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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,	§	
v.	§	Civil Action No. 3:05-CV-1465-L
HANS TSCHEBAUM and MICHAEL TSCHEBAUM,	§	(Jury Trial Demanded)
Defendants.	§	

PLAINTIFF'S MOTION TO COMPEL DEFENDANTS' RESPONSE TO DISCOVERY REQUESTS AND BRIEF IN SUPPORT

COMES NOW, Michael J. Quilling, Receiver for Sardaukar Holdings, IBC and Bradley C. Stark ("Plaintiff" or "Receiver") and files this Motion to Compel Defendants' Response to Discovery Requests and, in support of this motion, would respectfully show unto the Court as follows:

I.
Factual 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.* The SEC asked the Court overseeing that case to appoint a Receiver for the Defendants and Relief Defendant. By Order dated July 5, 2005, the Court appointed Michael J. Quilling as Receiver for Sardaukar Holdings, IBC and Bradley C. Stark, and he has since continued to function

in that capacity.

2. Sardaukar Holdings, IBC ("Sardaukar") is an entity that operated a *Ponzi* scheme and fraudulent investment program under the direction and control and Bradley C. Stark ("Stark"). In particular, investors sent funds to Sardaukar's JPMorgan Chase bank account for investment under Stark's direction. As investor funds were received, however, Stark systemically diverted most of those funds to make *Ponzi* payments to earlier investors and to support an extravagant lifestyle for himself, his friends, and his family. Among those who benefitted from this scheme were Hans Tschebaum and his son Michael Tschebaum. Stark began diverting money to the Tschebaums within days after the first investor funds were received.

3. On July 25, 2005, the Receiver filed his Complaint against Hans and Michael Tschebaum (collectively, "Defendants") for constructive trust and disgorgement, fraudulent transfer, and fees, expenses, costs, and interest.[1] *Complaint* [Dkt. No. 1]. In material part, the Complaint alleged that:

> 9. Two such cronies were Hans Tschebaum and his son Michael Tschebaum. Within days after the first investor funds were received, Stark began diverting money to them. Based upon the records currently available to the Receiver, Michael Tschebaum directly received a total of at least $334,237.00 and Hans Tschebaum received and continues to have possession of a 2005 Maserati vehicle which Stark purchased for $141,675,71.00 using investor funds. The Defendants gave no benefit whatsoever to Sardaukar for the funds and vehicle and have no legitimate claim to them.

Complaint [Dkt. No. 1] at ¶ 9.

4. Defendants filed their Answer on September 1, 2005 which contained the following

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[1] The Receiver amended his Complaint on March 22, 2006, to include Michael Tschebaum's company, Palace Investments, Inc. ("Palace Investments"), as a Defendant. The Receiver is still waiting for opposing counsel to determine whether it will accept service of process for that entity.

admission: "Defendants . . . admit that one or the other of the Defendants received funds and possession of the automobile substantially as described in paragraph 9 of the Complaint." *Original Answer of Defendants* [Dkt. No. 5]at ¶ 1.

5. On January 18, 2006 the Receiver filed his motion for preliminary injunction that would have Defendants relinquish possession of funds they received from Sardaukar as well as the 2005 Maserati purchased on their behalf. *Motion for Preliminary Injunction and Brief in Support* [Dkt. No. 12]. In their brief opposing the motion for preliminary injunction, Defendants submitted to this Court the *Declaration of Hans Tschebaum* ("Defendant's Declaration"). *Appendix to Defendants' Response to Plaintiff's Motion for Preliminary Injunction and Brief in Support* [Dkt. No. 15] at 33-34. Defendant's Declaration addresses both the legal and factual bases raised by the Receiver in this case. In particular, it explains the purpose and manner of Sardaukar's payments to both Hans and Michael Tschebaum. *Defendant's Declaration* at ¶ 3. It further addresses communications with Sardaukar investors and the Defendant's understanding of Sardaukar's business dealings. *Id.* at ¶ 4. Finally, Defendant's Declaration describes the circumstances surrounding the acquisition of the 2005 Maserati Quatraporte. *Id.* at ¶ 5. While this Declaration was signed by Hans Tschebaum, both Defendants joined in submitting it to the Court as part of their *Response to Plaintiff's Motion for Preliminary Injunction and Brief in Support* [Dkt. No. 14].

