

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-263
	§	
v.	§	ECF
	§	
DEREK SCHENK, Individually and d/b/a	§	Referred to the U.S. Magistrate Judge
HALO FILM VENTURES,	§	
	§	
Defendant.	§	

**RESPONSE TO THE COURT’S ORDER OF AUGUST 14, 2006,  
AND RECEIVER’S MOTION TO EXPAND TIME FOR SERVICE  
OF PROCESS UPON DEFENDANT AND BRIEF IN SUPPORT**

TO THE HONORABLE JEFF KAPLAN, UNITED STATES MAGISTRATE JUDGE:

COMES NOW Plaintiff Michael J. Quilling, as the appointed Receiver for Sardaukar Holdings, IBC and Bradley C. Stark, (“Plaintiff” or “Receiver”) and files this his Response to the Court’s Order of August 14, 2006, [Dkt. No. 13] and his Motion to Expand Time for Service of Process upon Defendant Derek Schenk, individually and d/b/a Halo Film Ventures (“Defendant”). In support of such, the Receiver would respectfully show the Court as follows:

**I.  
INTRODUCTION**

Rule 4(m) of the Federal Rules of Civil Procedure provide that the District Court shall extend time for service of process beyond the usual 120-day period if a plaintiff can show “good cause” for not achieving service during that time. As explained below, the Receiver’s diligent efforts demonstrate “good cause” even if service has not yet been successful. The supporting evidence

clearly shows that, despite the Receiver's efforts, all attempts at personal or alternative service of process have been frustrated by (1) Defendant's apparent attempt to evade personal service, (2) the departure of Northshore Process Service's two employees who directly handled this case, and (3) Northshore Process Service's recent refusal to sign an affidavit detailing the services it has provided for the Receiver. While the Receiver has grown irritated with these delays, it is hard to imagine that they have prejudiced the Defendant's ability to defend this action. Therefore, the Receiver submits that good cause exists to continue with this case and allow the Receiver additional time to obtain personal or alternative service of process on the Defendant.

## II. BACKGROUND FACTS

1. This case arises out of a lawsuit brought by the Securities and Exchange Commission ("SEC") against Bradley C. Stark, Sardaukar Holdings IBC, and others for promising high-yield returns to investors and then squandering their money on unrelated personal expenditures. *See Securities and Exchange Commission, v. Megafund Corporation, et al.*, Cause No. 3:05-CV-1328-L (N.D. Tex.) (the "SEC Proceedings").

2. By order of July 5, 2005, the Court overseeing that case appointed Michael J. Quilling as Receiver for the defendants and relief defendant and he has since continued to function in that capacity. *See Order Appointing Temporary Receiver* ("Order Appointing Receiver") [Dkt. No. 9], as amended July 19, 2005 [Dkt. No. 36] (3:05-CV-1328).

3. The Order Appointing Receiver expressly authorizes legal action to recover investor funds fraudulently transferred to third parties:

The Receiver is hereby authorized to institute such actions or proceedings to impose a constructive trust, obtain possession and/or

recover judgment with respect to persons or entities who received assets or funds traceable to investor monies.

*Id.* [Dkt. No. 36] at ¶ 13.

4. On February 10, 2006, the Receiver filed his Complaint against Defendant seeking to recover \$260,000.00 of investor funds. *Complaint* [Dkt. No. 1]. The Receiver retained Northshore Process Service (“Northshore”) to effect personal service of process on the Defendant. *Affidavit of Lisa M. Smith* (“Smith Affidavit”), Exhibit “A” at ¶ 4.

