

ORIGINAL

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

U.S. DISTRICT COURT NORTHERN DISTRICT OF TEXAS
FILED
JAN 18 2006
CLERK, U.S. DISTRICT COURT
By _____ Deputy

MICHAEL J. QUILLING, RECEIVER FOR
SARDAUKAR HOLDINGS, IBC and
BRADLEY C. STARK,

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Plaintiff,

v.

Civil Action No. 3:05-CV-1465-L

HANS TSCHBAUM and MICHAEL
TSCHBAUM,

Defendants.

(Jury Trial Demanded)

**PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION
AND BRIEF IN SUPPORT**

TO THE HONORABLE SAM A. LINDSAY, UNITED STATES DISTRICT JUDGE:

COMES NOW, Michael J. Quilling, Receiver for Sardaukar Holdings, IBC and Bradley C. Stark, ("Plaintiff" and "Movant") seeking the issuance of a preliminary injunction, and would show unto the Honorable Court as follows:

I.

BACKGROUND

1. On July 1, 2005, the Securities and Exchange Commission ("SEC") initiated Case No. 3:05-CV-1328-L currently styled *Securities and Exchange Commission, Plaintiff, vs. Megafund Corporation, Stanley A. Leitner, Sardaukar Holdings, IBC., Bradley C. Stark, CIG, Ltd., and James A. Rumpf, Individually and d/b/a Cilak International, Defendants, and Pamela C. Stark, Relief Defendant*, and in connection therewith sought the appointment of a Receiver as to the Defendants

and Equity Relief Defendant. By Order dated July 5, 2005, entered in the SEC Proceedings, Michael J. Quilling was appointed as the Receiver and has continued to function in that capacity since that time. A true and correct copy of said Order is attached to the Quilling Declaration as Exhibit A-1 and is incorporated by reference herein for all purposes. As is set forth in said Order (the “Receivership Order”), the Court took “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 Defendants and Relief Defendants and any entities they control (“Receivership Assets”).” The Receiver is tasked by the Receivership Order to “have exclusive control, possession, and custody of all Receivership Assets.”

2. By subsequent Order dated July 19, 2005, entered in the SEC Proceedings, the receivership was expanded to include additional individuals and entities, including CIG, Ltd. and James A. Rumpf, Individually and d/b/a Cilak International. A true and correct copy of said Order is attached to the Quilling Declaration as Exhibit A-2 and is incorporated by reference herein for all purposes. By virtue of the same Order, Michael J. Quilling was appointed as the Receiver for each of the additional individuals and entities and he continues to function in that capacity since that time.

3. Sardaukar Holdings, IBC (“Sardaukar”) is an entity which operated a Ponzi scheme¹ and fraudulent investment program under the direction and control and Bradley C. Stark (“Stark”). In particular, investors sent funds to an account at JP Morgan Chase Bank, N.A. in the name of Sardaukar which were to be invested by Sardaukar under the direction of Stark. However, as

1. 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. The scheme is named for Charles Ponzi, who was convicted for perpetrating such schemes in the 1920's. Black's Law Dictionary 1180 (7th Ed.1999).

investor funds were received, he systemically diverted most of the funds to support an extravagant lifestyle and spending habits and to make Ponzi payments to investors. He also systemically diverted investor funds to his cronies so that they could share in the loot. Hans Tschebaum and Michael Tschebaum (“Defendants” and “Respondents”) were two of these cronies.

4. On July 5, 2005, Movant filed his complaint in this action, seeking the imposition of a constructive trust on certain accounts held by the Defendants, as well as an order of disgorgement and the reversal of fraudulent transfers. As is alleged in the complaint, Michael Tschebaum received \$334,237.00 in Receivership Assets, which he deposited, at least in part, into his Charles Schwab Account No. 8936-8058. The Receiver has prepared a spreadsheet of all of Sardaukar’s JP Morgan Chase Bank account activity from October 2004 through July 2005. This spreadsheet is attached to the Quilling Declaration as Exhibit A-3 and incorporated by reference herein for all purposes. Four separate fund transfers to Michael Tschebaum from this Sardaukar account totaling \$334,237.00 are highlighted in yellow. True and correct copies of the three backup Sardaukar account statements are attached to the Quilling Declaration as Exhibit A-4 and are incorporated herein by reference. As is also alleged in the complaint, Hans Tschebaum and Michael Tschebaum have had in their possession, and for their use, a 2005 Maserati Quatraporte, VIN: ZAMCE 39A250016814 (the “Maserati”). The Maserati was obtained for Hans Tschebaum and/or Michael Tschebaum by Stark, who titled it in the entity name Administrative Specialists, a company owned and controlled by Michael Tschebaum. True and correct copies of the Retail Installment Sale Contract and two wire transfer advices from Sardaukar evidencing the purchase of the vehicle for the Tschebaums are attached to the Quilling Declaration as composite Exhibit A-5 and incorporated by reference herein for all purposes.