6. The Receiver sent interrogatories, requests for admission, and requests for production to both Defendants on February 16, 2006, primarily seeking details and supporting documents for earlier statements made to the Court in Defendant's Answer and Declaration.

7. Defendants' responses were originally due on March 21, 2006. However, Defendants' counsel requested an extension. At that time, opposing counsel represented that

responsive documents and substantive answers were still being compiled for production to the Receiver. The Receiver consented to the extension.

9. Defendants' discovery responses arrived on April 21, 2006, but did not contain a single substantive answer. With the exception of two responses,[2] Defendants provided the same one-sentence answer to every interrogatory, request for admission, and request for production: "On the advice of counsel, I hereby assert my privilege against self-incrimination under the Fifth Amendment to the United States Constitution." A copy of these responses is attached as Exhibit "A" and incorporated for all purposes.

II.
Arguments and Analysis

Defendants have already volunteered sworn statements about the transactions at the heart of this matter in their Declaration. As explained more fully below, Federal case law does not allow the Defendants to support their pleadings with testimony and then resist discovery of those matters under the veil of the Fifth Amendment. By offering affirmative statements to this Court, Defendants waived their privilege against self-incrimination as it relates to: (1) funds and property received from Sardaukar; (2) communications with Sardaukar and its investors; (3) the nature of Sardaukar's business dealings; and (4) circumstances surrounding Sardaukar's purchase of the 2005 Maserati Quatraporte.

A. The Extent of Defendants' Fifth Amendment Privilege.

The Fifth Amendment's self-incrimination clause states that: "No person . . . shall be

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[2] The only substantive answers were to Interrogatory No. 1, which requested that both Hans Tschebaum and Michael Tschebaum provide the name, address, and telephone number of any person who assisted in answering the Receiver's discovery requests.

compelled in any criminal case to be a witness against himself." U.S. Const., amend. V. The United States Supreme Court has explained that this privilege "protects a person only against being incriminated by his own compelled testimonial communications." *Doe v. United States*, 487 U.S. 201, 207 (1988), *citing Fisher v. United States*, 425 U.S. 391 (1976), *Schmerber v. California*, 384 U.S. 757 (1966); *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967). Generally, this privilege can be asserted in any proceeding where Defendants reasonably believe that information sought could be used against them in a later criminal proceeding. *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972). However, it is for the Court to decide whether and to what extent a witness may invoke the Fifth Amendment. *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (a witness's "say-so does not of itself establish the hazard of incrimination"); *Securities and Exchange Commission v. First Financial Group of Texas*, 659 F.2d 660, 668 (5th Cir.1981) ("A party is not entitled to decide for himself whether he is protected by the fifth amendment privilege"); *United States v. Goodwin*, 625 F.2d 693, 700 (5th Cir.1980) ("the witness may not establish the privilege by his bald assertion of the privilege"). Court review is proper when parties have already waived their Fifth Amendment privilege or use it to avoid discovery.

B. Defendants Waived their Fifth Amendment Privilege by Offering Sworn Statements to this Court About the Material Issues in this Case.

Defendants lost their privilege against self-incrimination by volunteering sworn statements to the Court. Once a party offers testimony, he waives any future privilege against self-incrimination as to the scope of the matters addressed. *United States v. White*, 846 F.2d 678, 689 (1988). The waiver need not be formal or affirmative—a witness can waive his rights inadvertently. *White*, 846 F.2d at 689(explaining that a "knowing and intelligent" waiver is only required when waiving the

