

received “commissions” from Sardaukar in the form of \$334,237.00 in cash plus a 2005 Maserati Quatraporte purchased for \$141,675.71. Sardaukar, however, never generated any investment income and was simply a shell through which Stark ran a *Ponzi* scheme.

The Northern District of Texas has conclusively determined that commissions out of a *Ponzi* scheme are fraudulent transfers and voidable under the Texas Uniform Fraudulent Transfer Act (“UFTA”). In this case, neither party disputes that the underlying transfers actually took place. In fact, Sardaukar’s own bank statements provide a detailed record of those transfers while also proving the *Ponzi* scheme’s existence. Without question, the bank records show that: (1) investor funds constituted virtually all of Sardaukar’s revenue; (2) those funds were commingled and used for personal expenses rather than legitimate investments; and (3) any investment “returns” to earlier contributors were actually *Ponzi* payments from the commingled funds of later contributors. Therefore, under the settled law of this district and the UFTA, the Receiver is entitled to summary judgment on his fraudulent transfer claims against Hans Tschebaum and Michael Tschebaum.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

1. This case arises out of a lawsuit brought by the Securities and Exchange Commission (“SEC”) against numerous defendants involved in different levels of a purported investment program. *See Securities and Exchange Commission, v. Megafund Corporation, et al.*; Cause No. 3:05-CV-1328-L (N.D. Tex.). The SEC brought that suit against Bradley C. Stark, Sardaukar Holdings IBC, and others for promising high-yield returns to investors and then squandering their money on unrelated personal expenditures. *See Complaint* [Dkt. 1] at ¶ 3 (3:05-CV-1328).

2. By order of July 5, 2005, the Court overseeing that case appointed Michael J. Quilling

as Receiver for the defendants and relief defendant and he has since continued to function in that capacity. *See Order Appointing Temporary Receiver* (“Order Appointing Receiver”) [Dkt. No. 9], as amended July 19, 2005 [Dkt. No. 36] (3:05-CV-1328).

3. The Order Appointing Receiver expressly authorizes legal action to recover funds transferred out of the Receivership Estate:

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 persons or entities who received assets or funds traceable to investor monies.

Id. [Dkt. No. 36] at ¶ 13.

4. Within three weeks of his appointment, the Receiver filed this action against Hans Tschebaum and Michael Tschebaum (collectively “Defendants”) seeking to recover investor funds sent to them as \$334,237.00 in cash plus a 2005 Maserati Quatraporte (“Maserati”) purchased for \$141,675.71. *See Complaint* [Dkt. No. 1]. The Receiver has traced the cash transfers to Michael Tschebaum’s personal brokerage account and Hans Tschebaum has, at various times, held himself out as possessing the Maserati. Appendix at 7-8, ¶¶ 5-6. Although the purchase agreement for the Maserati lists Administrative Specialists as the buyer, Michael Tschebaum signed those documents and listed himself as president of the company. Appendix at 8, ¶ 6. Defendants themselves admit that these transfers occurred “substantially as described” in the Receiver’s Complaint, but insist that they were commissions earned from the Sardaukar investment program. *Original Answer of Defendants* [Dkt. No. 5] at ¶ 1; *Defendants’ Response to Plaintiff’s Motion for Preliminary Injunction* [Dkt. No. 14] at ¶¶ 4, 16.

5. On March 22, 2006, the Receiver amended his Complaint to include an additional

\$768,000.00 of investor funds sent to Palace Investments, Inc. (“Palace Investments”), an entity owned and controlled by the Defendants. *See Amended Complaint* [Dkt. No. 27]. Opposing counsel agreed to accept service for Palace Investments on May 4, 2006. *See Appendix at 4*. Accordingly, under the Federal Rules of Civil Procedure, the deadline has not yet passed for Palace Investments to file its Answer. Fed. R. Civ. P. 12. The Receiver anticipates adding Palace Investments to this motion after reviewing its Answer.

6. This Court has also suggested that it might allow the Receiver to include Palace Investments in an Amended Motion for Summary Judgment before any responsive briefs are due. In the interests of economy and expediency, the Receiver favors proceeding in that manner.