5. The Maserati was purchased with investor funds, and as such, constitutes a Receivership Asset in accordance with the Receivership Orders. The Receiver has account records for the Charles Schwab account up through June 2005, but still needs records from July 2005 to the present.

II.

APPLICATION FOR TEMPORARY INJUNCTION

6. All of the facts set forth in section II are incorporated by reference herein for all purposes. This motion is supported by the Declaration of Michael J. Quilling, filed concurrently herewith in a separate appendix and incorporated herein by reference for all purposes.

7. Plaintiff hereby applies for a preliminary injunction pursuant to FED. R. CIV. P. 65, TEX. CIV. PRAC. & REM. CODE §§ 65.001, *et. seq.* and Texas Common Law. As is set forth more specifically below, unless Defendants are restrained as requested herein, Plaintiff, on behalf of the Receivership estate, will be irreparably harmed, as Receivership Assets will be depleted or otherwise transferred or converted, and the Defendants will continue to loot and appropriate Receivership Assets for their own purposes. Further, if Defendants are not immediately restrained, then they will in all likelihood continue to act in their present unlawful manner, depleting the value of and/or secreting and spending Receivership Assets, resulting in any monetary judgment being rendered ineffectual. Once Receivership Assets have depreciated, their value cannot be restored. To the Receiver's knowledge, Defendants are not in a position to answer in damages out of their own assets for any diminution in value to Receivership Assets. In this vein, Plaintiff alleges that he has no adequate remedy at law and that monetary damages will not make the Receivership Estate whole.

8. The purpose of a preliminary injunction is typically to preserve the *status quo* pending either a permanent injunction or a trial on the merits. *University of Texas v. Camenisch*, 451 U.S.

390, 395, 101 S.Ct. 1830, 1834 (1981). The purpose of a preliminary injunction is always to prevent irreparable injury so that the trial court's ability to render a meaningful decision on the merits is preserved. *Canal Authority of Florida v. Callaway*, 489 F.2d. 567, 576 (5th Cir. 1974). If the existing *status quo* is itself causing a party irreparable harm, it then becomes necessary to alter it so as to prevent the harm by, for instance, returning the parties to the last uncontested *status quo* between them. *Id.* Thus, mandatory injunctions requiring action by the defendant are sometimes available to prevent irreparable harm.

9. In order to be entitled to preliminary injunctive relief, the Plaintiff must plead and prove the following:

- a. irreparable harm;
- b. substantial likelihood of success on the merits;
- c. the injury faced by plaintiff outweighs the injury sustained by defendants as a result of the injunctive relief; and
- d. the granting of injunctive relief would not adversely affect public policy or interest.

Callaway, 489 F.2d. at 572. All four elements are mixed questions of law and fact. *Blue Bell Bio-Medical v. Cin-Bad, Inc.*, 864 F.2d 1253, 1256 (5th Cir. 1989). Each must be considered to determine whether, on balance, they collectively favor granting the injunctive relief requested. *Picker International, Inc. v. Blanton*, 756 F.Supp. 971 (N.D. Tex. 1990). A preliminary injunction should issue only if the movant has clearly carried the burden of persuasion regarding all four factors. *Allied Marketing Group, Inc. v. CDL Marketing, Inc.*, 878 F.2d 806, 809 (5th Cir. 1989). When the plaintiff is seeking a mandatory injunction, he must show that on balance, the four factors weigh heavily and compellingly in his favor. *See, e.g., GTE Corp. v. Williams*, 731 F.2d 676, 679

(10th Cir. 1984); *Citizens Concerned for the Separation of Church and State v. City and County of Denver*, 628 F.2d 1289, 1299 (10th Cir. 1980).