Fifth Amendment privilege in a custodial interrogation); *United States v. Anderson*, 79 F.3d 1522, 1527 (9th Cir. 1996) (finding inadvertent waiver upon giving testimony and producing documents according to a subpoena). This reflects the general rule that, once a witness has voluntarily revealed an incriminating fact, privilege cannot be invoked to avoid disclosure of details in the same proceeding. *Rogers v. United States*, 340 U.S. 367, 373 (1951); *U.S. v. Gary*, 74 F.3d 304, 312 (1st Cir. 1996), cert. denied 518 U.S. 1026. Stated another way, "[t]he law . . . does not permit a witness to open the door just wide enough to offer the Court an impaired view of the facts. Once the witness voluntarily opens the door, the Court may open it completely, and scrutinize every exposed matter." *In re Mudd*, 95 B.R. 426, 430 (Bankr. N.D. Tex. 1989).

For purposes of waiving a Fifth Amendment privilege by prior testimony, a party's affidavit functions the same any other form of testimony. *OSRecovery, Inc. v. One Groupe Int'l, Inc.*, 262 F.Supp.2d 302, 310 (S.D.N.Y. 2003). Defendants cannot offer a sworn statement to support their pleading and later invoke the Fifth Amendment to avoid discovery about those same matters. *Id.*; *see also Rogers,* 340 U.S. at 371, 373 (testimonial waiver applies to production of documents); *In re Donald Sheldon & Co.,* 93 F.Supp.2d 503, 505 (S.D. N.Y. 2000) (compelling production of documents relating to earlier testimony).

For example, in *In re Shamisiev*, 172 B.R. 144 (Bankr. N.D. Ga. 1994), a bankruptcy debtor waived his Fifth Amendment privilege by voluntarily submitting an affidavit in support of his Motion for Summary Judgment. *Id.* at 145. The Court determined that his privilege was waived with regard to "any factual issue raised in that affidavit" and, therefore, he was not later entitled to a protective order preventing discovery of those facts. *Id.*

Similarly, in *Nutramax Labs., Inc. v. Twin Labs., Inc.*, 32 F.Supp.2d 331 (D. Md. 1999), a

corporate representative submitted two affidavits to the Court in supporting briefs. *Id.* at 334. The affidavits directly addressed the relationship between two entities that were involved in that litigation. *Id.* In holding that such sworn statements clearly constitute a waiver for purposes of the Fifth Amendment, the Court noted that a witness cannot have it both ways—the privilege cannot be invoked for purposes of discovery but discarded to support a party's pleadings. *Id.*

Defendants in this case have clearly waived their rights under the Fifth Amendment by twice opening the door to further questions about the facts underlying this case. First, Defendants' Answer states that "one or the other of the Defendants received funds and possession of the automobile substantially as described in paragraph 9 of the Complaint." *Original Answer of Defendants* [Dkt. No. 5] at ¶ 1. Second, Defendants' Declaration expanded on this admission by offering testimony about communications, payments, and business arrangements relating to the Defendants, Sardaukar, Stark, and Sardaukar's investors. *Defendant's Declaration* at ¶¶ 3-5. In revealing these facts to the Court, Defendants waived any future claim of privilege as it relates to those matters. The Court cannot allow Defendants testify in support their pleadings while hiding behind the Fifth Amendment for purposes of discovery. Such a practice would allow Defendants to obscure the truth by picking and choosing which facts the Court may consider. *See, e.g.*, *In re Edmond*, 934 F.2d 1304, 1308 (4th Cir. 1991) ("By selectively asserting his Fifth Amendment privilege, [the witness] attempted to insure that his unquestioned, unverified affidavit would be the only version."). Defendants do not enjoy the luxury of revealing facts at their own convenience. To the contrary, by making affirmative statements to this Court, the Defendants—knowingly or unknowingly—waived their right to avoid an inquiry into those matters.