5. By April 20, 2006, Northshore had determined that Defendant was not at the address listed in the Complaint. *Id.* at ¶ 5. At Northshore’s recommendation, the Receiver paid for a skip trace to determine Defendant’s current location. *Id.*

6. On May 5, 2006, Northshore informed the Receiver that Defendant was located at 141 Daugherty Avenue in Holbrook, New York. *Id.* at ¶ 6. The Receiver paid an additional fee to have personal service completed at that address within 24 hours. *Id.*

7. On June 12, 2006, Northshore sent the Receiver a Return of Non-Service and explained that (1) numerous attempts were made to serve the Defendant at the Holbrook address, (2) although the process server observed activity at that address, none of the inhabitants would answer the door to accept service of process, and (3) Northshore believed that leaving a copy of the summons and complaint at that address would be reasonably effective in giving Defendant notice of this litigation. *Id.* at ¶ 7. On June 30, 2006, one of Northshore’s representatives signed an affidavit to that effect, which was attached to the Receiver’s *Motion to Allow Alternate Method for Service of Process Upon Defendant* (“Motion for Alternative Service”) [Dkt. No. 11]. *Id.*

8. On July 6, 2006, this Court issued an Order [Dkt. No. 12] denying the Receiver’s

motion and requesting a supplemental affidavit explaining “*how* [the process server] knows defendant either resides at the Holbrook address or likely would receive notice of this action if the summons and complaint are posted on the front door of that address.”

9. As explained more fully below, the Receiver has diligently attempted to serve the Defendant or obtain this supplemental affidavit supporting alternative service. The Receiver’s efforts, however, have been frustrated by (1) Defendant’s apparent attempt to evade personal service, (2) the departure of Northshore’s two employees who directly handled this case, and (3) Northshore’s recent refusal to sign an affidavit detailing the services it has provided for the Receiver. *Id.* at ¶ 9.

10. For these reasons, the Receiver now respectfully requests an extension of time under Fed. R. Civ. P. 4(m) to continue attempting service upon the Defendant.

### III. ARGUMENTS AND ANALYSIS

#### A. **The Federal Rules of Civil Procedure Permit Additional Time for Service of Process when the Receiver Shows Good Cause.**

Rule 4(m) of the Federal Rules of Civil Procedure mandates an extension of time for service of process upon a showing of “good cause”:

If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

Fed. R. Civ. P. 4(m) (emphasis added). In determining whether “good cause” exists under Rule 4(m), Courts often consider whether a plaintiff was diligent in his attempts to obtain service on the

defendant. *See, e.g., Cox v. Leggett & Platt, Inc.*, 2002 WL 1812049 at \*1 (N.D. Tex. Aug. 05, 2002) (finding good cause to extend time under Rule 4(m) where plaintiff's failure to serve defendant "is not wholly due to a lack of diligence"). When such good cause is affirmatively shown, the Court "must extend time for service" under Rule 4(m). *Thompson v. Brown*, 91 F.3d 20, 21 (5th Cir.1996); *Bayco Products, Ltd. v. Tap Enterprises, Inc.*, 2005 WL 1489933 at \* 4 (N.D.Tex. June 25, 2005).

### B.

#### **The Receiver's Continued Diligence Constitutes Good Cause for Expanding the Time for Service of Process.**

The attached records clearly show that the Receiver has been diligent in his attempts to obtain service of process on the Defendant. He has pursued personal service under Fed. R. Civ. P. 4(e)(2) as well as alternative methods of service under Fed. R. Civ. P. 4(e)(1) and Tex. R. Civ. P. 106(b). *See Smith Affidavit*, Exhibit "A" at ¶ 10; *Motion for Alternate Service* [Dkt. No. 11]. However, as the timeline below illustrates, the Receiver's attempts have been frustrated by the Defendant as well as the revolving door of process servers assigned to this case by Northshore:

Date	Activity with Respect to Serving Defendant
April 12, 2006	The Receiver conducted a telephone conference with Northshore to determine their availability to serve process on the Defendant. <i>Smith Affidavit</i> , Exhibit "A" at ¶ 10.
April 13, 2006	The Receiver mailed Northshore a letter retaining their services and included his payment, the summons, and a copy of the complaint. <i>Id.</i> ; <i>Letter of April 13, 2006</i> , Exhibit "B".

