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EXHIBITS

- Exhibit A – Declaration of John W. Stark, Jr.
- Exhibit B – Declaration of Barbara Stark
- Exhibit C – John Stark’s Employment Agreement
- Exhibit D – John Stark’s Accounting Formulae, Design, and Spreadsheets
- Exhibit E – Tesori Fine Art & Collectibles’ Sign and Brochure

Defendants alleging that they had improperly received money from Sardaukar Holdings, IBC (hereafter “Sardaukar”).

3. On October 24, 2006, the Receiver filed his *Motion for Summary Judgment* and Supporting Brief (together, the “Receiver’s MSJ”).

4. By Order of the Court dated October 25, 2006, the Court set the date to respond to the Receiver’s MSJ to be November 27, 2006.

5. The Receiver has alleged that Sardaukar was run as a *Ponzi* scheme. The Defendants deny that Sardaukar was a *Ponzi* scheme. *See* Exhibit A (Declaration of John Stark) p. 1, ¶ 2. In fact, Defendants have denied that Sardaukar was a “ponzi” scheme and that the transfers occurred as the Receiver has alleged in his complaint since the Defendants’ answer. *See* Answer, at ¶¶ 8-9 and generally. The Defendants further deny that they have or had any knowledge of any fraudulent activity as alleged in the Receiver’s Complaint. *See* Exhibit A p. 2, ¶ 5, and Exhibit B (Declaration of Barbara Stark) p. 1, ¶ 3.

6. John Stark was initially employed by Sardaukar from approximately May 2002 to October 2004. *See* Exhibit A p. 1, ¶ 3, and Exhibit C (John Stark’s Employment Agreement). His title with Sardaukar was CEO; however, his only duties consisted of signing various documents which registered the company with other organizations. *See* Exhibit A at Id. John Stark received no compensation for the work done during this period except for transfers sought by the Receiver. *See* Exhibit A at Id.

7. John Stark was subsequently employed as Audit/Accounting Manager from April 1, 2005 until the Securities and Exchange Commission action was filed on

July 5, 2005.¹ *See* Exhibit A p. 2, ¶ 3. During this time his duties included one business-related trip, development of revenue reporting spreadsheet formulas, familiarization with the payroll system, and research and evaluation of several automated consolidated accounting systems. *Id.* and Exhibit D (John Stark's Accounting Formulae, Design, and Spreadsheets). As compensation for his work, he received a fixed salary, and as a condition of his employment, Sardaukar agreed to pay certain military social security obligations totaling \$3,000.00. *Id.* For the April to July 2005 period at Sardaukar, he received \$23,001.13 in salary. *Id.*

8. Although John Stark was not involved in any investment or stock transactions, in order to meet with clients and establish an operating office, John Stark traveled to the city of London, in the United Kingdom in April 2005. *See* Exhibit A, p. 2, ¶ 4. All of his expenses were directly related to and in furtherance of the businesses of Sardaukar, including its investment-related business of Tesori. *Id.*

9. As part of Sardaukar's investment strategy, among other investments, Sardaukar invested in Tesori Fine Arts and Collectibles (hereafter "Tesori") and Moondoggie stock. *See* Exhibit A p. 2, ¶ 5.

10. Tesori was an art and collectables retailer which was going to sell art from Europe at a substantial mark-up. *See* Exhibit B p. 2, ¶ 6, and Exhibit E (Tesori Fine Art & Collectibles' Sign and Brochure). Defendant Barbara Stark was an employee of Tesori. *Id.*

11. In furtherance of Tesori's business, Barbara Stark went to Europe to purchase inventory for Tesori as well as make business contacts for future orders. *See* Exhibit B p. 2, ¶ 7. All of Barbara Stark's expenses and purchases were directly related

¹ S.E.C. v. Megafund Corp., No. 3:05-CV-1328-L

to and in furtherance of the business of Tesori. *Id.* It is Barbara Stark's understanding that Sardaukar was covering the purchases and expenses as part of Sardaukar's investment in Tesori. *Id.* It is also Barbara Stark's understanding and belief that approximately \$19,138.63 was spent in expenses and purchasing inventory during the travel to Europe, but she have no personal knowledge as to the amount. *Id.*

12. In addition, \$10,400.00 was paid to Barbara Stark by Pamela Stark, the owner of Tesori, for the work that Barbara Stark performed for Tesori. *See* Exhibit B p. 3, ¶ 8. Barbara Stark's duties with Tesori included developing the company prospectus, store design, and consulting on the selection and purchase of inventory. *Id.* Barbara Stark has no personal knowledge that any amounts paid by Pamela Stark came from Sardaukar, *Id.*, nor has the Receiver alleged that Pamela Stark's money came from Sardaukar.

