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. 3:05-CV-1976-L (BD)
v.	§	**ECF**
JOHN W. STARK, JR. and BARBARA STARK,	§	**Referred to U.S. Magistrate Judge**
Defendants.	§	

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

Plaintiff Michael J. Quilling, the court-appointed Receiver for Sardaukar Holdings IBC and Bradley C. Stark, ("Plaintiff" or "Receiver") hereby files this reply brief in support of his Motion for Summary Judgment [Dkt. No. 39] and would respectfully show the Court as follows:

I.
ARGUMENTS AND ANALYSIS

Defendants' Response Brief [Dkt. No. 44] fails to raise a disputed issue of material fact precluding summary judgment in this case. A material fact is one that affects the ultimate outcome of the case. *MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437, 1440 (10th Cir. 1996); *see also Poulis-Minot v. Smith*, 388 F.3d 354, 363 (1st Cir. 2004). In this case, the only material facts are those that relate to (1) whether Sardaukar was operated as a *Ponzi* scheme, (2) whether Sardaukar transferred $173,174.06 of investor funds to Defendants, and (3) whether Defendants took those funds in good faith *and* in exchange for reasonably equivalent value to Sardaukar. *See* Tex. Bus. &

Com. C. §§ 24.005(a)(1), 24.009. The Receiver has affirmatively established supporting material facts through bank records, his declaration, and the Defendants' own testimony from discovery and their depositions. *See Brief in Support of Plaintiff's Motion for Summary Judgment* [Dkt. No. 40]. Defendants have not offered any specific evidence challenging those exhibits. Instead, they offer two declarations that are conclusory, not based on personal knowledge, and that contradict their earlier discovery responses and depositions. As explained more fully below, such testimony cannot be used to create a genuine fact issue that prevents summary judgment.

A. Defendants Do Not Dispute the Bank Records Establishing the *Ponzi* Scheme.

The Receiver has submitted a declaration explaining how the *Ponzi* scheme is self-evident from Sardaukar's account records. *Receiver's Declaration,* Exhibit "A" [Dkt. No. 41] at ¶¶ 7-8 (App. at 7-8); *Summary of Sardaukar's Account at JPMorgan Chase*, Exhibit "A-1" [Dkt. No. 41] (App. at 11-23). Those records conclusively show that: (1) investor funds constituted virtually all of Sardaukar's revenue; (2) those funds were commingled and used for expenses not related to legitimate investments; and (3) what funds remained were commingled and used to pay "returns" to earlier investors. *Receiver's Declaration,* Exhibit "A" [Dkt. No. 41] at ¶ 8 (App. at 7-8). Without question, this constitutes a classic *Ponzi* scheme and the Court should enter that finding through summary judgment.[1] Black's Law Dictionary 1180 (7th ed.); *see, e.g., Quilling v. Gilliland*, Civil Action No. 3:01-CV-1617 (N.D. Tex. Mar. 6, 2002).

Defendants have not specifically disputed these account records or offered any evidence

[1] Defendants suggest that this Court should not issue summary judgment on the Receiver's claims until the *Ponzi* scheme is established in the main receivership proceeding. *Response Brief* [Dkt. No. 44] at ¶¶ 30-31. Waiting for a final determination in the SEC's case, however, is unnecessary and would only prevent the Receiver from marshaling assets or making investor distributions. *See, e.g., Quilling v. Gilliland*, Civil Action No. 3:01-CV-1617 (N.D. Tex. Mar. 6, 2002) (establishing a *Ponzi* scheme through summary judgment in an ancillary proceeding).

challenging their truthfulness. Instead they attempt to construe the Receiver's declaration as an "opinion" rather than an allegation supported by material facts. *Response Brief* [Dkt. No. 44] at ¶¶ 25-26. The Receiver's declaration, however, expressly incorporates and relies upon Sardaukar's account records when explaining why the *Ponzi* scheme is self-evident.[2] *Receiver's Declaration,* Exhibit "A" [Dkt. No.41] at ¶ 7 (App. at 7).

