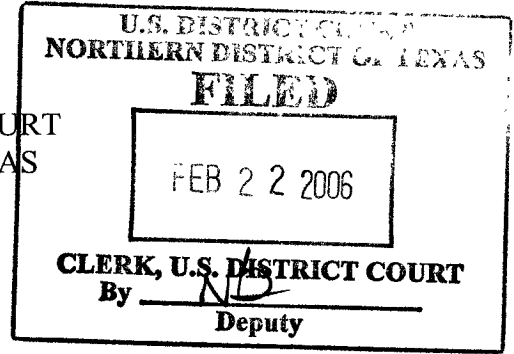


ORIGINAL

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.

HANS TSCHBAUM and MICHAEL
TSCHBAUM,

Defendants.

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

(Jury Trial Demanded)

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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 submits this Reply to *Defendants' Response to Plaintiff's Motion for Preliminary Injunction and Brief in Support* [Dkt. 14] ("Defendants' Response" or "Response Brief"), and would show unto the Court as follows:

**I.
Introduction**

Defendants' Response consists entirely of the hollow drum pounding of two convicted felons seeking, with the assistance of counsel, to perpetuate a fraud on the Court. Defendants grossly misstate some facts and conveniently omit others. For example, Defendants state that Plaintiff is tardy in seeking this preliminary injunction and should have sought it a year ago. *See Defendants' Response* at ¶ 2. This was not possible, however, given that Plaintiff was only appointed Receiver seven months ago, on July 5, 2005. Plaintiff filed his complaint against Defendants only three weeks after he was appointed. Defendants also complain that no discovery has taken place. Discovery, however, was not permitted until December 16, 2005, when this Court issued its Scheduling Order.

Even more alarming is Defendants' failure to disclose material facts about the exhibits supporting their Response Brief. For example, the Declarations of Hans Tschebaum and Bradley C. Stark fail to reveal that both men are convicted felons. *See U.S. v. Tschebaum*, 306 F.3d 540 (8th Cir. 2002)¹ (regarding Tschebaum's misrepresentations to the I.R.S. under 18 U.S.C. § 1001 and 26 U.S.C. § 7203); *U.S. v. Stark*, Case No. 1:02-CR-01006-ARR-1 (E.D.N.Y. May 8, 2003) (convicting Stark of forging counterfeit securities under 18 U.S.C. § 513(a)). Further, the ManPro account statement attached to Stark's Declaration **is a forgery and no such account ever existed**. For these reasons alone Defendants' Response should be disregarded by the Court in its entirety as perjury since it is without any basis of support in law or fact.²

In contrast to the Defendants' misrepresentations, the Plaintiff's evidence still demonstrates that all four factors for a preliminary injunction weigh heavily in the Plaintiff's favor. First, the rapid and certain depreciation of assets in Defendants' possession is well documented and indicates that harm to the Receivership Estate is imminent and irreparable. Second, Plaintiff enjoys a likelihood of success on the merits because the existence of the *Ponzi* scheme is evident from Sardaukar bank records attached to the original Declaration of Michael J. Quilling. As such, the underlying fraud has been established *per se*. Third, the comparative hardships favor preserving the status quo

¹ That case affirmed revoking Hans Tschebaum's parole for misrepresentations he made to the District Court, his attorney, and his parole officer. Among other things, Tschebaum (1) misrepresented the amount of home detention he served; (2) failed to notify his parole officer of unauthorized trips out of state; (3) underreported his monthly expenditures; and (4) hid \$1.8 million of "commissions" in a sham trust account to avoid paying income tax. *Id.* at 542-43.

