDuff's Motion to Dismiss* [Dkt. No. 24].

admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."). None of the letters are sworn, made under penalty of perjury, or demonstrate the declarant's personal knowledge of the facts stated therein. *See Nissho-Iwai Am. Corp. v. Kline*, 845 F.2d 1300, 1306 (5th Cir. 1988) (unsworn affidavits do not raise factual issues precluding summary judgment); *Martin v. John W. Stone Oil Distrib., Inc.*, 819 F.2d 547, 549 (5th Cir.1987). Defendant also submits three exhibits (Exhibits "A"-"C") that purport to be certificates notarized in Belize. Those exhibits, however, do not bear the sworn affirmations necessary for admission under Rule 902(3) of the Federal Rules of Evidence. Fed. R. Evid. 902(3) (requiring that foreign public documents include "a final certification as to the genuineness of the signature and official position" of the subscribing foreign official); *see also Acosta-Mestre v. Hilton Int'l, Inc.,* 156 F.3d 49, 57 (1st Cir. 1998) (affirming that a notarized document is not equivalent to an official record under the Federal Rules of Evidence).

Essentially, Defendant relies on his own naked assertions to challenge summary judgment in this case. His claims, however, can not be considered because they simply appear in the Response Brief without any supporting affidavit or verified pleading.[2] *See* Fed. R. Civ. P. 56(e) ("an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading" but must support his specific factual challenge "by affidavits or as otherwise provided in this Rule"). Furthermore, Defendant's claims are nothing more than self-serving conclusions that, without supporting evidence, cannot create a factual dispute precluding summary judgment. *See Travelers Ins. Co. v. Lilheberg Enters.*, 7 F.3d 1203, 1206-07 (5th Cir. 1993) ("conclusory allegations

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[2] Defendant's Response Brief is only accompanied by one verification that, by its own terms, only applies to the "Notice of Default, and Demand" [sic] on pages 11-13. *Respondent's Written Response to Petitioner's Motion for Partial Summary Judgment* ("Defendant's Response Brief") [Dkt. No. 36] at 13.

supported by a conclusory affidavit will not suffice to require a trial"); *Marshall v. E. Carrol Parish Hosp. Serv. Dist.*, 134 F.3d 319, 324 (5th Cir. 1998) ("It goes without saying that such conclusory, unsupported assertions are insufficient to defeat a motion for summary judgment").

As explained more fully below, Defendant's failure to produce competent evidence in this case is compounded by the fact that he has raised no specific challenge to the Receiver's exhibits supporting summary judgment.

B. The Undisputed Material Facts in this Case Support Summary Judgment on the Receiver's Claims.

In support of his Motion for Partial Summary Judgment, the Receiver has presented this Court with numerous uncontested exhibits that Defendant has completely ignored or otherwise dismissed as "unrelated." *Defendant's Response Brief* [Dkt. No. 36] at ¶ 1. In particular, Defendant has not specifically and coherently disputed the truthfulness of (1) the Receiver's declaration, (2) the bank records showing that Megafund was a *Ponzi* scheme, (3) the deposition testimony of Gary Lancaster, or (4) the records from Cash Cards International showing that Defendant, his wife, and an associate named Robert Reese ultimately received the bulk of investor funds transferred from Megafund. *See*, *e.g.*, *Lilheberg Enters.*, 7 F.3d at 1206-07 (to avoid summary judgment, the non-movant must challenge the movant's evidence with "specific facts showing an issue for trial").

Even when viewed in light most favorable to Defendant, the undisputed material facts in these documents establish that Megafund was a *Ponzi* scheme and $304,272.58 of investor funds were transferred at Defendant's direction as compensation for recruiting investors. Those records also show that a substantial portion of the investor funds were ultimately distributed to accounts controlled by Defendant, his wife, and a business associate and applied towards the purchase of a

residence that Defendant maintained in Deer Park, Texas.

1. The Receiver's Declaration and Megafund's Bank Records Are Undisputed and Clearly Support a Finding that Megafund was a *Ponzi* Scheme.