The only evidence to the contrary consists of John Stark's conclusory statement that Sardaukar was a "legitimate investment company" that he speculates could have been profitable had this Court not appointed a Receiver. *Response Brief* [Dkt. No. 44] at ¶¶ 26, 28; *Declaration of John W. Stark*, Exhibit "A" [Dkt. No. 45-2] at ¶ 5 (App. at 4). That testimony, however, directly contradicts John Stark's numerous statements that he does not have personal knowledge about Sardaukar's investments or operations. *See John Stark's Deposition*, Exhibit "C" [Dkt. No. 41] at 30 (App. at 51); *see also Declaration of John W. Stark* [Dkt. No. 45-2] at ¶ 4; ("I was not involved in any investment or stock transactions"). Defendants cannot rely on such unfounded and speculative testimony when trying to avoid summary judgment. *See* Fed. R. Civ. P. 56(e) (requiring testimony from those with personal knowledge); *see also Marshall v. E. Carrol Parish Hosp. Serv. Dist.*, 134 F.3d 319, 324 (5th Cir. 1998) (ruling that summary judgment is appropriate when the non-moving relies upon "conclusory allegations, improbable inferences, and unsupported speculation").

The Receiver also submits that a reasonable jury could not agree with John Stark's statement after reviewing the undisputed bank records and other evidence before this Court. Sardaukar's

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[2] Those same bank records have already established the *Ponzi* scheme's existence in another ancillary proceeding. *Quilling v. Tschebaum*, Civil Action No. 3:05-CV-1465 (N.D. Tex. Jul. 21, 2006). As in this case, the accuracy of those records was undisputed and, even when considered in the light most favorable to defendants, the Court found that Sardaukar was a *Ponzi* scheme. *Id.*

expenditures could never be confused with "valuable investment[s]" since none of them realized a single dollar of earnings for Sardaukar or its investors.[3] *See Summary of Sardaukar's Account at JPMorgan Chase,* Exhibit "A-1" [Dkt. No. 41] (App. at 11-23) (showing Sardaukar's income came wholly from investors). Furthermore, legitimate investment companies would not commingle contributions from later investors to pay "returns" to earlier investors or use them for the personal expenses of friends and family. *Id.; see also Receiver's Declaration*, Exhibit "A" [Dkt. No. 41] at ¶¶ 7-8 (App. at 7-8).

B. Defendants Do Not Dispute that they Received $173,174.06 of Investor Funds Transferred from Sardaukar.

Sardaukar's bank records also show that Defendants received investor funds totaling $173,174.06 from Sardaukar. *See Id.* at ¶ 6 (App. at 6-7). Defendants admit that those transfers occurred and their dates and amounts are not in dispute. *See Defendants' Discovery Responses*, Exhibit "D" [Dkt. No. 41] at ¶ 6 (App. at 65).

C. The Undisputed Material Facts Show that Sardaukar Did Not Receive Reasonably Equivalent Value for the $173,174.06 Transferred to Defendant.

In order for Defendants to prevail on their affirmative defense, they must show that they took the funds in good faith *and* that Sardaukar received an equivalent value in exchange. *See SEC v. Cook*, 2001 WL 256172, *4 (N.D. Tex. Mar. 8, 2001) ("If [respondent] wishes to raise section 24.009 as a defense he may do so, but the burden falls on him to present facts that support it"). In

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[3] Defendants specifically cite Moondoggie Technologies, Inc. and Tesori Fine Art & Collectibles as an investments that would have been profitable. The Receiver, however, was forced to sell its Moondoggie shares at a loss because that company is in dire straits financially. *See Unopposed Motion to Sell Common Stock of Moondoggie Technologies, Inc.* [Dkt. No. 180] (3:05-CV-1328). Furthermore, Sardaukar's bank records show that Tesori was nothing more than a drain on investor funds and a pretext for taking family trips to Europe. *See Summary of Sardaukar's Account at JPMorgan Chase,* Exhibit "A-1" [Dkt. No. 41] (App. at 11-23) (showing that Sardaukar paid for the Stark family's trips to Europe and realized no income from Tesori).

order for there to be a genuine issue of material fact precluding summary judgment, the Defendants must offer specific evidence that could persuade a reasonable jury to find in their favor. *See MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437, 1440 (10th Cir. 1996) (a "genuine issue" of material fact exists only if a reasonable jury could return a verdict for the non-movant). The Receiver submits that Defendants cannot carry their burden of proof on both elements before a reasonable jury because (1) Sardaukar received no actual benefit in exchange for the $173,174.06 transferred to Defendants and (2) the undisputed material facts provide many reasons to doubt that Defendants accepted the funds in good faith. From Sardaukar's point of view, each and every one of those transfers were manifestly unreasonable and no rational jury could find for the Defendants.