7. As explained more fully below, the Receiver now moves for summary judgment against the individual Defendants because bank records conclusively show that Sardaukar was a *Ponzi* scheme and, therefore, all commissions paid out of those funds constitute fraudulent transfers as a matter of law. *See Appendix at 7-9*.

III. ARGUMENTS AND ANALYSIS

A.

Summary Judgment is Appropriate in this Case Because There is No Genuine Issue of Material Fact.

The material facts in this case are undisputed and, therefore, the Receiver is entitled to summary judgment as a matter of law. A party is entitled to summary judgment if there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is “material” only if it might affect the 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). An issue is “genuine” only if a reasonable jury could return a verdict for the non-movant on the evidence. *MacDonald*, 94 F.3d at 1440; *Poullis-Minot*, 388 F.3d at 363. Stated another way, the Court should award summary judgment where the record, taken as a whole, could not lead a rational jury to find for the non-moving party. *See Logan v. Commercial Un. Ins. Co.*, 96 F.3d 971 978 (7th Cir. 1996).

The Receiver brings this motion to recover assets fraudulently transferred to Defendants from a *Ponzi* scheme. Defendants already admit that the transfers actually occurred. *See Original Answer of Defendants* [Dkt. No. 5] at ¶ 1. Therefore, the only material issue in this case is whether Stark operated Sardaukar as a *Ponzi* scheme. As explained more fully below, Sardaukar’s bank records unquestionably establish this fact, entitling the Receiver to summary judgment.

B.

All Transfers from a *Ponzi* Scheme are Fraudulent Transfers as a Matter of Law.

The Receiver claims that all transfers from Sardaukar to Defendants are voidable under the Texas Uniform Fraudulent Transfer Act (“UFTA”)¹ or the supplemental provisions of common law.

In relevant part, that statute provides:

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor’s claim arose within a reasonable time before or 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. & Com. C. § 24.005. While creditors must ordinarily prove fraudulent intent to recover

¹ The California Uniform Fraudulent Transfer Act contains the same provisions. *See* Cal. Civ. C. § 3439 *et seq.*

under this provision of the UFTA, that element is automatically established for transfers out of a *Ponzi* scheme. *Quilling v. Gilliland*, Civil Cause No. 3:01-CV-1617 (N.D. Tex. Mar. 6, 2002); *S.E.C. v. Cook*, 2001 WL 256172, *3 (N.D. Tex. Mar. 8, 2001); *see also, In re Ramirez Rodriguez*, 209 B.R. 424, 434 (Bankr. S.D. Tex. 1997); *In re Independent Clearing House Co.*, 77 B.R. 843 (Bankr. D. Utah 1987). This presumption is necessarily true because a *Ponzi* scheme is insolvent from conception. *Warfield v. Byron*, 2006 WL 118250, *5 (5th Cir. Jan. 17, 2006), *citing Cunningham v. Brown*, 265 U.S. 1, 7-8 (1924). Accordingly, all payments from a *Ponzi* scheme—including “commissions” or other compensation—are fraudulent transfers hindering, delaying and defrauding any creditors. *See Cook*, 2001 WL 256172 at *3, 4 (granting Receiver’s motion for summary judgment to recover commissions paid from a *Ponzi* scheme); *see also Warfield*, 2006 WL 118250 at *6-7 (disgorging commissions skimmed from investor payments into a *Ponzi* scheme); *In re Alpha Telecom, Inc.*, 2004 WL 3142555, *4 (D. Or. Aug. 18, 2004) (disgorging commissions for selling securities for a *Ponzi* scheme). Therefore, to the extent that Sardaukar was a *Ponzi* scheme, Defendants have no legal basis to retain the assets transferred from investor funds.

C.

Bank Records Demonstrate that Defendants were Paid Commissions from a *Ponzi* Scheme.

The attached evidence conclusively shows that Sardaukar was, in fact, a *Ponzi* scheme. The Receiver has taken possession of Sardaukar’s account at JPMorgan Chase Bank, N.A., where Stark received all known contributions from Sardaukar investors. *See Appendix at 7, ¶¶ 3, 5.* The account records are voluminous, so the Receiver’s accountant prepared a spreadsheet summary. Appendix at 10, et seq. These records not only confirm all transfers to Hans Tschebaum, Michael Tschebaum,

and Palace Investments, but they also irrefutably prove that Stark operated Sardaukar as a *Ponzi* scheme. Appendix at 7-9, ¶¶ 5-8.