² Plaintiff files with this Reply Brief his supplemental appendix containing the *Supplemental Declaration of Michael J. Quilling, Receiver, in Support of Plaintiff's Motion for Preliminary Injunction* ("Plaintiff's Supplemental Declaration") at Exhibit "A." Plaintiff's Supplemental Declaration is required given (1) the inaccuracies set forth in Defendants' Response and (2) Plaintiff's ethical duties to point out the fraud that Defendants attempt to perpetrate on the Court. *Plaintiff's Supplemental Declaration* at ¶ 1.

pending trial. Finally, those members of the public who invested with Sardaukar stand to benefit most from this preliminary injunction because it preserves assets for their benefit.

II.
All Four Factors Weigh in Favor
of Plaintiff's Motion for Preliminary Injunction

A. Irreparable Harm

Plaintiff seeks this Preliminary Injunction to prevent the Defendants from irreparably depleting and depreciating Receivership Estate assets, leaving Plaintiff with no adequate remedy at law. Plaintiff's ongoing investigation has revealed that Michael Tschebaum deposited at least \$334,237.00 of funds from Sardaukar investors into his Charles Schwab account. *Plaintiff's Motion for Preliminary Injunction* [Dkt. 12] at ¶¶ 4, 12. By June 2005, that account had been depleted to only \$106,376.63. *Plaintiff's Motion for Preliminary Injunction*, Exhibit "A" ("Plaintiff's Declaration") at ¶ 8. Such rapid spending activity illustrates the real and imminent threat that Defendants will not have enough cash on hand after trial to satisfy a money judgment in the Plaintiff's favor. Similarly, the 2005 Maserati Quattroporte (the "Maserati") continues to depreciate with every passing day and with every mile of use. *See, e.g., U.S. v. O'Brien*, 836 F.Supp. 438, 440 (S.D. Ohio 1993) (taking judicial notice of vehicle depreciation); *see also In re Wood*, 190 B.R. 788, 794 (Bankr. M.D. Pa. 1996); *U.S. v. One 1964 Chevrolet Impala Auto.*, 247 F.Supp. 329, 332 (D. S.C. 1965). Allowing the Maserati's value to depreciate in this manner presents an imminent and irreparable risk that Plaintiff cannot recover the full purchase price of \$141,675.71 after trial. This risk is underscored by Defendants' Response Brief, which does not address Plaintiff's concerns regarding Defendants' solvency or that the Maserati is currently uninsured. In either case, the risk of loss to the Receivership Estate is imminent, has already occurred and will continue in the future.

i. Plaintiff Seeks this Preliminary Injunction to Preserve Assets of the Receivership Estate.

Defendants' Response ignores the purpose of Plaintiff's application, which is to preserve Receivership Estate assets, and instead presents arguments outside those considered for a preliminary injunction. Defendants urge that the potential for harm was as likely seven months ago, when the case was filed, as it is now. *Defendants' Response* at ¶ 2. This, of course, is not a consideration before the Court. Rather, preliminary injunctions generally seek to preserve a plaintiff's opportunity to receive the damages awarded at judgment. *Hughes Network Sys., Inc. v. Interdigital Comm. Corp.*, 17 F.3d 691, 694 (4th Cir. 1994). Plaintiff already demonstrated that Sardaukar's assets have been depleted to the point that even money damages need to be protected. *Productos Carnic, S.A. v. Cent. Am. Beef & Seafood Trading Co.*, 621 F.2d 683, 686 (5th Cir. 1980) (even where money damages are the appropriate remedy, a preliminary injunction is appropriate to protect that remedy); *see also Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984) (preliminary injunction appropriate if damages will be seriously deficient as a remedy for the harm suffered). Plaintiff has no desire to "squeeze" a settlement out of the Defendants. *Plaintiff's Supplemental Declaration* at ¶ 3; *cf. Defendant's Response* at ¶ 3. Rather, Plaintiff is pursuing this preliminary injunction in accordance with his duty to aggressively pursue funds stolen from innocent investors. *Plaintiff's Supplemental Declaration* at ¶ 3.

ii. The Preliminary Injunction Seeks to Prevent Ongoing Harm that is Certain and Well Documented.

