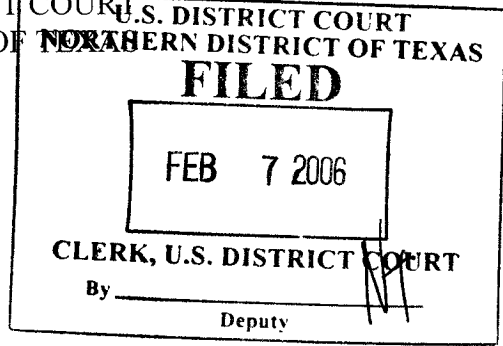


ORIGINAL

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,

vs.

HANS TSCHBAUM and MICHAEL TSCHBAUM,

Defendants.

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

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND BRIEF IN SUPPORT

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

COME NOW, Hans Tschebaum and Michael Tschebaum ("Defendants") and files this their Response to Plaintiff's Motion for Preliminary Injunction and Brief in Support and would show to the Honorable Court as follows:

I. INTRODUCTION

1. Plaintiff seeks the issuance of a Preliminary Injunction to deprive Defendants of the ownership and use of approximately \$458,000 in cash and property. Although alleging as a basis for the Motion that the Defendants were the recipients of proceeds of a Ponzi scheme, the Plaintiff ((who is a Receiver with access to all the records of Sardaukar Holdings, IBC (Sardaukar") and Bradley C. Stark ("Stark") the supposed architects of the Ponzi scheme)) has submitted only his own

affidavit, which is heresay on its face, and excerpts of records indicating that the Defendants received funds from Sardaukar, a fact admitted by Defendants in their answer.

2. The Plaintiff's complaint, which seeks recovery of money, and property worth money, was filed approximately one year ago. The Plaintiff's Motion for an injunction would not have been justified at the time the action was filed, and it is not justified now. Plaintiff has not even alleged that any conduct has occurred in the past year which justifies the request for preliminary injunction. There is no threat that had not occurred a year ago, there is no harm that is any more imminent now than it was a year ago, and, this action remains an action for recovery of money damages, just as it was one year ago. No discovery has been taken in this case.

3. It is evident is that the Receiver (Plaintiff) does not have the evidence to prove that the Defendants had any part in a Ponzi scheme. Instead of either trying to prove his case or dismissing this action, the Receiver is trying to "squeeze" a settlement from the Defendants through the issuance of a Preliminary Injunction designed to force Defendants to the settlement table.

II. ARGUMENT AND AUTHORITIES

4. This response is supported by the declarations of Bradley C. Stark (Exhibit A-1) and Hans Tschebaum (Exhibit A-2), filed concurrently herewith in a separate appendix and incorporated herein by reference for all purposes. In his declaration Stark states that he never conducted a Ponzi scheme. Stark stated that with respect to the clients referred to him by the Defendants, Sardaukar placed each investor's funds in a separate account maintained at ManPro, a well recognized commodity trading institution. Attached to Stark's declaration are records of one of the client's referred by Tschebaum to Sardaukar. Those records show that the balance of the client's separately

maintained account grew from \$371,266.63 on December 15, 2004 to \$1,421,011.33 on May 2, 2005. For referring clients to Stark and Sardaukar, Tschebaum received commissions based upon the amount of profit earned by the client. In each instance, the commissions were consented to by the client referred to Sardaukar by Tschebaum. None of Tschebaum's clients have complained about the investment practices of Sardaukar, Stark or Tschebaum. None of them has alleged that a Ponzi Scheme occurred.

5. Neither does Mr. Quilling's affidavit identify a single dissatisfied investor. Quilling's affidavit contains nothing but heresay and nothing more than what he alleged in his complaint one year ago. The only allegations in the Complaint concerning these Defendants are that these Defendants innocently received the fruits of the Ponzi scheme. Mr. Quilling's affidavit refers to records that merely show a fact that the Defendants have admitted from the outset; that the Defendants received funds from Sardaukar. Without proof of more, Defendants will certainly prevail in this action.

6. Plaintiff has not shown that he could not be compensated in money damages. This failure of proof alone dooms the request for injunctive relief.

Standard For Temporary Injunction.

7. A preliminary injunction is an "extraordinary remedy." *Miss. Power & Light Co. vs. United Gas Pipe Line Co.*, 760 F.2d 618, 619 (5th Cir. 1985). It should only be granted if the movant has clearly carried the burden of persuasion on all prerequisites. *Id.* The decision to grant a preliminary injunction is to be treated as the exception rather than the rule. *Id.* A preliminary

injunction is typically intended to preserve the status quo pending a final decision on the merits of the case. *Hollon v. Mathis Indep. Sch. Dist.*, 491 F.2d 92, 93 (5th Cir. 1974).

