Exhibit "A"

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-G
v.	§	
JOHN W. STARK, JR. and BARBARA STARK,	§	
Defendants.	§	

PLAINTIFF'S SURREPLY TO
DEFENDANTS' MOTION TO DISMISS

TO THE HONORABLE A. JOE FISH, CHIEF UNITED STATES DISTRICT JUDGE:

COMES NOW, Michael J. Quilling, in his capacity as Receiver for Sardaukar Holdings IBC and Bradley C. Stark, ("Receiver") and submits this Surreply regarding the Motion to Dismiss filed by Defendants John W. Stark, Jr. and Barbara Stark and would respectfully show this Court as follows:

I.
Introduction

Defendants filed a motion seeking to dismiss the Receiver's complaint but waited until their Reply Brief to reveal any supporting case law. Defendants' Reply Brief also raised numerous legal arguments and factual allegations for the first time, including: (1) alleged deficiencies in the Return of Service; (2) specific facts allegedly needed to prove Constructive Trust and Disgorgement; and (3) insisting that the Receiver pick among numerous legal theories set forth in the Texas Uniform

Fraudulent Transfer Act. Defendants' assertions, however, fly in the face of established case law and ignore facts expressly pleaded in the Complaint. For these reasons, which are explained more fully below, the Defendant's Motion to Dismiss should be denied.

II.
Arguments and Authorities

A. The Receiver Has Made a Prima Facie Showing that this Court has Personal Jurisdiction over the Defendants.

The Receiver has unquestionably demonstrated that this Court properly exercises personal jurisdiction over the Defendants. The Receiver has offered an affidavit stating that all elements of 28 U.S.C. § 754 and § 1692 are satisfied for purposes of exercising personal jurisdiction over the Defendants. In fact, the Defendants do not dispute that the Receiver has fully complied with these statutes but, instead, insist that personal jurisdiction must be proven on the face of the Complaint rather than through briefs and affidavits. *Supplemental Brief in Support of Motion to Dismiss and Reply to Plaintiff's Response to Motion to Dismiss* ("Defendants' Reply Brief") [Dkt. 10-1] at ¶ 2. Settled case law, however, expressly allows the Receiver to establish personal jurisdiction through supplemental briefs and affidavits.

A plaintiff's burden to establish personal jurisdiction over the defendant only arises "[o]nce a defendant presents a motion to dismiss" on those grounds. *Gundle Lining Constr. v. Adams Cty. Asphalt, Inc.*, 85 F.3d 201, 204, 207 (5th Cir. 1996). At that point, "plaintiff cannot simply stand on its pleadings, but must, through affidavits or otherwise, set forth specific facts demonstrating that the Court has jurisdiction." *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991); *see also Earle v. Aramark Corp.*, 2004 WL 1879884, *2 (N.D. Tex. Aug. 16, 2004); *Fielding v. Hubert Burda Media, Inc.*, 2004 WL 532714, *2 (N.D. Tex. Feb. 11, 2004); *E2M Health Servs. v. Curative*

Health Servs., 2003 WL 23017509, *3 (N.D. Tex. Dec. 19, 2003). In so doing, the plaintiff must make out a prima facie case supporting personal jurisdiction. *Alpine View Co. v. Atlas Copco A.B.*, 205 F.3d 208, 215 (5th Cir. 2000). The Court accepts as true all uncontroverted allegations, as well as their reasonable inferences, and resolves all conflicting allegations in the plaintiff's favor. *Id; Mason v. FDIC,* 888 F.Supp. 799, 803 (S.D. Tex. 1995).

When viewed in the Receiver's favor, the Complaint and affidavit clearly state a prima facie case for personal jurisdiction over the Defendants. The Receiver's Complaint alleges that jurisdiction is proper under 28 U.S.C. § 754. *Complaint* at ¶ 4. As stated previously, § 754 and §1692 allow for personal jurisdiction over the Defendants if, within ten days of his appointment, the Receiver files the Complaint and Order of Appointment in the district where Receivership Assets are located. 28 U.S.C. § 754. The Receiver has already submitted to this Court the Affidavit of Michael J. Quilling, which states that these filings were properly made in the United States District Court for the Central District of California. *Plaintiff's Response to Defendants' Motion to Dismiss* [Dkt. 9], Exhibit "A." The Complaint also sets out that the Defendants are located in that district and have in their possession assets of the Receivership Estate. *Complaint* at ¶¶ 2, 3, 9. When considered in the Receiver's favor, these allegations and their reasonable inferences clearly make a prima facie showing that jurisdiction is proper under § 754 and §1692.