13. The Receiver also claims that \$24,042.02, which was paid as rent, was in some way fraudulently transferred. This money was in payment for allowing Bradley Stark and his family to live in the 16960 Washington Street, Riverside, California property of John and Barbara Stark. *See* Exhibit A, p. 3, ¶ 6, and Exhibit B, p. 2, ¶ 4. In addition, Sardaukar was also being operated out of the property and this payment covered that expense as well. *See* Exhibit A, p. 3, ¶ 6, and Exhibit B, p. 2, ¶ 4.. This money was taken in good faith and for reasonably equivalent value. *See* Exhibit A, p. 3, ¶ 6, and Exhibit B, p. 2, ¶ 4.

14. In addition, the Receiver claims that \$95,154.43 was in some way fraudulently transferred. *See* Exhibit A, p. 3, ¶ 7, and Exhibit B, p. 2, ¶ 5. This money was in repayment for a large amount of money which was loaned to Bradley Stark for his

business use and as further consideration for Sardaukar's operation out of John and Barbara Stark's house. See Exhibit A, p. 3, ¶ 7, and Exhibit B, p. 2, ¶ 5. This money was taken in good faith and for reasonably equivalent value. See Exhibit A, p. 3, ¶ 7, and Exhibit B, p. 2, ¶ 5.

15. The Defendants did receive some funds from Sardaukar, but these funds were in exchange for reasonably equivalent value and taken in good faith and are protected by Tex. Bus. Comm. Code §24.009(a). See Exhibit A and Exhibit B.

16. Also, some of the funds that the Receiver is attempting to avoid are from a third party and are also protected from avoidance by Tex. Bus. Comm. Code §24.009(a).

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

III. RESPONSE ARGUMENTS AND AUTHORITIES

A. Summary Judgment Standard

18. 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.”).

19. In addition to this burden on the Receiver, the Court must view all evidence presented in the light most favorable to the non-movants, in this case, the Defendants. 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.”).

20. 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)).

21. 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).

22. 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 Holdings was a Ponzi Scheme

i. There has been no Judicial Determination that Sardaukar Holdings was a Ponzi Scheme

23. 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 and there has been no judicial determination that Sardaukar Holdings was, in-fact, a *Ponzi* scheme.²

24. The Receiver's allegation that Sardaukar is a *Ponzi* scheme is simply his opinion of the meaning of the purported (and disputed) facts. Without a judicial determination of a *Ponzi* scheme before a trier of fact, his legal conclusion is merely opinion of a matter which is directly relevant to the case. 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).

² The Receiver also points to the Tschebaum matter (Case No. 3:05-CV-1465-L) in which no response was filed and the Court simply accepted the Receiver's opinion that a *Ponzi* scheme existed. There has been no judicial determination that has been contested. More importantly, this issue has not been determined with an opportunity for these Defendants to respond.

25. 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 Receiver has no other basis to claim that the Defendants were involved with any fraudulent transfer. In fact, the Receiver presents no evidence of any fraudulent transfer. The Receiver simply presupposes the existence of a *Ponzi* scheme and uses this assumption as the basis for his argument.

26. Sardaukar was a legitimate business and not run as a *Ponzi* scheme. *See* Exhibit A at page 1 ¶ 4. Without any judicial determination that Sardaukar Holdings was a *Ponzi* scheme, the Receiver must therefore establish its existence with undisputed evidence in this case, which he has not done.

ii. The Evidence does not show that Sardaukar Holdings was a Ponzi Scheme

27. The existence of a *Ponzi* scheme is a material fact, for which a bona fide dispute exists. This, on its face, precludes summary judgment. Even the Receiver's own evidence, taken in the light most favorable to the Defendants, does not establish the existence of a *Ponzi* scheme.