Notwithstanding the unsupported protestations of two convicted felons to the contrary, Plaintiff has offered this Court compelling evidence that Receivership Estate assets are being depleted by the Defendants. Defendants summarily state that the Motion for Preliminary Injunction relies only upon "mere speculation." *Defendants' Response* at ¶ 6. Plaintiff's motion, however,

presents compelling evidence establishing that Sardaukar transferred investor funds to the Defendants and that, by June 2005, the Defendants had sheltered, disposed of, or otherwise depleted those funds by \$227,860.37. Plaintiff possesses records from Michael Tschebaum's Charles Schwab account that demonstrate these facts in a manner rising well above mere "speculation."³ *Plaintiff's Declaration* at ¶ 8. Interestingly, Defendants do not dispute these figures, which certainly support a finding of imminent and irreparable harm.

B. Likelihood of Success on the Merits

Because the existence of a *Ponzi* scheme establishes fraudulent intent *per se*, Plaintiff clearly enjoys a likelihood of success on the merits. In his Complaint, Plaintiff has stated causes of action for Constructive Trust and Disgorgement, Fraudulent Transfer, and Attorney's Fees, Costs, and Interest. *Complaint* at ¶¶ 10-16. Plaintiff is entitled to this relief by establishing that a fraudulent transfer occurred under the Texas Uniform Fraudulent Transfer Act (the "UFTA") or the supplemental provisions of common law. Tex. Bus. & Com. C. § 24.008, § 24.011, § 24.013.⁴ Defendants readily admit that the alleged transfers took place from Sardaukar's account at JPMorgan Chase. *Defendants' Original Answer* [Dkt. 5] at ¶ 1; *Defendants' Response* at ¶ 1. Bank records show that this account was funded only by funds from *Ponzi* scheme victims, not interest earned on legitimate investments. See *Plaintiff's Motion for Preliminary Injunction*, Exhibit "A-3" ("JPMorgan Chase Account"). The JPMorgan Chase Account clearly shows that Stark deposited and commingled investor funds without ever sending them to individual ManPro investment accounts, as claimed in his Declaration. *Id.* Rather, all transfers from Sardaukar—including those

³ Plaintiff does not expect the Court to rule on his Motion for Preliminary Injunction until after a full evidentiary hearing. At that time, Plaintiff can provide copies of these records to the Court since, for the purposes of briefing this issue, it is unnecessary to provide Defendants with copies of their own bank statements.

⁴ The California Uniform Fraudulent Transfer Act contains the same provisions. Cal. Civ. C. § 3439 et seq.

at issue in this case—were paid directly out of the defrauded investors’ deposits.⁵ This arrangement illustrates a classic *Ponzi* scheme.⁶

Furthermore, the mere existence of a *Ponzi* scheme establishes fraudulent intent as a matter of law because the 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). While Defendants claim that the funds they received were “commissions” on investments, commissions paid out of a *Ponzi* scheme are fraudulent transfers as a matter of law. *S.E.C. v. Cook*, 2001 WL 256172, *3 (N.D. Tex. Mar. 8, 2001); 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).

i. The Court May Properly Consider Plaintiff’s Declarations.

In weighing the likelihood of success, the Plaintiff’s Declaration is properly considered by the Court. Defendants contend that this testimony, and the accompanying bank records, are not “credible” and are “heresay [sic] on its face” *Defendants’ Response* at ¶¶ 1, 9. Plaintiff’s Declaration, however, is sworn testimony for the Court to consider during a full evidentiary hearing on this matter. As such, it is expressly outside the definition of hearsay. See Fed. R. Evid. 801(c). Furthermore, unlike the forged and perjured testimony in Defendants’ exhibits, Plaintiff’s Declaration simply recites facts obtained during his ongoing investigation.

⁵ For example, on April 18, 2005, Sardaukar received \$110,000.00 from two investors, Peter Kaiser and Norman D. Spahr. These funds were not deposited in individual accounts at ManPro. 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. See *JPMorgan Chase Account* at 30.