10. A district court's determination of a motion for preliminary injunction is reviewed on appeal on an abuse of discretion standard. *Blue Bell Bio-Medical*, 864 F.2d at 1256. The district court's findings will be overturned only if clearly erroneous. *Id.*

A. Irreparable Harm.

11. Irreparable harm requires a showing that the harm is imminent, the injury itself would be irreparable and that plaintiff has no other adequate remedy at law. *See, Northern Cal. Power Agency v. Grace Geothermal Corp.*, 469 U.S.1306, 1306, 105 S.Ct. 459, 459 (1984); *Chacon v. Granata*, 515 F.2d 922, 925 (5th Cir. 1975); *DSC Communications Corp. v. DGI Technology, Inc.*, 81 F.3d 597, 600 (5th Cir. 1996).

12. Harm is imminent. Defendants are currently in possession of Receivership Assets, including money and the above-mentioned Maserati. The account into which the Receiver knows Receivership funds were deposited is not frozen, and the Receiver is not in possession of the vehicle. As alleged in his Complaint, Defendant Michael Tschebaum received the sum of at least \$334,237.00 from Sardaukar Holdings, IBC. Based on records available to the Receiver, as of June 2005, Michael Tschebaum's Charles Schwab account contained only \$106,376.63. This represents substantially less than the amount fraudulently received by Michael Tschebaum. Thus, at least some of the funds have disappeared. Further, one of the Defendants is in possession of the Maserati, which continues to depreciate in value as time passes, and which the Receiver is not sure is even insured. The fact that the harm has already occurred, and is occurring now, shows that the harm to the Plaintiff on behalf of the Receivership estate is imminent.

13. Harm is irreparable. Harm is irreparable if it cannot be prevented or fully rectified by a final judgment following a trial. *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981). It is not the magnitude of the harm but the irreparability of it that matters for purposes of a preliminary injunction. *Danden Petroleum, Inc. v. Northern Natural Gas Co.*, 615 F.Supp. 1093, 1098-99 (N.D. Tex. 1985). The Receiver is unaware that either Defendant is capable of responding in damages should a final decree be entered against them on the Receiver's claims. If Defendants continue to dissipate the referenced funds and/or transfer or secret away the Maserati, or if the Maserati is destroyed while uninsured, then Defendants would not be able to compensate the Receivership estate for those large amounts out of their own pockets. A final judgment requiring Defendants to disgorge money and turn over assets is ineffective if there is no money or assets to disgorge, and Defendants are broke.

14. No adequate legal remedy. For purposes of injunctive relief, there is no adequate remedy at law if the legal remedy is merely illusory, damages cannot be calculated (or if defendant is incapable of responding in damages) or effective legal relief cannot be obtained without the necessity of filing multiple lawsuits. *Wilson v. Illinois S. Ry.*, 262 U.S. 574, 577, 44 S.Ct. 203, 204 (1924); *Dresser-Rand Co. v. Virtual Automation, Inc.*, 361 F.3d 831, 848 (5th Cir. 2004); *Winston v. General Drivers, Warehousemen & Helpers Local 89*, 879 F.Supp. 719, 725 (W.D. Ky. 1995). Here, as discussed above, even though damages could probably be calculated, it is exceedingly unlikely that Defendants would be capable of responding in damages should a final decree of disgorgement be entered. Any judgment of disgorgement or imposition of a constructive trust would be illusory if the Receivership Assets have been dissipated, damaged or destroyed and Defendants are broke.

B. Likelihood of Success on the Merits.

15. It is not necessary that the plaintiff prove with certainty that it will ultimately prevail, just that there is a likelihood that it will succeed on the case's merits, based on a "sliding scale," taking into account the intensity of this factor (in conjunction with the other three factors) in any given factual situation. *State of Texas v. Seatrain International, S.A.*, 518 F.2d 175, 180 (5th Cir. 1975); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931, 95 S.Ct. 2561, 2568 (1975).