28. The Receiver's repeated allegation of the existence of a *Ponzi* scheme is not sufficient, nor is it evidence for the purposes of summary judgment. The Receiver states "[a] *Ponzi* scheme exists where money from new investors is used to pay 'profit' to earlier investors, without the operation of an actual revenue-producing business. Black's Law Dictionary 1180 (7th ed. 1999)." Receiver's MSJ p. 9. As an investment company, Sardaukar was actively investing in what were and would have been profitable investments but for the Receiver's own actions. *See* Exhibit A, p. 2 ¶ 5, and Exhibit B, p. 2 ¶ 6. For example, among Sardaukar's various investments were: Moondoggie Stock

and Tesori Fine Art and Collectibles. *See* Exhibit A, p. 5 ¶ 5. Further, what the Receiver opines to be ‘spending sprees’ were in fact inventory purchasing and business networking travel. *See* Exhibit B, p. 2 ¶ 7.

29. Because Sardaukar was actively investing in what were and would have continued to be profitable ventures, Sardaukar was not simply paying earlier investors with money received from later investors.³ *See* Exhibit A, p. 2 ¶ 5. Further, the Receiver’s exhibit A-1 fails to give any definitive indication of a *Ponzi* scheme, especially taken in the light most favorable to the Defendants. Again, the Receiver has simply made a legal conclusion based on alleged facts which must be taken in the light most favorable to the Defendants. 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 existence of a *Ponzi* scheme is *the* material fact to the Receiver’s case, and this fact *is* subject to a bona fide dispute.

iii. The Receiver is Seeking a Declaratory Judgment that Sardaukar Holdings was a Ponzi Scheme by Inappropriate Means

30. 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

³ Upon information and belief, the Receiver has prevented John Stark from giving affidavit testimony to support this response. *See* Exhibit A, p.3 ¶ 4,

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”).

31. The allegation of the *Ponzi* scheme is currently being litigated in another case and any determination that this Court would make would not be binding on any other proceedings.⁴ The Receiver, himself, believes that another party was allegedly running an alleged *Ponzi* scheme. Relying on their personal experience, the Defendants have not been involved with anything that they believed to be a *Ponzi* scheme. See Exhibit A, p. 2, ¶ 5, and Exhibit B, p. 1, ¶ 3. The fact that this issue is currently being litigated in a separate suit should, by itself, show that this material fact is subjected to a bona fide dispute and should not be decided against the Defendants without full participation by necessary parties or before it is decided against those parties in another proceeding.⁵

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

32. Section 24.009(a) 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(a)

⁴ Case No. 3:05-CV-1328

⁵ Again, upon information and belief, the Receiver seeks to prevent necessary affidavit testimony by Bradley Stark, which would add to the material disputes of facts in this case against the Defendants

33. The Receiver is correct when he states that “[Tex. Bus. & Com. Code §24.009(a)] is an affirmative defense for which Defendants bear the burden of proof.” *See* Receiver’s MSJ p. 10. However, by the Receiver’s analysis of the facts involved and dispute therewith, the Receiver has simply shown factual issues which remain for trial.

34. Further, the Receiver alleges that the Defendants are in violation of Tex. Bus. & Com. Code §24.005(a)(1). The Receiver states: “[w]hile creditors must ordinarily prove fraudulent intent to recover under this provision of the UFTA, that element is automatically established for transfers out of a *Ponzi* scheme.” *See* Receiver’s MSJ p. 7.

35. The Receiver therefore has stated that when there is no *Ponzi* scheme, the creditor (here the Receiver) must present evidence of an intent to defraud. Here, it appears that the Receiver has assumed that a *Ponzi* scheme automatically has been established – this, of course, is not the case. Again, at the very least, the evidence presented by both parties, taken in the light most favorable to the Defendants, shows that there clearly are bona fide disputes about material facts which leaves issues for trial as to the existence of the alleged *Ponzi* scheme.

36. 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 Defendants.