1. Sardaukar Did Not Receive Reasonably Equivalent Value for the $24,042.02 of Investor Funds Paid to March Community Credit Union.

All parties admit that Sardaukar made a single payment of $24,042.02 to pay off Defendants' line of credit at March Community Credit Union. *See Defendants' Discovery Responses*, Exhibit "D" [Dkt. No. 41] at 8 (App. at 66). In her deposition, Defendant Barbara Stark stated that her son simply announced he was paying that debt on Defendants' behalf without any discussion of consideration or value exchanged to Sardaukar's investors. *Barbara Stark Deposition*, Exhibit "B" [Dkt. No. 41] at 17-18, 32-33 (App. at 29-30, 33). To date, Defendants have not challenged this testimony and it remains an undisputed material fact.

When asked about this transfer during discovery, however, Defendants changed their story and stated that the $24,042.02 payment was in exchange for housing Brad Stark and his family. *Defendant's Discovery Responses*, Exhibit "D" [Dkt. No. 41] at 8 (App. at 66); *see also Defendant's Response Brief* [Dkt. No. 44] at ¶ 49. Even if this Court accepted the Defendants' explanation at

face value, it is obvious that Brad Stark's personal living expenses benefitted only him and not Sardaukar or its investors.

After the Receiver filed his Motion for Summary Judgment, the Defendants again changed their story in an attempt to create a fact issue. Rather than relying on their earlier undisputed testimony, Defendants submitted new declarations that now claimed "Sardaukar was also being operated out of the property and this payment covered that expense as well." *See Declaration of John W. Stark*, Exhibit "A" [Dkt. No. 45] at ¶ 6 (App. at 5); *Declaration of Barbara Stark*, Exhibit "B" [Dkt. No. 45] at ¶ 4 (App. at 8). These declarations obviously contradict the Defendants' earlier testimony and they cannot rely on those statements to avoid summary judgment. *See S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 495-96 (5th Cir. 1996) ("this court does not allow a party to defeat a motion for summary judgment using an affidavit that impeaches, without explanation, sworn testimony"); *see also Buttry v. Gen. Signal Corp.*, 68 F.3d 1488, 1493 (2d Cir. 1995) (when considering summary judgment evidence, the Court should disregard a party's new, contradictory testimony). Defendants already had plenty of opportunities to explain how Sardaukar could possibly have benefitted from the $24,042.02 transfer and failed to do so.[4]

2. Sardaukar Did Not Receive Reasonably Equivalent Value for the $95,154.43 Paid to GMAC Mortgage.

It is undisputed that Sardaukar made a single payment of $95,154.43 to GMAC Mortgage that paid off the mortgage on Defendants' home. *See Barbara Stark Deposition*, Exhibit "B" [Dkt. No. 41] at 12-13 (App. at 28); *John Stark Deposition*, Exhibit "C" [Dkt. No. 41] at 5-6 (App. at 44-

[4] Even if this Court does accept Defendants' new version of events, Sardaukar was run entirely from Brad Stark's personal computer and a reasonable jury could not conclude that Sardaukar received any benefit from this arrangement that justified paying $24,042.02 of investor funds to Defendants.

45). Defendants claim that the payment was made on their behalf in exchange for "credit" extended to Brad Stark. *Defendant's Discovery Responses*, Exhibit "D" [Dkt. No. 41] at 8 (App. at 66); *see also Defendants' Response Brief* [Dkt No. 44] at ¶ 50. Defendants, however, admitted that this "credit" actually benefitted another one of Brad Stark's businesses and not Sardaukar. *See Barbara Stark Deposition*, Exhibit "B" [Dkt. No. 41] at 18-19 (App. at 30) (stating that the GMAC mortgage was paid off for loans relating to a business in Colorado called Travel Exams).