C. Defendants Cannot Claim a Blanket Fifth Amendment Privilege in Answering Discovery Requests.

Defendants may not use the Fifth Amendment to avoid answering interrogatories, requests for admission, and requests for production of documents by simply stating that all responses will tend to incriminate them. *See Hoffman*, 341 U.S. at 486. Such blanket claims of privilege are not a viable exercise of a witness's Fifth Amendment privilege. *See United States v. Hatchett*, 862 F.2d 1249, 1251 (6th Cir. 1988); *United States v. Schmidt*, 816 F.2d 1477, 1482 (10th Cir.1987); *Capitol Prod. Corp. v. Hernon*, 457 F.2d 541, 543-44 (8th Cir.1972). When a party seeks to avoid discovery with a blanket claim of privilege, the Court should conduct a particularized inquiry about each claim of privilege to determine if the claim is well-founded. *Hoffman*, 341 U.S. at 486 (District Court has the duty to require answers where party's assertion of privilege is clearly mistaken); *Hatchett*, 862 F.2d at 1251 (party claiming the privilege must explain how each interrogatory raises a reasonable fear of incrimination); *Capitol Prod. Corp.*, 457 F.2d at 543-44; *Scarfia v. Holiday Bank*, 129 B.R. 671, 674 (M.D. Fla. 1990). If a claim is unfounded, the Court should compel Defendants to respond. *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *Scarfia v. Holiday Bank*, 129 B.R. 671, 674 (M.D. Fla. 1990).

To the extent Defendants have not waived their Fifth Amendment privilege, the threat of incrimination must still be determined by this Court. By asserting a blanket objection to all of the Recevier's discovery requests, the Defendants abusing the privilege against self-incrimination. *See* Defendants' Discovery Responses, Exhibit A. This Court should conduct a particularized inquiry as to each of Defendants' discovery responses and determine (1) whether the Fifth Amendment privilege was already waived and (2) whether a response would establish a link in the chain of

evidence for a criminal prosecution. If Defendants' claim is unfounded for either reason then, at the very least, this motion to compel should be granted as to those discovery requests.

III.
Prayer for Relief

WHEREFORE, PREMISES CONSIDERED, the Receiver prays that this Court issue an Order compelling Hans Tschebaum and Michael Tschebaum to provide discovery responses relating to: (1) funds and property received from Sardaukar; (2) communications with Sardaukar and its investors; (3) the nature of Sardaukar's business dealings; and (4) circumstances surrounding their acquisition of the 2005 Maserati Quatraporte. Alternatively, Receiver prays that this Court conduct a particularized inquiry as to each claim of privilege asserted in Hans Tschebaum's and Michael Tschebaum's discovery responses and determine whether the privilege against self-incrimination has already been waived or whether a response would even tend to incriminate them. Finally, Receiver prays for such other and further relief, general or special, at law or in equity, to which he may justly show himself 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
Texas State Bar No. 16432300
Email: mquilling@qsclpc.com
Brent J. Rodine
Texas State Bar No. 24048770
Email: brodine@qsclpc.com

ATTORNEYS FOR RECEIVER

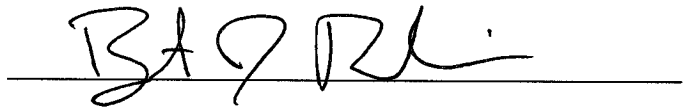
CERTIFICATE OF CONFERENCE

Pursuant to Local Civil Rule 7.1, the Receiver would respectfully show the Court as follows:

1. On April 27, 2006, counsel conferred by telephone and it was determined that this motion would be opposed.

2. Brent J. Rodine participated for the Receiver and Micah Hurt participated for the Defendants.

3. This motion is opposed. Defendants state that they are entitled to assert Fifth Amendment privilege because they believe that the Receiver has intimated that one or both of them participated in criminal activities.



CERTIFICATE OF SERVICE

On the 27 day of April, 2006, a true and correct copy of the above and foregoing was sent via e-mail and first class mail, with full and proper postage prepaid thereon, to:

Mr. Bruce W. Claycombe
GEARY, PORTER & DONOVAN, P.C.
One Bent Tree Tower
16475 Dallas Parkway, Suite 500
Addison, Texas 75001-6837

ATTORNEY FOR DEFENDANTS