D. The Defendants’ Affirmative Defenses Raise Issues of Material Facts

37. The Receiver’s MSJ infers that the Defendants 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(a) even if his *Ponzi* scheme allegation fails. Any such allegation would not be accurate, and to address any such allegation, the Defendants 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

38. John Stark was initially employed by Sardaukar from approximately May 2002 to October 2004. His title with Sardaukar was CEO, however his only duties consisted of signing various documents which registered the company with other organizations. *See* Exhibit C. John Stark received no compensation for the work done during this period other than what the Receiver seeks to avoid. *See* Exhibit A, p. 2, ¶ 3.

39. John Stark was subsequently employed as Audit/Accounting Manager from April 1, 2005 until the Securities and Exchange Commission action was filed on July 5, 2005. His duties included one business-related trip, development of revenue reporting spreadsheet formulas, familiarization with the payroll system, and research and evaluation of several automated consolidated accounting systems. *See* Exhibit D. As part of the compensation for his work, he received a fixed salary, and as a condition of his employment, Sardaukar agreed to pay certain military related social security obligations totaling \$3,000.00. For the April to July 2005 period at Sardaukar, John Stark received \$23,001.13 in salary. *Id.* The money John Stark received was exchanged for John Stark's time and service for Sardaukar, but never in the nature of commissions. *Id.*

40. The Receiver has presented no evidence that John Stark's time and service were not reasonably equivalent value for the payment John Stark 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.

41. Although John Stark was not involved in any investment or stock transactions, in order to meet with clients and establish an operating office, John Stark traveled to the city of London, in the United Kingdom in April 2005. All of his expenses were directly related to and in furtherance of the businesses of Sardaukar, including its investment-related business of Tesori. *See* Exhibit A, p. 2, ¶ 4.

42. All of these traveling expenses were for the benefit of Sardaukar and its investment business. Any benefit conferred by the funds in question were for the business of Sardaukar. *Id.*

43. Also, with regard to Tesori, Barbara Stark went to Europe to purchase inventory for Tesori as well as make business contacts for future orders. All of Barbara Stark's expenses and purchases were directly related to and in furtherance of the business of Tesori. It is Barbara Stark's understanding that Sardaukar was covering the purchases and expenses as part of Sardaukar's investment in Tesori. It is also Barbara Stark's understanding that approximately \$19,138.63 was spent in expenses and purchasing inventory on the travel to Europe. *See* Exhibit B, p. 2, ¶ 7.

44. Barbara Stark received no personal benefit from these trips. These trips and the expenses and purchases were for the benefit of Tesori and by extension Sardaukar as its investment.

45. In addition, the Receiver claims that \$10,400.00 was in some way fraudulently transferred by Sardaukar. This money was paid to Barbara Stark by Pamela Stark, the manager of Tesori, for the work that Barbara Stark performed for Tesori.

Barbara Stark has no personal knowledge that any amounts paid by Pamela Stark came from Sardaukar. *See* Exhibit B, p. 3, ¶ 8.

46. Barbara Stark's duties with Tesori included developing the company prospectus, store design, and consulting on the selection and purchase of inventory and store location. *See* Exhibit E. The sum of \$10,400.00 is a reasonable amount of compensation for the services Barbara Stark performed. *See* Exhibit B, p. 3, ¶ 8.

47. This money was received from Pamela Stark, not from Sardaukar or Bradley Stark. Section 24.009(a) 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 provided Pamela Stark the money in question, and further assuming *arguendo* that Sardaukar was a *Ponzi* scheme, Section 24.009(a) relieves Barbara Stark of any liability as taking from a subsequent transferee.

48. Sardaukar was an investment company involved in currency investment and business investment. Sardaukar was a legitimate investment company which was actively investing in new projects in order to create positive return to both new and old clients. Having worked for Sardaukar, John Stark has no reason to believe that Sardaukar was a *Ponzi* scheme as the Receiver alleges. Likewise, John Stark has no reason to believe that Sardaukar or Bradley Stark were in any way trying to defraud investors. *See* Exhibit A, p. 2, ¶ 5. Also, Barbara Stark has no reason to believe that Sardaukar or Bradley Stark were in any way trying to defraud investors. *See* Exhibit B, p. 1, ¶ 3.