April 20, 2006	Northshore Process Service notified the Receiver that Defendant was not at the address listed in the complaint. They then offered to locate him by performing a skip trace. The Receiver mailed his request and payment for a skip trace. <i>Smith Affidavit</i> , Exhibit "A" at ¶ 10; <i>Letter of April 20, 2006</i> , Exhibit "C".
May 5, 2006	The Receiver spoke with Northshore's representative by telephone and e-mail regarding the results of the skip trace and the possibility of achieving expedited service of process on the Defendant at 141 Daugherty Avenue, Holbrook, New York, 11741. The Receiver then mailed his request and payment to effect personal service on the Defendant within 24 hours. <i>Smith Affidavit</i> , Exhibit "A" at ¶ 10; <i>E-mail of May 5, 2006</i> , Exhibit "D"; <i>Letter of May 5, 2006</i> , Exhibit "E".
June 12, 2006	Northshore sent the Receiver a Return of Non-Service on the Defendant. In a follow-up telephone call, Northshore explained that there are residents in the Holbrook address, but they were avoiding the process server. The Receiver then requested that Northshore prepare an affidavit reciting those facts for purposes of a motion for alternative service. <i>Smith Affidavit</i> , Exhibit "A" at ¶ 10; <i>Letter of June 12, 2006</i> , Exhibit "E"; <i>Return of Non-Service</i> , Exhibit "F".
June 13, 2006 - June 30, 2006	Northshore informed the Receiver that Ray Barr, the process server who signed the Return of Non-Service, had been deployed to serve with the United States Armed Forces in Iraq. However, an affidavit was executed by his direct supervisor, Tom Goodwin. <i>Smith Affidavit</i> , Exhibit "A" at ¶ 10.
July 5, 2006	The Receiver filed his Motion for Alternative Service [Dkt. No. 11].
July 6, 2006	The Court issued an Order [Dkt. No. 12] denying the Receiver's motion and requesting that Northshore explain how it knows that Defendant resides at the Holbrook address or likely would receive notice there.
July 25, 2006	After numerous telephone calls went unreturned, the Receiver sent Tom Goodwin a proposed affidavit regarding the procedure that Northshore used in locating Defendant by means of a skip trace. <i>Smith Affidavit</i> , Exhibit "A" at ¶ 10.
July 26, 2006 - August 23, 2006	Numerous telephone calls to Northshore went unreturned. <i>Id.</i> .

**RESPONSE TO THE COURT'S ORDER OF AUGUST 14, 2006, AND RECEIVER'S MOTION****TO EXPAND TIME FOR SERVICE OF PROCESS UPON DEFENDANT AND BRIEF IN SUPPORT - Page 6**

L:\MJQ\MEGAFUND 911.0110\MJQ v. Derek Schenk\Pleadings\Motion to Expand Time for Service of Process.wpd

August 24, 2006	The Receiver spoke with other representatives from Northshore, who explained that Tom Goodwin was no longer employed with Northshore but that a proposed affidavit could be sent to Donna Cummins. The Receiver then sent a proposed affidavit to Ms. Cummins by overnight delivery. <i>Smith Affidavit</i> , Exhibit “A” at ¶ 10; <i>Letter of August 24, 2006</i> , Exhibit “H”.
August 28, 2006	After discussions with two other representatives from Northshore, the Receiver learned that Donna Cummins was, in fact, not available to sign that affidavit. The Receiver was then referred to Alex, another Northshore representative. The Receiver asked that Alex sign an affidavit confirming Northshore’s records of these transactions, explaining a skip trace search, and identifying what public records were reviewed in that procedure. <i>Smith Affidavit</i> , Exhibit “A” at ¶ 10.
August 29, 2006 - August 31, 2006	Alex informed the Receiver that he would not sign the affidavit as requested. Northshore has since refused to answer or return phone calls from the Receiver’s attorneys. <i>Id.</i>

This timeline shows that the Receiver diligently followed up on every finding and recommendation that he received from Northshore. First, the Receiver paid \$85.00 for Northshore’s retainer. Then he paid an additional \$150.00 for Northshore to conduct a skip trace in April of 2006. Once that skip trace indicated that the Defendant was residing in Holbrook, New York, the Receiver paid an additional \$150.00 in May of 2006 to expedite personal service within 24 hours.