B. A Technical Error Outside the Receiver's Control Does Not Invalidate Service of Process to the Defendants.

The Federal Rules of Civil Procedure contemplate that a Court may have personal jurisdiction over a defendant despite imperfect service of process. *Drill South, Inc. v. Int'l Fidelity Ins. Co.*, 234 F.3d 1232, 1238 (11th Cir. 2000). In fact, a defect in service of process is a harmless

error if service was in "substantial compliance" with the Federal Rules of Civil Procedure. *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982).

The misstated date on the Return of Service in this case is not fatal because it was merely a technical error that is out of the Receiver's control. In determining whether service of process substantially complied with the Federal Rules of Civil Procedure, the District Court has discretion to distinguish between "mere technical errors" and "a complete disregard for rule's requirements." *Weaver v. New York*, 7 F.Supp.2d 234, 235 (W.D.N.Y. 1998); *see also Young's Trading Co. v. Fancy Import, Inc.*, 222 F.R.D. 341, 343 (W.D. Tenn. 2004) (distinguishing between an "innocent mistake" and "inexcusable neglect"). While actual notice of the case alone will not cure defective service of process, the Court has broad remedial powers to correct service errors when justice demands it and no prejudice would result. *See, e.g., McCaslin v. Cornhusker State Indus.*, 952 F.Supp. 652, 659 (D. Neb. 1996), *citing Haley v. Simmons*, 529 F.2d 78, 79 (8th Cir. 1976). A technical error in service of process may be excused if the defendant actually received service and is not prejudiced by the mistake. *Armco, Inc. v. Penrod-Stauffer Bldg. Sys., Inc.*, 733 F.2d 1087, 1089 (4th Cir. 1984) ("where there is actual notice, every technical violation of the rule or failure of strict compliance may not invalidate the service of process."); *see also, Dow v. Jones*, 232 F.Supp.2d 491, 497 (D. Md. 2002) (upholding service despite alleged inaccuracies in the defendant's physical description on the return of service); *Tention v. Southern Pac. R. Co.*, 336 F.Supp. 25, 25 (D. S.C. 1972) (holding that a misnomer on the return of service was not fatal).

Clearly, the service of process made upon Defendants in this case should not be set aside. The Defendants simply allege that the process server wrote down the wrong date on the return affidavit. *Defendant's Reply* at ¶ 3. Setting aside service of process for a mere technical error by

the process server would prejudice the Receiver by (1) invalidating service of process for circumstances outside his control and (2) delaying these proceedings when no substantial right of the defendant has been violated. *See Hawkins v. Dep't of Mental Health,* 89 F.R.D. 127 (W.D. Mich. 1981). Furthermore, Defendants have not alleged that they failed to receive service or that they suffered prejudice as a result of the technical error. In short, Defendants have not alleged any of the conditions justifying dismissal in this case.

Furthermore, even if service of process were set aside on those grounds, dismissal is not the proper remedy. The general rule is that when a Court finds that service is insufficient but curable, it should quash the first attempt at service and give plaintiff an opportunity to re-serve. *See, e.g., Gregory v. United States*, 942 F.2d 1498, 1500 (10th Cir.1991). Therefore, even if the technical error on the process server's return was fatal, this Court should still deny Defendants' Motion to Dismiss and simply order the Receiver to reissue service of process.

C. Defendants May be Served with Process at a Location Other than the Address Listed in the Complaint.

The Receiver's service of process upon the Defendants is valid because service may be accomplished by personal delivery, regardless of what address is listed in the Complaint. Federal Rule of Civil Procedure 4(e) allows for service of process upon an individual by personal delivery:

> (e) SERVICE UPON INDIVIDUALS WITHIN A JUDICIAL DISTRICT OF THE UNITED STATES. Unless otherwise provided by federal law, service upon an individual . . . may be effected in any judicial district of the United States:
>
> (1) *pursuant to the law of the state in which the district court is located, or in which service is effected*, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or

> (2) *by delivering a copy of the summons and of the complaint to the individual personally* or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

Fed. R. Civ. Proc. 4(e) (emphasis added). Rule 4(e) does not state that personal service can only be accomplished at the address listed in the Complaint and, in fact, the provisions of Rule 4 are given their most liberal and flexible construction. *See, e.g., Nowell v. Nowell*, 384 F.2d 951, 953 (5th Cir. 1967), *cert. denied*, 390 U.S. 956 (1968) (holding that the language currently in Rule 4(e)(2) should be construed broadly). Moreover, the Rules of Civil Procedure in both Texas and California—which are expressly incorporated in Rule 4(e)(1)—allow for personal service of the Defendants anywhere in the State, regardless of their location. Tex. R. Civ. Proc. 106(a)(1); Cal. R. Civ. Proc. § 415.10. Furthermore, case law clearly allows the Receiver to achieve personal service of process at locations other than the Defendants' address listed in the Complaint. *See, e.g., Burnham v. Superior Court of Cal.*, 495 U.S. 604 (1990) (affirming personal service of process upon a New Jersey resident during a trip to California).