In opposing summary judgment, however, Defendants ignored this earlier testimony and relied upon new declarations that suddenly added that the $95,154.43 repaid personal loans to Brad Stark as well as in "further consideration for Sardaukar's operation out of John and Barbara Stark's house." *See John Stark's Declaration*, Exhibit "A" [Dkt. No. 45] at ¶ 7 (App. at 5). Obviously, this statement differs from the Defendants' undisputed deposition testimony and cannot be offered at the eleventh hour to create a fact issue precluding summary judgment. *See S.W.S. Erectors, Inc.*, 72 F.3d at 495-96 (5th Cir. 1996); *Buttry*, 68 F.3d at 1493 (2d Cir. 1995).[5]

3. Sardaukar Did Not Receive Reasonably Equivalent Value for the $10,400.00 Paid to Barbara Stark and $19,138.63 in Travel Expenses Related to Pam Stark's Art Dealership.

Both parties agree that Pam Stark's art dealership, Tesori Fine Art & Collectibles, ("Tesori") was a business completely separate from Sardaukar. *See Barbara Stark Deposition*, Exhibit "B" [Dkt. No. 41] at 55 (App. at 34) (stating that trips to Europe were to conduct business for Tesori and not Sardaukar); *see also Declaration of Barbara Stark,* Exhibit "B" [Dkt. No. 45] at ¶ 3 (App. at 7)

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[5] As explained in footnote 4, even if this Court does accept Defendants' new version of events, Sardaukar was run entirely from Brad Stark's personal computer and a reasonable jury could not conclude that Sardaukar received any benefit from this arrangement that justified paying $95,154.43 of investor funds to Defendants.

("I have never, in any way, been employed by Sardaukar").[6] Therefore, no reasonable jury could conclude that Sardaukar or its investors received any value in exchange for expenses related to Tesori—including those funds paid to Barbara Stark and for the Defendants' trips to Europe.[7]

In their latest declarations, Defendants make a brand new claim that Sardaukar would have realized some value from Tesori had "the Receiver not interfered." *Defendants' Response Brief* [Dkt. No. 44] at ¶ 28. But this is just naked speculation and does not show that Sardaukar actually did receive anything in exchange—which is what Defendants must show to prevail on their affirmative defense. *See, e.g., Marshall*, 134 F.3d at 324 (5th Cir. 1998) ("conclusory allegations, improbable inferences, and unsupported speculation" carry no weight when opposing summary judgment). Furthermore, neither Defendant has the requisite personal knowledge to offer any testimony about Sardaukar's investments. *See John Stark's Declaration*, Exhibit "A" [Dkt. No. 45] at ¶ 4 (App. at 4) (stating that he "was not involved with any investment or stock transactions" of Sardaukar); *Barbara Stark's Declaration,* Exhibit "B" [Dkt. No. 45] at ¶ 3 (App. at 7) ("I have never, in any way, been employed by Sardaukar"). Without personal knowledge, Defendants' statements cannot create a fact issue precluding summary judgment. *See* Fed. R. Civ. P. 56(e).

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[6] Defendants seem to acknowledge this distinction in stating that Barbara Stark was paid by Pam Stark and not Sardaukar. *Defendants' Response Brief* [Dkt. No. 44] at ¶ 48. This, however, does not protect Barbara Stark from liability under the UFTA. Having been appointed for all three parties, the Receiver may recover investor funds transferred through Sardaukar, Brad Stark, or Pam Stark. *See Order Appointing Receiver* [Dkt. No. 36] (3:05-CV-1328).