A *Ponzi* scheme exists where money from new investors is used to pay “profits” to earlier investors, without the operation of an actual revenue-producing business. *See* Black’s Law Dictionary 1180 (7th ed. 1999); Appendix at 8, ¶ 7. The bank records clearly show that investor funds constitute Sardaukar’s only revenue.² Appendix at 8-9, ¶¶ 7-8; Appendix at 11-24. As Sardaukar received those funds, however, Stark systematically diverted large amounts to benefit himself, his friends, and his family.³ Appendix at 8, ¶ 7. In fact, within days of receiving the first investors’ funds, Stark transferred over one-third of that money to Michael Tschebaum individually. Appendix at 11. What principal remained after Stark’s spending sprees and handouts were commingled and used to pay “returns” to earlier investors. *See, e.g.*, Appendix at 15 (showing payments to Clover Investments LLC and CDB&B Investors, Inc.). This kind of arrangement illustrates a classic *Ponzi* scheme. Appendix at 8, ¶ 7.

Sardaukar’s bank records stand on their own in establishing the existence of this *Ponzi* scheme. *Id.* They show conclusively that: (1) investor funds constituted virtually all of Sardaukar’s revenue; (2) those funds were commingled and used for personal expenses rather than legitimate investments; and (3) any investment “returns” to earlier contributors were actually *Ponzi* payments

² Sardaukar received numerous investments directly from individuals, but also received substantial investments from entities like CIG, Ltd., CDB&B Investors, Inc., Clover Investment, LLC, International Consultants & Referrals, and Investment World, Inc. *See* Appendix at 9, ¶ 8.

³ For example, on April 18, 2005, Sardaukar received \$110,000.00 from two investors, Peter Kaiser and Norman D. Spahr. Appendix at 21. These funds were not deposited in investment accounts, as Defendants have previously represented to the Court. *See Defendants’ Response to Plaintiff’s Motion for Preliminary Injunction* [Dkt. No. 14] at ¶ 4. Instead, before the day ended, Stark had spent over \$100,000.00 on personal expenses including payments to American Express, his wife’s Capital One account, the utility company, Exxon Mobil, SBC, a five-star Italian hotel, and a \$50,000.00 transfer to his wife’s personal bank account. Appendix at 21.


from the commingled funds of later contributors. *Id.* Defendants admit receiving transfers (cloaked as “commissions”) from that account and have not yet refuted the existence of this *Ponzi* scheme. *Id.* at ¶¶ 6, 9. Therefore, under the settled law of this district and the UFTA, the Receiver is entitled to judgment as a matter of law based on the undisputed material facts.

**IV.
PRAYER FOR RELIEF**

WHEREFORE, PREMISES CONSIDERED, the Receiver respectfully requests that the Court enter summary judgment in his favor and against Hans Tschebaum and Michael Tschebaum, and enter an order (1) avoiding all transfers Defendants received directly or for their benefit from Sardaukar Holdings, IBC; (2) entering judgment against them, jointly and severally, in the amount of \$475,912.71 less a credit in the Defendants’ favor for the ultimate sale price the Receiver recovers for the Maserati; and (3) awarding the Receiver his reasonable attorneys’ fees, expenses, costs, and interest, and such other and further relief, at law or in equity, to which he is justly entitled.

Respectfully submitted,

QUILLING SELANDER CUMMISKEY & LOWNDS, P.C.
2001 Bryan Street, Suite 1800
Dallas, Texas 75201-4240
(214) 871-2100 (Telephone)
(214) 871-2111 (Facsimile)

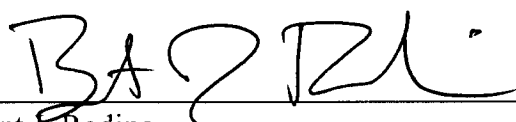
By: 
Michael J. Quilling
State Bar No. 16432300
Email: mquilling@qsclpc.com
Brent J. Rodine
State Bar No. 24048770
Email: brodine@qsclpc.com

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

On the 12th day of May, 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:

Bruce Claycombe
Geary, Porter & Donovan, P.C.
16475 Dallas Parkway, Suite 500
Dallas, Texas 75001-6837



Brent J. Rodine