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

MICHAEL J. QUILLING, as Receiver for Sardaukar Holdings, IBC and Bradley C. Stark	§	
	§	
Plaintiff,	§	
	§	NO. 3-05-CV-1465-L
VS.	§	
	§	
HANS TSCHEBAUM, ET AL.	§	
	§	
Defendants.	§	

FINDINGS AND RECOMMENDATION OF THE
UNITED STATES MAGISTRATE JUDGE

Plaintiff Michael J. Quilling, as Receiver for Sardaukar Holdings, IBC and Bradley C. Stark, has filed a motion for summary judgment in this case brought under the Texas Uniform Fraudulent Transfer Act ("TUFTA"), Tex. Bus. & Comm. Code Ann. § 24.001, *et seq*. For the reasons stated herein, the motion should be granted.

I.

This case arises out of a lawsuit brought by the Securities and Exchange Commission ("SEC") against various defendants and relief-defendants involving the sale of unregistered securities. *SEC v. Megafund Corp.*, No. 3-05-CV-1328-L ("the *Megafund* Litigation"). In that case, the SEC alleges that the defendants, including Sardaukar Holdings, IBC ("Sardaukar") and Bradley C. Stark ("Stark"), raised more than $13 million from unwitting investors by making false representations about the expected rate of return on their investments and by promising that a portion of the profits generated from the sale of securities would be used to benefit charitable causes.

On July 5, 2005, the court appointed Michael J. Quilling as the Receiver for all defendants in the *Megafund* Litigation. In that capacity, Quilling was authorized to:

> take[ ] exclusive jurisdiction and possession of the assets, monies, securities, claims in action, and properties, real and personal, tangible and intangible, of whatever kind and description, wherever situated, of [the named defendants and relief defendant] and any entities they control ("Receivership Assets"), and the books and records of the Defendants and Relief Defendant ("Receivership Records").

See Order, 7/5/05 at 1-2, ¶ I(1)). The order further provides:

> The Receiver is hereby authorized to institute, defend, compromise or adjust such actions or proceedings in state or federal courts now pending and hereafter instituted, as may in his discretion be advisable or proper for the protection of Receivership Assets or proceeds therefrom, and to institute, prosecute, compromise or adjust such actions or proceedings in state or federal court as may in his judgment be necessary or proper for the collection, preservation and maintenance of Receivership Assets.
>
> 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 person or entities who received assets or funds traceable to investor monies. All such actions shall be filed in this Court.

Id. at 5-6, ¶ I(12) & (13)).

On July 25, 2005, the Receiver filed this action against Hans Tschebaum and his son, Michael Tschebaum ("Tschebaum defendants") to recover $475,912.71 in investor funds allegedly transferred by Stark. (Plf. Compl. at 3, ¶ 9). The Tschebaum defendants admit that these transfers occurred "substantially as described" in the complaint, (*see* Def. Ans. at 1, ¶ 1), but insist that the funds were commissions lawfully earned from the Sardaukar investment program. On May 12, 2006, the Receiver filed a motion for summary judgment on his fraudulent transfer claim. Although the Tschebaum defendants have had more than 60 days to respond to this motion, no response has

been filed.[1] The court therefore considers the motion without the benefit of a response.

II.

Summary judgment is proper when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A movant who has the burden of proof at trial must establish "beyond peradventure all of the essential elements of the claim or defense to warrant judgment in his favor." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). Once the movant meets its initial burden, the non-movant must show that summary judgment is not proper. *See Duckett v. City of Cedar Park*, 950 F.2d 272, 276 (5th Cir. 1992). The parties may satisfy their respective burdens by tendering depositions, affidavits, and other competent evidence. *See Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.), *cert. denied*, 113 S.Ct. 82 (1992). Where, as here, the non-movant has not filed a summary judgment response or submitted any controverting evidence, the court may accept as true the undisputed facts adduced by the movant. *See Tillison v. Trinity Valley Electric Cooperative, Inc.*, No. 3-03-CV-2480-D, 2005 WL 292423 at *1 (N.D. Tex. Feb. 7, 2005), *citing Bookman v. Shubzda*, 945 F.Supp. 999, 1002 (N.D. Tex. 1996). All evidence must be viewed in the light most favorable to the party opposing the motion. *Rosado v. Deters*, 5 F.3d 119, 122 (5th Cir. 1993).

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[1] The court originally ordered the Tschebaum defendants to file a response to the motion for summary judgment by June 8, 2006. *See* Order, 5/15/06 at 2. On June 22, 2006, two weeks after this deadline expired, defendants filed a motion to stay all proceeding until July 13, 2006 and for leave to file a late summary judgment response so the parties could explore the possibility of settlement. Without deciding whether defendants should be allowed to file a late response, the court agreed to defer ruling on the Receiver's motion for summary judgment "until July 13, 2006, at the earliest." Order, 6/23/06. The order further provides that "[i]f this case does not settle by that date, defendants may renew their motion for leave to file [a] late response[ ] to plaintiff's motion[.]" *Id.* Although this deadline passed more than one week ago, defendants neither have filed a summary judgment response nor renewed their motion for leave to file this response out-of-time.

A.

The Receiver alleges that cash payments totaling $475,912.71, including $141,675.71 used to purchase a 2005 Maserati automobile, made to the Tschebaum defendants by Stark constitute voidable transfers under TUFTA. This statute provides, in pertinent part:

> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or within a reasonable time after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) with actual intent to hinder, delay, or defraud any creditor of the debtor.