49. The Receiver also claims that \$24,042.02, which was paid as rent, was in some way fraudulently transferred. This money was in payment for allowing Bradley

Stark and his family to live in the 16960 Washington Street, Riverside, California property of John and Barbara Stark. In addition, Sardaukar was also being operated out of the property and this payment covered that expense as well. This money was taken in good faith and for reasonably equivalent value. See Exhibit A, p. 3, ¶ 6, and Exhibit B, p. 2, ¶ 4.

50. In addition, the Receiver claims that \$95,154.43 was in some way fraudulently transferred. This money was in repayment for a large amount of money which was loaned to Bradley Stark for his business use and as further consideration for Sardaukar's operation out of John and Barbara Stark's house. This money was taken in good faith and for reasonably equivalent value. See Exhibit A, p. 3, ¶ 7, and Exhibit B, p. 2, ¶ 5.

51. To summarize, some of the funds which the Receiver claims are avoidable did not originate from Sardaukar or Bradley Stark and are thus exempted from avoidance by Section 24.009(a) even assuming *arguendo* that a *Ponzi* scheme existed, all funds were taken in exchange for reasonably equivalent value and, as shown below, all funds were taken in good faith and are therefore not avoidable.

ii. The Defendants took the Funds in Good Faith

52. In addition to receiving the funds in exchange for reasonably equivalent value, the Defendants took the funds in good faith. The Defendants had (and have) no knowledge of any alleged attempts by Brad Stark to defraud any creditors. See Exhibit A, p. 2, ¶ 5, and Exhibit B, p. 1, ¶ 3. Even assuming *arguendo* that Brad Stark had been operating a *Ponzi* scheme, it is still necessary for the Receiver to show that the Defendants 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.”).⁶

53. As stated in the Declarations of John Stark and Barbara Stark, all the funds that the Receiver now wishes to avoid were taken in good faith. *See* Exhibit A and Exhibit B. The Receiver has not shown that any *Ponzi* scheme existed, nor has he shown that the Defendants 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 Defendants did not take the funds in good faith.

54. Taken in the light most favorable to the Defendants, the evidence provided by the Receiver and provided by the Defendants, at the very least, creates a bona fide dispute of a material fact. In reality, the Receiver has shown no evidence, what so ever that the Defendants 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 Defendants also have shown that they took the funds in good faith and for reasonably equivalent value as further evidence that many material facts alleged by the

⁶ The Receiver has pointed to *Quilling v. Tschebaum* to show that when a *Ponzi* scheme is shown, then intent is inferred. However, as the Finding and Recommendation of the United States Magistrate Judge states “...in the case of a *Ponzi* scheme, courts have found that the debtor’s intent to hinder, delay or defraud is established by the mere existence of the *Ponzi* scheme.” Finding and Recommendation of the United States Magistrate Judge in case no. 3:05-CV-1465-L, p. 4. As the Court noted, even if the Receiver can show the existence of a *Ponzi* scheme, then only the intent of the debtor is presumed, not the intent or knowledge of the transferee. The Receiver has therefore not established the second component required to show an avoidable fraudulent transfer as against the Defendants.

Receiver are, at a minimum, subject to a bona fide dispute, and there clearly are issues for trial.

IV. CONCLUSION

55. For the reasons set forth above, the Receiver is not entitled to summary judgment. The Defendants have shown that the existence or non-existence of a *Ponzi* scheme is a disputed material fact in this case, and that they took by subsequent transferee and for reasonably equivalent value and in good faith.

56. The Receiver bears the burden for showing that there is no material fact with which there is a bona fide dispute. When considering this, the Court will look upon all the evidence in the record in the light most favorable to the non-movant - in this case the Defendants.

57. Further, the Receiver has neither given, nor even hinted at any evidence which would show that the Defendants have in any way violated Tex. Bus. & Com. Code §24.005(a)(1) outside of his *Ponzi* scheme allegation. The Defendants have also shown themselves to be protected from any liability by Tex. Bus. & Com. Code §24.009(a). Given this absence of evidence, the Receiver is not entitled to judgment by motion for summary judgment.

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

Dated November 27, 2006.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on November 27, 2006 a true and correct copy of the foregoing was served via first class mail, postage pre-paid, to counsel for the Plaintiff at the address below.

/s/ Mark A. Castillo
Mark A. Castillo

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