8. To obtain a preliminary injunction, Plaintiff must show a (1) substantial likelihood of success on the merits, (2) a substantial threat that Plaintiff will suffer irreparable injury if this injunction is not granted, (3) that the threatened injury outweighs any damage that the injunction might cause the Defendants, and (4) that the injunction will not disserve the public interest. *Planned Parenthood of Houston and Southeast Texas vs. Sanchez*, 403 F.3d 324, 329 (5th Cir. 2005); *Canal Auth. of State of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974). This "extraordinary remedy" should only be granted if Plaintiff has clearly carried the burden of persuasion on all four requirements. *Miss. Power & Light Co.*, 760 F.2d at 621 (emphasis added). This burden is increased even further when the applicant seeks a mandatory injunction, as the Plaintiff has in this instance. *Malkemzos v. DeBuono*, 102 F.3d 50, 54 (2d Cir. 1996).

A. Plaintiff Cannot Show That He Is Likely to Succeed on the Merits.

9. As is stated above, Plaintiff's allegation regarding the existence of a Ponzi scheme involving Stark and Defendants is wholly unsupported by any credible evidence. Apparently, Plaintiff anticipated that Defendants would make no response and that mere allegations, unrefuted, would support the application. As the declarations of Tschebaum and Stark demonstrate, Plaintiff has failed to show in any way that he is likely to prevail on the merits in this action.

B. Plaintiff Cannot Show a Substantial Threat of Immediate or Irreparable Harm or Damages.

10. Plaintiff has alleged, but failed to prove, that unless this Court grants an injunction he will be irreparably harmed and that assets will be depleted or otherwise transferred or converted

13. Additionally, "irreparable harm" must be of a nature that cannot be prevented or fully remedied by a final judgment in damages following trial. *Roland Machinery Co. v. Dresser Ind., Inc.*, 749 F.2d 380, 391 (7th Cir. 1984). Plaintiff has made no showing a judgment awarding money damages at the conclusion of this lawsuit would not make the Plaintiff whole. Instead, Plaintiff simply lists a variety of speculative reasons for wanting an injunction now as opposed to enforcing a money judgment after a trial on the merits.

14. Plaintiff's motion impermissibly seeks, by preliminary injunction, what the Receiver seeks at final trial on the merits. He seeks to deprive the Defendants of their property, immediately. Plaintiff states that he is "unaware" whether Defendants could fulfill a judgment against them him should Plaintiff prevail. He also states that a Maserati, to which he has no legal claim, could be destroyed while possibly uninsured as a reason to justify an injunction. There are simply no concrete facts in Plaintiff's motion evidencing any Ponzi scheme or any "siphoning away" of assets to "cronies" as he has called Defendants. Therefore, no evidence exists to support Plaintiff's request for injunctive relief, much less mandatory injunctive relief that requires action over preserving the status quo. *Rhodia, Inc. v. Harris Co.*, 470 S.W. 2d 415, 419. Mandatory injunctions require a heightened level of proof and should only be entered upon a clear showing that the moving party is entitled to the relief requested and compelling enough to show extreme necessity, hardship, or that very serious damage will result from a denial of preliminary relief. *Malkemzos v. DeBuono*, 102 F.3d 50, 54 (2nd Cir. 1996); *Tom Doherty Associates, Inc. v. Saben Entertainment, Inc.*, 60 F.3d 27, 33-38 (2d Cir. 1995); *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2nd Cir. 1985); *Rhodia, Inc.*, 470 S.W. 2d at 419. Clearly, Plaintiff's mere speculation of the potentiality of harm does not rise

by Defendants for their own purposes. Plaintiff has also alleged, but failed to prove, that an injunction is necessary to prevent immediate depletion of receivership assets. Plaintiff has, of course, failed to prove that the property in the hands of the Defendants is anything other than their own, lawfully owned, property. But even if the Court believed that there was a possibility that the property might eventually be proved to be assets of the Receiver's estate, the Court should deny the relief requested nonetheless.

11. To justify the issuance of an injunction before a trial on the merits, the movant is required to show that the movant, in the absence of the injunctive relief, will suffer immediate and irreparable harm and injury. "Immediate harm" requires a showing that the harm complained of is imminent. *Chacon v. Granata*, 515 F.2d 922, 925 (5th Cir. 1975). The United States Supreme Court has acknowledged that while "imminence" is a somewhat elastic concept, it cannot be stretched beyond its purpose to allow alleged injury that is too speculative to support injunctive relief. *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717 (1990). The injury must be shown to be "certainly impending." *Id.* at 158.