Despite the Receiver’s best efforts, however, Northshore was unable to effect personal service at that address. The process server could not get anyone at the Holbrook address to answer the door. After numerous attempts, he finally concluded that “the Defendant may be absconding.” *Return of Non-Service*, Exhibit “F”.

As frustrating as these results were, they have been compounded by the departure of Northshore’s two representatives who directly handled this matter. As explained above, the original process server, Ray Barr, left Northshore around June of 2006 to serve with the United States Armed

Forces in Iraq. His direct supervisor, Tom Goodwin, signed the original affidavit supporting the Receiver's Motion for Alternative Service but then left the company in July of 2006. The Court has since requested a supplemental affidavit explaining "how [the process server] knows defendant either resides at the Holbrook address or likely would receive notice of this action if the summons and complaint are posted on the front door of that address." Order of July 6, 2006 [Docket No. 12]. Regretfully, Northshore's remaining employees are unwilling to provide this Court with an affidavit addressing those concerns.

Taken together, the Receiver submits that these facts constitute good cause for extending the time for service under Fed. R. Civ. P. 4(m). Despite the Receiver's diligence, he has been perpetually waiting on responses or results from his process server for the last four-and-a-half months. He, therefore, respectfully requests that this Court expand the time for achieving service of process or obtaining a supplemental affidavit in support of the Receiver's Motion for Alternative Service.

**C. Extending the Time for Service of Process Would Not Cause Any Prejudice to the Defendant.**

It is hard to imagine that the Defendant would suffer any prejudice from an expanded time for service of process. Any dismissal in this case would be without prejudice, meaning the Receiver could simply re-file and resume this case where he left off.<sup>1</sup> In either case, Defendant is in the exact same position and is not disadvantaged by allowing this case to continue. Therefore, for the sake of judicial economy, this Court ought to extend the Receiver's time for obtaining service of process

---

<sup>1</sup> The statute of limitations on the Receiver's claims do not expire until 2009. Tex. Bus. & Com. C. § 24.010(1) (four-year limitations period for transfers made with intent to hinder, delay, or defraud).

on the Defendant.<sup>2</sup>

WHEREFORE, PREMISES CONSIDERED, the Receiver respectfully requests that this Court issue an order that (1) notes that good cause exists to extend the time for serving process on the Defendant under Fed. R. Civ. P. 4(m) and (2) grants the Receiver an additional 60 days to complete service or provide the Court with a supplemental affidavit justifying alternative service under Fed. R. Civ. P. 4 (e)(1).

Respectfully submitted,

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

By: /s/ Brent J. Rodine  
Michael J. Quilling  
State Bar No. 16432300  
Email: [mquilling@qsclpc.com](mailto:mquilling@qsclpc.com)  
Brent J. Rodine  
State Bar No. 24048770  
Email: [brodine@qsclpc.com](mailto:brodine@qsclpc.com)

ATTORNEYS FOR RECEIVER

---

<sup>2</sup> Even without a showing of “good cause,” this Court has discretion to expand the time for service if judicial economy requires it. *See Thompson v. Brown*, 91 F.3d 20, 21 (5th Cir.1996) (“If good cause is present, the district court must extend time for service. If good cause does not exist, the court may, in its discretion, decide whether to . . . extend time for service.”); *Bayco Products, Ltd. v. Tap Enterprises, Inc.*, 2005 WL 1489933 at \* 4 (N.D.Tex. June 25, 2005).