TEX. BUS. & COMM. CODE ANN. § 24.005(a) (Vernon 2002). Ordinarily, the creditor must prove that the challenged transfer was made with the intent to defraud. *See Quilling v. Gilliland*, 3-01-CV-1617-BD, 2002 WL 373560 at *2 (N.D.Tex. Mar. 6, 2002) (Kaplan, J.), *appeal dism'd*, No. 02-10415 (5th Cir. Jun. 3, 2002). However, in the case of a *Ponzi* scheme,[2] courts have found that the debtor's intent to hinder, delay, or defraud is established by the mere existence of the *Ponzi* scheme. *Id.*; *see also Warfield v. Byron*, 436 F.3d 551, 558 (5th Cir. 2006) (burden of proving that transfers were made with actual intent to defraud is satisfied by establishing the existence of a *Ponzi* scheme "which is, as a matter of law, insolvent from its inception"); *SEC v. Cook*, No. 3-00-CV-0272-R, 2001 WL 256172 at *3 (N.D. Tex. Mar. 8, 2001), *citing In re Independent Clearing House Co.*, 77 B.R. 843, 860 (Bankr. D. Utah 1987) (finding requisite intent to defraud from fact that debtor must have known that *Ponzi* scheme would inevitably collapse and that later investors would lose their investment).

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[2] A *Ponzi* scheme is a fraudulent investment scheme where money from new investors is used to pay "profits" on the money contributed by earlier investors, without the operation of an actual revenue-producing business other than the raising of new funds by finding more investors. *See* BLACK'S LAW DICTIONARY 1180 (7th ed. 1999).

B.

The summary judgment evidence conclusively establishes that Sardaukar was an unlicensed investment broker created and controlled by Stark. Investors, who were promised high-yield returns on their contributions, were recruited by Stark and instructed to send funds to an account at JP Morgan Chase Bank. As Sardaukar received those funds, Stark systematically diverted millions of dollars to benefit himself, his family, and his friends--including the Tschebaums. Sardaukar never generated any investment revenue. What little money remained after Stark depleted the bank account was commingled and used to pay "returns" to earlier investors. (*See* Plf. MSJ App. at 8-9, ¶ 7). Among the payments made by Stark were:

Date	**Amount**	**Recipient**	**Description**
10/27/04	$ 20,000.00	Michael Tschebaum	Payment to Charles Schwab account
11/24/04	$ 256,000.00	Michael Tschebaum	Payment to Charles Schwab account
12/17/04	$ 50,000.00	Michael Tschebaum	Payment to Charles Schwab account
01/07/05	$ 8,237.00	Michael Tschebaum	Payment to Charles Schwab account
02/09/05	$ 30,000.00	Ferrari of Beverly Hills	Purchase of Maserati automobile
02/09/05	$ 111,675.71	Ferrari of Beverly Hills	Purchase of Maserati automobile

(*Id.* at 7, ¶ 5). Although the Maserati allegedly was purchased by Administrative Specialists, the Receiver has determined that Hans Tschebaum controls and regularly possesses the car. (*Id.* at 8, ¶ 6).[3]

Defendants have not offered any argument, much less evidence, to refute any of these facts. To the contrary, defendants admit that the transfers occurred "substantially as described" by the Receiver. (Def. Ans. at 1, ¶ 1). Because there is no genuine issue of material fact for trial, the

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[3] Shortly after this motion was filed, Hans Tschebaum agreed to surrender possession of the Maserati to the Receiver. *See* Order, 5/15/06.

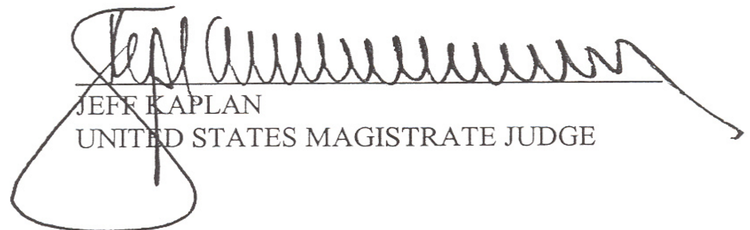
Receiver is entitled to judgment as a matter of law on his fraudulent transfer claim.

RECOMMENDATION

Plaintiff's motion for summary judgment [Doc. #44] should be granted. The court should enter judgment against Michael Tschebaum in the amount of $334,237.00 and against Hans Tschebaum in the amount of $141,675.71, together with prejudgment and post-judgment interest as allowed by law.[4] As the prevailing party in this case, the Receiver is entitled to recover "costs and reasonable attorney's fees as are equitable and just." *See* TEX. BUS. & COMM. CODE ANN. § 24.013. An application for attorney's fees shall be filed within 14 days after entry of a final judgment in accordance with Fed. R. Civ. P. 54(d)(2).

A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party may file written objections to the recommendation within 10 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). The failure to file written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: July 21, 2006.



JEFF KAPLAN
UNITED STATES MAGISTRATE JUDGE

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[4] In his motion for summary judgment, the Receiver argues that the Tschebaums are jointly and severally liable for the total amount of these fraudulent transfers. However, the evidence shows that only Michael Tschebaum received the cash transfers totaling $334,237.00 and that only Hans Tschebaum controlled the Maserati purchased for $141,675.71. On these facts, there is no basis for the imposition of joint and several liability.