12. As is stated above, there is no showing that any event is imminent, or indeed, that there has been any change in circumstances since the filing of this action one year ago. Instead, it appears that Plaintiff suffers from an entirely speculative fear of financial injury. The mere possibility of injury, however, is not sufficient. *Calmes v. U.S.*, 926 F.Supp 582, 591 (N.D. Tex. 1996). A mere fear of speculative injury or possibility or fear that the injury will occur will not constitute an "immediate danger" that will support the issuance of a preliminary injunction. *Id.*

to a level of imminent and extreme damage and, consequently, injunctive relief should be denied.

C. Plaintiff's Alleged Threatened Injury Does Not Outweigh Harm to Defendants.

15. Where injunctive relief is requested, Courts balance the harm to the respective parties should the injunction not be granted. *Yakus v. U.S.*, 321 U.S. 414 (1944); *Callaway*, 489 F.2d at 572. Plaintiff is not entitled to any money or personal property from Defendants as he has no legal claim to such property. Plaintiff has made no credible showing of the existence of a Ponzi scheme, such that it would enable Plaintiff to recover any assets from Defendants. On the contrary, Plaintiff has simply laid out a bald assertion that a Ponzi scheme exists. Mere allegations alone, without credible evidence to support them, cannot justify the taking of property that Defendants have sworn that they have legally and rightfully earned.

16. The Declaration of Hans Tschbaum states that he has no knowledge of the existence of any Ponzi scheme as alleged by Plaintiff. Additionally, he states that the Maserati referred to by Plaintiff was purchased by Stark for the Defendants through money legitimately earned through investments. Nothing in Plaintiff's motion establishes otherwise. Consequently, confiscating or freezing any property or any assets from Defendants amounts to stealing and/or conversion of property rightfully belonging to them. Until Plaintiff makes some credible showing that Defendants have unlawfully received any assets, or transferred any funds illegally, an injunction by this Court would be both wrongful and unwarranted due to the sheer lack of evidence of wrongdoing by Defendants that has been presented by Plaintiff.

D. The issuance of the Injunction would not serve the public interest.

17. Defendants have the same rights as any other citizen of the United States. The Receiver in a civil suit assumes the same position as any other litigant. The previously stated standards for the issuance of preliminary injunctions, i.e., immediate and irreparable harm and injury, a showing of a likelihood of prevailing on the merits, and the necessity of a bond, exist to insure the rare and reasonable exercise of the Court's extraordinary equitable powers. The issuance of a preliminary injunction without proof of even one of the four basic elements required in order to justify the exercise of the Court's power would obviously be contrary to the public interest.

E. Bond Requirements.

18. The Receiver, like any movant, is required to post a bond to secure compliance with a preliminary injunction. The Receiver in this case is not, and has not claimed to be, an officer or agency of the United States. He is, therefore, required to post a bond "in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained," Fed. R. Civ. P. 65(c). Without waiving all the grounds which prevent the issuance of an injunction, Defendants would urge that a bond in at least double the amount of the value of the property (or at least \$925,000) would be required to protect against the wrongful issuance of the injunction.

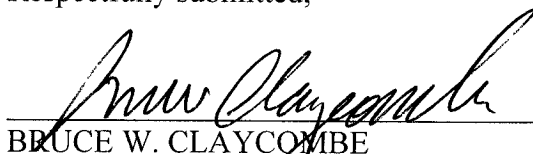
**III.
CONCLUSION**

20. Plaintiff has failed to meet the required burden for obtaining a preliminary injunction before this Court. Specifically, the Plaintiff has not shown a likelihood of prevailing on the merits of this action, a risk of immediate injury or irreparable harm, that the balance of hardships to the

respective parties weighs in his favor, or that the public interest would be served by granting this injunction. First and foremost, Plaintiff has wholly failed to establish the existence of a Ponzi scheme through any credible evidence. In the absence of such a scheme, any preliminary injunction would be improper. Plaintiff is simply trying to accelerate the process of obtaining ultimate relief through a mandatory injunction over one year into this litigation. Based upon the foregoing, all requested relief should be denied.

WHEREFORE, PREMISES CONSIDERED, Defendants pray that the Court deny Plaintiff's request for a preliminary injunction as set forth hereinabove; and for such other and further relief, general or special, at law or at equity, to which Defendants may be justly entitled.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February 2006 the foregoing document was served upon the following counsel of record in accordance with Rule 5(b) of the FEDERAL RULES OF CIVIL PROCEDURE via First Class Mail, postage pre-paid:

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