16. The Receiver has alleged causes of action for imposition of a constructive trust and disgorgement of Receivership Assets received by Defendants, fraudulent transfer and for recovery of his attorney's fees, costs and interest.

17. This Court recognizes claims by the Receivership estate to recover Ponzi scheme funds on behalf of the defrauded investors. The mere existence of a Ponzi scheme establishes as a matter of law the defendant's actual intent to defraud, hinder or delay. *See, e.g., SEC v. Cook*, 2001 WL 256172, * 2 (N.D. Tex. Mar. 8, 2001)²(citing *In re Independent Clearinghouse Co.*, 77 B.R. 843 (Bankr. D. Utah 1987) and *In re Ramirez Rodriguez*, 209 B.R. 424, 434 (Bankr S.D. Tex. 1997)). The Texas Uniform Fraudulent Transfer Act ("UFTA") clearly authorizes the very equitable claims that the Receiver seeks in this case, including (1) constructive trust and disgorgement, (2) fraudulent transfer, and (3) fees, expenses, costs, and interest. *See*, TEX. BUS. & COM. CODE § 24.008 and § 24.013 (granting Receivers the power to avoid transfers, seek costs and obtain "other relief the circumstances may require."). Once intent to defraud is established, any such transfers of Receivership Assets are voidable under the UTFA, and the Receiver is entitled to seek other relief to obtain possession of the fraudulently transferred property as he sees fit, including imposition of a constructive trust. *See, U.S. v. Durham*, 86 F.3d 70, 72-73 (5th Cir. 1996).

² *See*, Appendix, Exhibit B.

18. The Receiver's Complaint sets forth facts alleging the existence of a Ponzi scheme perpetrated by Sardaukar and Stark. The existence of this Ponzi scheme has not been disputed by Defendants and, as such, the scheme's existence is "substantially established." *See, S.E.C. v. Cook, 2001 WL 256172 *3*. Further, Defendants admit in their Answer that they "received funds and possession of the automobile substantially as described in ... the Complaint." The Receiver has traced the fraudulently transferred funds and property from the perpetrators of the Ponzi scheme to Defendants. Under these circumstances, where Defendants are admitted transferees of funds and property under a Ponzi scheme, with intent to defraud presumed as a matter of law, the Receiver has shown, at a minium, that there is a substantial likelihood that he will prevail on his claims on the merits.

C. Balance of Hardship.

19. The movant must plead that the injury faced by plaintiff outweighs the injury that would be sustained by the defendant as a result of the injunctive relief. *Yakus v. U.S.*, 321 U.S. 414, 440, 64 S.Ct. 660, 675 (1944). In balancing the relative hardships between the parties, plaintiff may also address the effect of the requested injunctive relief on nonparties. *See, e.g., Ward v. Walsh*, 1 F.3d 873, 878 (9th Cir. 1993).

20. The Plaintiff, in his capacity as Receiver, charged with recovering funds and assets that were obtained and transferred fraudulently pursuant to an illegal Ponzi scheme, suffers great hardship if he is unable to utilize judicial processes to secure such assets from dissipation or recover them outright. It is counterintuitive to imagine a scenario where the recipients of funds and property that essentially constitute funds stolen from innocent investors are deemed to suffer any hardship at all by having to give up and/or forego use of the ill gotten gains. In contrast, the Receiver will be unable to do the job required of him by this Court if he is unable to secure the funds and property

at issue here. In this case, as in all instances where transferees of property under a Ponzi scheme are involved, the harm to the Receiver - and, consequently, the Receivership estate, defrauded investors and the public interest in general - is far greater than any harm (if any) done to the transferees of investor funds. *See, e.g., F.T.C. v. Affordable Media*, 179 F.3d 1228, 1237 (9th Cir. 1999).

D. Effect on Public Interest.

21. The movant must plead that the granting of the requested injunctive relief would not adversely affect public policy or public interest. *DSC Comm. Corp. v. DGI Tech., Inc.*, 81 F.3d 597, 600 (5th Cir. 1996). Again, in considering this factor, the plaintiff may address, and the Court may consider, the impact of the injunctive relief on nonparties. *See, e.g., Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002).