D. The Receiver's Complaint Alleges All Facts Necessary to Obtain Relief.

The Federal Rules of Civil Procedure do not require the plaintiff's pleadings to detail the facts or legal theories of his complaint. *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Rather, a Complaint must simply contain a "short and plain statement" giving Defendant fair notice of the claim. Fed. R. Civ. Proc. 8. Defendants are on fair notice so long as the Complaint informs them of the "general basis" for each element of a cause of action. *Chae v. Rivendell Woods, Inc.*, 415 F.3d 342, 348 (4th Cir. 2005). Plaintiffs need only plead the "factual predicate" of their claims, not

"evidentiary detail." *U.S. v. Melrose-Wakefield Hosp.* 360 F.3d 220, 240 (1st Cir. 2004). Stated another way, the a Complaint must only state enough information for the defendant to prepare an answer—not a defense. *Chao v. Rivendell Woods, Inc.* 415 F.3d 342, 349 (4th Cir. 2005). Given the liberal standard of notice pleading, it is no surprise that dismissals like the one that Defendants seek are rare. *Clark v. Amoco Prod. Co.*, 794 F.2d 967, 970 (5th Cir.1986).

In this case, the Complaint has clearly set forth sufficient facts supporting the Receiver's causes of action. He has explained the underlying *Ponzi* scheme and identified the fraudulent transfers that are the subject of this suit. *Complaint* at ¶¶ 8, 9. In fact, the Receiver describes those transfers by amount, their actual or approximate date, and their known purpose. *Complaint* at ¶ 9. Moreover, the fact section of the Complaint traces these funds back to the bank account funding Stark's *Ponzi* scheme. *Id.* All of these allegations are fully incorporated into each of the Receiver's causes of action. *Complaint* at ¶¶ 10, 13, 15. It is, therefore, apparent that all factual elements for recovery have been alleged on the face of the complaint. *See Mason v. FDIC*, 888 F. Supp. 799, 803 (S.D. Tex. 1995).

In seeking additional facts, the Defendants apparently want the Receiver to try his entire case in the Complaint—which is not required under the standard of notice pleading. The facts as pleaded have clearly laid a factual predicate for each claim. In seeking Constructive Trust and Disgorgement, the Receiver has put Defendants on notice that (1) Stark and his associates engaged in an actual or constructive fraud, (2) the Defendants were thereby unjustly enriched, and (3) the property to be held in trust (i.e., the fund transferred by Sardaukar, their proceeds, or their equivalent value) can be traced to some identifiable res in which the Receiver has an interest (i.e., investor funds once held in Sardaukar's bank account). *See Burkhart Grob Luft und Raumfahrt GmbH & Co. KG v.*

E-Systems, Inc., 257 F.3d 461, 469 (5th Cir. 2001) (explaining elements of constructive trust claim). Similarly, in pursuing his Fraudulent Transfer cause of action, the Receiver has pleaded facts that put Defendants on notice that (1) he has a claim to funds for which Stark and/or Sardaukar were liable (establishing a "creditor" and "debtor" under Tex. Bus. & Comm. C. § 24.002), (2) those funds were transferred without a reasonable exchange of value, and (3) Sardaukar was not a solvent business but, instead, a shell for Stark's *Ponzi* scheme. These elements support multiple theories of recovery under Chapter 24 of the Texas Business & Commerce Code, as well as statutory and equitable recovery of costs and fees. Tex. Bus. & Comm. C. § 24.008, § 24.013. Furthermore, the mere existence of a *Ponzi* scheme makes these transfers fraudulent as a matter of law. *See Warfield v. Byron*, 2006 WL 118250 , *5-7 (5th Cir. Jan. 17, 2006); *S.E.C. v. Cook*, 2001 WL 256172, *3 (N.D. Tex. Mar. 8, 2001). The Receiver does not, at this early date, have to select which of these legal theories will ultimately be advanced at trial, so long as he alleges facts upon which relief can be granted. *McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 551 (5th Cir. 2003). Similarly, to the extent that the Receiver is required to plead the circumstances of fraud with particularity, the Complaint's factual allegations do exactly that.[1] Accordingly, the Complaint complies with the well-settled standards of notice pleading and clearly states a claim against the Defendants for purposes of Federal Rules of Civil Procedure 9(b) and 12(b)(6).

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[1] Defendants conspicuously ignore the Receiver's assertion that circumstances of fraud need not be pleaded with particularly in this instance because (1) traditional pleading standards are relaxed in receivership cases and (2) the *Ponzi* scheme's existence is undisputed and, therefore, Sardaukar's transfers are fraudulent as a matter of law. *Plaintiff's Response to Defendants' Motion to Dismiss*, pp. 7-9.

Respectfully submitted,

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