⁶ See Black’s Law Dictionary 1180 (7th ed. 1999) (describing a 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”).

ii. Defendants' Exhibit Challenging the *Ponzi* Scheme's Existence is a Forgery.

Defendants offer the Declaration of Bradley C. Stark ("Stark's Declaration") to deny the existence of a *Ponzi* scheme. *Defendants' Response*, Exhibit "A-1." Stark, however, is a convicted felon and the Court should not give his testimony any credence. In fact, the records maintained by JPMorgan Chase and Man Financial Corp. ("Man Financial") directly contradict the ManPro records attached to Stark's Declaration. *Stark's Declaration*, Exhibit "A." Sardaukar's account at JPMorgan Chase clearly shows that funds from numerous investors were collectively deposited in that account, not held in separate accounts at ManPro as proffered by Stark. *See JPMorgan Chase Account; cf. Defendants' Response* at ¶ 4.

Stark only provides statements for one account at ManPro—and the authenticity of those statements has been vitiated. *See Declaration of Toni Rossetti* ("Rossetti's Declaration"), attached hereto as Exhibit "B." Rossetti is employed at Man Financial as a Compliance Officer. *Rossetti's Declaration* at ¶ 1. In that capacity, Rossetti is familiar with the type, form, and substance of account statements generated by Man Financial and ManPro Futures. *Id.* ¶ 2. Rossetti reviewed the documents submitted by Defendants, purporting to be a series of "Daily Commodity Statements" for an account at ManPro Futures, a division of Man Financial, entitled SARDAUKAR HOLDINGS IBC (DIR) ***INTERNATIONAL CONSULTANTS AND REFERRALS, INC.***, account number E G27 SARDKR 40118. *Id.* at ¶ 3. Rossetti has determined that the account number does not match the name on that account. *Id.* at ¶ 4. Further, she has determined that the account submitted by Defendants does not exist. *Id.* As stated in her Declaration, the documents attached to Stark's Declaration were not issued by Man Financial or ManPro Futures. *Id.* The only accounts ever established at Man Financial in the name of or associated with Sardaukar Holdings IBC were styled as "Sardaukar Holdings IBC (E/S)," account no. E G27 VANKR 40346, and "Sardaukar

Holdings IBC (DIR),” account no. E G27 VANKR 40112. *Id.* at ¶ 5. The total amounts deposited in those accounts were \$300,000.00 and \$2,391,500.00, respectively. *Id.* Other than those two accounts, no other accounts were ever established by Sardaukar for the benefit of any investors. *Id.* at ¶ 7. It is, therefore, apparent that the documents Defendants represent as ManPro financial statements are, in fact, forged and submitted as a fraud upon the Court. *Id.*; *Plaintiff’s Supplemental Declaration* at ¶ 5.

C. Balance of Hardship

Because Plaintiff enjoys a substantial likelihood of success on the merits, it is the Receivership Estate that will suffer the most if Plaintiff’s Motion for Preliminary Injunction is not granted. The Plaintiff’s duty is to return as much money as possible to the Receivership Estate. *Plaintiff’s Supplemental Declaration* at ¶ 3. Without an injunction, however, the Maserati will continue depreciating with every mile of use and Defendants will be free to continue spending the funds received from Sardaukar. Furthermore, if this Court accepts the Defendants’ intimation that they could satisfy a money judgment exceeding \$475,912.71, separate and apart from assets subject to this injunction, then it is hard to imagine that they would suffer any hardship as a result of this injunction. *Defendants’ Response* at ¶ 13.