22. As set forth immediately above, it cannot be countenanced that the public interest would not be greatly served by allowing the Receiver to freeze and/or recover ill gotten gains from transferees of such property under an illegal Ponzi scheme utilizing judicial processes. Funds in a Ponzi scheme are swindled from investors targeted from the general public and lied to by the promoters of the scheme. These defrauded individuals typically recover only a fraction of their original "investment," even when the scheme is uncovered quickly by regulatory authorities and the receiver experiences great success in recovering the stolen loot. There is a reason why Ponzi schemes are illegal - they are based on lies and deceit, and their existence undermines the public trust in investing. Members of the general public, often the old and infirm, are obvious targets of such schemes. Failure to uncover and prosecute promoters of such schemes would lead to financial anarchy and wholesale mistrust in even legitimate investment opportunities. Thus, not only would public policy and the general public interest not be adversely affected by granting the Receiver his

requested injunctive relief herein, but in fact it would be greatly enhanced. The actions of Stark and the Defendants herein should be discouraged and condemned.

III.

INJUNCTIVE RELIEF REQUESTED

23. The Receiver hereby requests a mandatory injunction as set forth below, or in the alternative, a prohibitory one, concerning Defendants and the Receivership Assets they have admitted to receiving. Preliminary injunctions are appropriate to freeze assets that are the subject of the underlying litigation and the movant is able to identify or trace as ill gotten gains fraudulently transferred or subject to a constructive trust. *See, generally, In re Fredeman Litigation*, 843 F.2d 821, 827 (5th Cir. 1988).

24. Accordingly, the Receiver prays that, following a hearing, if necessary, a preliminary injunction issue requiring the Defendants to act as follows:

That Defendants SHALL:

- a. immediately transfer all funds currently in Michael Tschebaum's Charles Schwab Account No. 8936-8058 to the Receiver's trust account for safekeeping pending a final resolution of this case, along with all account statements and records from July 2005 to the present;
- b. immediately relinquish possession of the 2005 Maserati Quatraporte, VIN: ZAMCE 39A250016814, in addition to all original title and /or transfer and insurance documents relating to same, to the Receiver or a designated agent of the Receiver, for safekeeping pending a final resolution of this case.

25. In the alternative, the Receiver prays that, following a hearing, if necessary, a preliminary injunction issue enjoining and restraining the Defendants as follows:

That Defendants SHALL NOT:

- a. sell, transfer, move, disassemble, intentionally damage or otherwise dispose of the 2005 Maserati Quatraporte, VIN: ZAMCE 39A250016814, or allow such to occur, except that the vehicle may be moved to any secure location deemed acceptable by the Receiver for safekeeping pending a final resolution of this case;
- b. withdraw, transfer or pay money, or allow money to be withdrawn, transferred or paid, from Michael Tschebaum's Charles Schwab Account No. 8936-8058 (or any other type of money account) into which Defendants have deposited any funds received from Sardaukar Holdings, IBC and/or Bradley C. Stark;
- c. dispose of, destroy, move or utilize in any way any records, files, documents and papers, in whatever form, created, generated, kept or maintained by Defendants in connection with their receipt, transfer or disposition of any and all funds and property of any kind received from Sardaukar Holdings, IBC and/or Bradley C. Stark; and
- d. co-mingle any of Defendants' money or assets with any assets, money or property constituting Receivership Assets, including, but not limited to, the \$334,237.00 and Maserati that Defendants have admitted to receiving from Sardaukar Holdings, IBC and/or Bradley C. Stark, including proceeds from sales or transfers of any such property.

IV.


CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that the Court set this matter for hearing, if necessary, at its earliest convenience; that, after reviewing the arguments and evidence presented, or following the hearing, the Court issue a preliminary injunction as set forth hereinabove; and for such other and further relief, general or special, at law or in equity, to which Plaintiff may be justly entitled.

Respectfully submitted,

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By:




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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF CONFERENCE

On January 18, 2006, I personally conferred with Bruce W. Claycombe, counsel for Defendants herein, at which time he stated that he opposed the relief requested in this motion.



Michael D. Clark

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2006, the foregoing Plaintiff's Motion for Preliminary Injunction was served upon the following parties via First Class Mail, postage pre-paid:

Mr. Bruce W. Claycombe
GEARY, PORTER & DONOVAN, P.C.
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Michael D. Clark