[7] In their depositions, both Defendants testified that the trips to Europe were ultimately related to Tesori's business, not Sardaukar's. *See Barbara Stark Deposition*, Exhibit "B" [Dkt. No. 41] at 55 (App. at 34) (stating that trips to Europe were to conduct business for Tesori and not Sardaukar); *John Stark Deposition*, Exhibit "C" [Dkt. No. 41] at 45 (App. at 54). John Stark has since changed his testimony to say that his travel expenses included a trip to London to "meet with clients and establish an operating office." *John Stark's Declaration*, Exhibit "A" [Dkt. No. 45] at ¶ 4 (App. at 4). He has already stated, however, that those meetings did not take place and he ended up supporting Pam Stark's efforts to find inventory for Tesori. *John Stark Deposition*, Exhibit "C" [Dkt. No. 41] at 45 (App. at 54). These material facts remain undisputed and Defendants cannot avoid summary judgment by simply trying to conflate Tesori with Sardaukar.

When considering Sardaukar's relationship with Tesori, the Receiver would refer the Court to the bank records that remain undisputed in this case. They show that Brad Stark used Sardaukar funds to bankroll Tesori (along with the Starks' other personal diversions) without realizing a single dollar in return. *See Summary of Sardaukar's Account at JPMorgan Chase,* Exhibit "A-1" [Dkt. No. 41] (App. at 11-23) (showing no income from Tesori). Therefore, no reasonable jury could conclude that Sardaukar or its investors received a reasonably equivalent value in exchange for those payments.

4. Sardaukar Did Not Receive Reasonably Equivalent Value for the $26,001.13 Paid to John Stark.

It is undisputed that Sardaukar transferred investor funds totaling $26,001.13 to John Stark. During discovery, Defendants claimed that those funds compensated John Stark for preparing spreadsheets to handle the company's payroll. *Defendant's Discovery Responses,* Exhibit "D" [Dkt. No. 41] at 8 (App. at 66). In his deposition, however, John Stark admits that he "never really got to handle the payroll" and merely created a spreadsheet template that Sardaukar never used. *Deposition of John Stark*, Exhibit "C" [Dkt. No. 41] at 42, 44 (App. at 54). John Stark's work product itself shows that Sardaukar received no actual benefit for the $26,001.13 of investor funds he received and a reasonable jury could not conclude that his compensation would be justified at arm's length. *See Defendants' Response Brief,* Exhibit "D" [Dkt. No. 45] (App. at 12-49) (showing that his entire work product consisted of multiple copies of the same empty formulas that Sardaukar never used).

D. The Undisputed Material Facts Show That Defendants Did Not Receive the $173,174.06 of Investor Funds in Good Faith.

Defendants cannot prove that they accepted investor funds in good faith because, under the circumstances, a reasonable person would have inquired further before accepting $173,174.06 from

Brad Stark's investment company. *See Motion for Summary Judgment* [Dkt. No. 40] at 10-11. For example, Defendants knew that Sardaukar was wholly owned and operated by their son, who had recently served time in prison for securities violations. *John Stark's Deposition*, Exhibit "C" [Dkt. No. 41] at 23-26 (App. at 49-50); *see also Barbara Stark's Deposition*, Exhibit "B" [Dkt. No. 41] at 37-38. John Stark himself served as President and CEO of Sardaukar and should have questioned Sardaukar's corporate irregularities as well as Brad Stark's conspicuous spending spree. *Defendants' Discovery Responses*, Exhibit "D" at 8 (App. at 66); *see also Flores v. Robinson Roofing & Constr. Co.*, 161 S.W.3d 750-756 (company officer did not receive funds in good faith because his position raises an inference that he knew the company was insolvent at the time of the transfer). Defendants ignore these facts (and others set forth in the Receiver's motion) and instead offer conclusive testimony to establish that they accepted all funds in good faith. *See Declaration of John W. Stark*, Exhibit "A" [Dkt. No. 45] at ¶¶ 6-7 (App. at 5); *Declaration of Barbara Stark*, Exhibit "B" [Dkt. No. 45] at ¶¶ 4-5 (App. at 8) (both concluding that "[t]his money was taken in good faith and for reasonably equivalent value"). Without specifically challenging the Receiver's facts, however, Defendants cannot rely upon their own legal conclusions to avoid summary judgment. *See Marshall*, 134 F.3d at 324 (5th Cir. 1998) (summary judgment is appropriate when the nonmoving party relies upon "conclusory allegations").

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

On the 12th 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:

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/s/ Brent J. Rodine