For purposes of summary judgment, a *Ponzi* scheme may be proved by uncontroverted testimony offered by the Receiver. *See S.E.C. v. Cook*, 2001 WL 256172, *3 (N.D. Tex. Mar. 8, 2001). In this case, the Receiver has submitted a Declaration explaining how the *Ponzi* scheme is self-evident given Megafund's bank records from JPMorgan Chase. *Receiver's Declaration,* Exhibit "A" [Dkt. No. 31] at ¶ 8 (App. at 4). In particular, those bank records conclusively show that: (1) investor funds constituted virtually all of Megafund's revenue; (2) those funds were commingled and used for expenses not related to any legitimate investments; and (3) what funds remained were commingled and used to pay "returns" to earlier investors. *Id.* at ¶ 8 (App. at 4); *see also Summary of Megafund's Wells Fargo Account,* Exhibit "A-1" [Dkt. No. 31] (App. at 8-16). **Defendant has not specifically disputed these facts or offered any evidence challenging the conclusion that Megafund was a *Ponzi* scheme.**

Those bank records also show that all funds at issue in this case were *Ponzi* payments that can be traced to Megafund investor contributions (either directly or through Lancorp). *See Receiver's Declaration,* Exhibit "A" [Dkt. No. 31] at ¶¶ 8-13 (App. at 4-5); *Diagram*, Exhibit "A-3" [Dkt. No. 31] (App. at 23); *Cash Cards International Account Records,* Exhibit "A-5" to "A-7" (App. at 31-49). As such, those funds were fraudulent transfers or otherwise imposed with a constructive trust. *Receiver's Declaration*, Exhibit "A" [Dkt. No. 31] at ¶ 14 (App. at 5-6).

2. The Records from Cash Cards International and the Testimony of Gary Lancaster are Undisputed and Show that $304,272.58 of Investor Funds were Transferred as Compensation for Defendant's Role in Recruiting Investors.

The Receiver's Motion for Partial Summary Judgment is supported by the deposition testimony of Gary Lancaster, the director of Lancorp. *See Deposition of Gary Lancaster,* Mar. 25, 2006, Exhibit "D" [Dkt. No. 31] (App. at 59-72). As compensation for recruiting investors, Defendant negotiated a 40% share of all returns (i.e., *Ponzi* payments) that Lancorp received from Megafund, which were then transferred according to Defendant's directions. *Id.* at 192, 197, 203-204, 214-216 (App. at 61, 63-64, 67). **Defendant does not specifically challenge this deposition testimony of Gary Lancaster.** Instead, he simply denies receiving "any portion" of the $304,272.58 from Megafund investors and states that he never benefitted from those funds and never held an account at Cash Cards International that received those funds. *Defendant's Response Brief* [Dkt. No. 36] at ¶ 1. The undisputed account records from Cash Cards International, however, show otherwise. The Receiver has provided this Court with summaries of account records from Cash Cards International for all accounts at issue in this case. *Cash Cards Int'l Account Summaries,* Exhibit "A-5" to "A-9" [Dkt. No. 31] (App. at 30-49); *see also Diagram*, Exhibit "A-3" [Dkt. No. 31] (App. at 23). Those records clearly show that at least $240,000.00 of the investor funds were immediately sent back to accounts controlled by Defendant, his wife, and a business associate named Robert Reese. *Id.* In fact, $170,000.00 was sent to account number 186074, which was held in the names of both Southern Trust Company and Gary McDuff. *See Diagram*, Exhibit "A-3" [Dkt. No. 31] (App. at 23); *Cash Cards Int'l Account Summary,* Exhibit "A-9" (App. at 47-49). Funds from that account were used to purchase 1318 Minchen Drive—the very residence where Defendant received service of process in this case. *Id.* (App. at 49); *Affidavit of Service,* Exhibit "K" [Dkt. No. 31] (App. at 90); *Deed of Trust,* Exhibit "L" [Dkt. No. 31] (App. at 95). **Defendant does not dispute these account records and has not offered any evidence challenging these transfers.**

II.
CONCLUSION

Defendant's Response Brief relies entirely on unspecific, unverified, and self-serving statements that cannot be used to create a fact issue for purposes of summary judgment. Accordingly, the only material facts before the Court are undisputed and compel a finding of summary judgment on the Receiver's claims for fraudulent transfer and constructive trust and disgorgement.

Respectfully submitted,

QUILLING SELANDER CUMMISKEY & LOWNDS, P.C.
2001 Bryan Street, Suite 1800
Dallas, Texas 75201
(214) 871-2100 (Telephone)
(214) 871-2111 (Facsimile)

By: *_/s/ Michael J. Quilling_*
Michael J. Quilling
State Bar No. 16432300
Email: mquilling@qsclpc.com
Brent J. Rodine
State Bar No. 24048770
Email: brodine@qsclpc.com

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

On the 5th day of December, 2006 a true and correct copy of the above and foregoing was sent via first class mail, with full and proper postage prepaid thereon, to:

Gary L. McDuff
1314 Minchen Drive
Deer Park, Texas 77536

/s/ Michael J. Quilling