In considering the balance of hardships, Defendants offer the sworn testimony of another convicted felon. *Defendants’ Response*, Exhibit “A-2” (“Hans Tschebaum’s Declaration”). In it, Hans Tschebaum claims that he had no knowledge of the *Ponzi* scheme. *Defendants’ Response* at ¶ 16, *Hans Tschebaum’s Declaration* at ¶ 4. As stated previously, however, Defendants’ knowledge of the *Ponzi* scheme is irrelevant because the mere existence of the scheme is *per se* evidence of fraudulent intent. *See, e.g., Cook*, 2001 WL 256172 at *3. Tschebaum also claims that the Defendants only received “referral fees” from Sardaukar, even though such payments from a *Ponzi*

scheme are fraudulent transfers as a matter of law. *See id.*; *Warfield*, 2006 WL 118250 at *6-7; *In re Alpha Telecom, Inc.*, 2004 WL 3142555 at *4. Finally, without citing the basis for his knowledge, Hans Tschebaum's Declaration also asserts that (1) Sardaukar opened separate accounts for each investor; (2) funds were never commingled; (3) no investor funds were used to pay other investors; and (4) Stark purchased the Maserati through "money legitimately earned through investments." *Defendants' Response* at ¶ 16, *Hans Tschebaum's Declaration* at ¶¶ 3, 5. Sardaukar's bank records, however, show just the opposite. In fact, the only documentary evidence illustrating a legitimate Sardaukar investment is the Man Pro account summary—which has already been exposed as a forgery. *See Rossetti Declaration* at ¶¶ 4-7; *Plaintiff's Supporting Declaration* at ¶ 5.

D. No Adverse Effect on Public Interest

The defrauded investors, too, have an interest in the preservation of the Receivership Estate because they will be the ultimate beneficiaries of this injunction. The Court has charged Plaintiff with the duty to collect and preserve assets for the Receivership Estate, with the ultimate goal of distributing those assets to members of the public who lost their savings to this *Ponzi* scheme. Defendants have no legitimate ownership interest in this property. The bank records before the Court are self-evident and directly trace the Maserati and at least \$334,237.00 back to Sardaukar's JP Morgan account and, ultimately, to the principal investments of Sardaukar investors. *See Plaintiff's Supplemental Declaration* at ¶ 5. The Court should therefore grant Plaintiff's Motion for Preliminary Injunction because it seeks to preserve the status quo by enjoining Defendants from depleting Receivership Estate assets—not commissions legitimately earned from Sardaukar.

E. Bond

The Court should excuse Plaintiff from posting bond because, as Receiver, he is functioning in a role appointed by the Court. Nevertheless, if the Court believes that a bond is necessary, and

that innocent investors should have to bear the expense, the Receiver will pledge assets of the Receivership Estate as security in his effort to recover and preserve investor assets held by the Defendants.

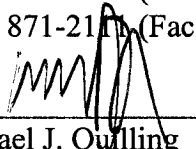
F. Conclusion

As in the original Prayer for Relief, Plaintiff respectfully seeks a full evidentiary hearing on the merits of his Motion for Preliminary Injunction. The documentation and testimony proving the *Ponzi* scheme's existence, Defendants' misrepresentations to the Court, and the depletion of Receivership Estate assets cannot be fully presented in the context of two briefs. Plaintiff, however, is certain that after a full evidentiary hearing, the Court will find that all four elements for a preliminary injunction weigh heavily in the Plaintiff's favor.

Respectfully submitted,

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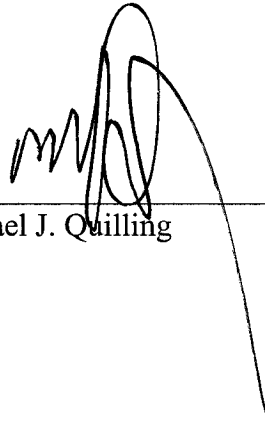
ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February, 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.
One Bent Tree Tower
16475 Dallas Parkway, Suite 500
Addison, Texas 75001-6837

ATTORNEYS FOR DEFENDANTS

A handwritten signature in black ink, appearing to read "Michael J. Quilling", is written over a horizontal line. The signature is stylized and somewhat cursive.

Michael J. Quilling