Supplement to AOR 2011-03

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March 2, 2011

BY HAND DELIVERY

David Adkins, Esq.
Office of General Counsel
Federal Election Commission
999 E Street N.W.
Washington, D.C. 20463

Re: Motion to Dismiss Briefs in Advisory Opinion Request 2011-03

Dear Mr. Adkins:

I write to follow up on our February 11, 2011 telephone conversation, in which you requested copies of the briefs in support of the motions to dismiss that were filed in *Janvey v. DSCC et al.*, No. 3-10-cv-346 (N.D. Tex. filed Feb. 19, 2010). We are pleased to provide these documents in response to your request:

- The Republican committees' motion to dismiss brief, dated March 31, 2010;
- The Democratic committees' motion to dismiss brief, dated April 23, 2010;
- The Plaintiff's response to the Republican committees' motion to dismiss brief, dated May 5, 2010;
- The Plaintiff's response to the Democratic committees' motion to dismiss brief, dated May 14, 2010;
- The Republican committees' reply brief, dated May 26, 2010;
- The Democratic committees' reply brief, dated May 28, 2010.

In their motions to dismiss, the Democratic committees argued that the Federal Election Campaign Act (the "Act") and the Bipartisan Campaign Reform Act ("BCRA") pre-empt the Plaintiff's state law claim, because Commission rules provide the exclusive conditions for the screening and refund of contributions by federally registered political committees, and because BCRA set forth the exclusive purposes for which any of Mr. Stanford's remaining pre-BCRA non-Federal donations could be spent.

That these arguments have been made in defense against the complaint should not affect the Commission's consideration of this request. The Commission has been clear all along that litigation costs related to compliance with the Act are "expenditures," while litigation costs *not* related to compliance with the Act are not "expenditures." In those advisory opinions in which the Commission found that legal costs were related to compliance with the Act, the requesters were responding to allegations that the *Act itself had been violated*, either by the committee or by a third party. *See* Advisory Opinion 1981-16 (Carter-Mondale) (seeking to "defray the costs of defending the Committee in any post-election litigation that may arise in connection with ... compliance actions of the Federal Election Commission, or the Commission's audit of the Committee"); 1990-17 (Hums) (the Committee "plan[ned] to retain legal counsel to represent their interests in connection with a complaint filed with the Commission"); 1993-15 (Tsongas) (seeking to defray costs with respect to investigation in which "indictment counts explicitly refer to violations of 2 U.S.C. 441a(a)(1)(A)" by third party and "indictment's description of [other] counts refers to the violations of the Act and regulations that resulted from such activity, including 2 U.S.C. 432(a)(3), 432(b), 432(c), 432(h), 434(b), and 11 CFR 102.8, 102.9, 102.15, 103.3, and 104.3-104.11.").

The *Janvey* litigation involves no allegation that any committee violated the Act. Rather, the Democratic committees have simply noted that the complaint would impermissibly infringe on prerogatives reserved to the Commission under the Act. This does not alter the fact that the litigation, at bottom, is unrelated to the committees' compliance with the Act. If you have any further questions, please let us know.

Very truly yours,

Brian G. Svoboda

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RALPH S. JANVEY, IN HIS CAPACITY AS COURT-APPOINTED RECEIVER FOR THE STANFORD INTERNATIONAL BANK, LTD., ET AL.,	§	
Plaintiff,	§	
v.	§	
DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE, INC.; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE, INC.; REPUBLICAN NATIONAL COMMITTEE; and NATIONAL REPUBLICAN SENATORIAL COMMITTEE,	§	**Case No. 3:10-CV-0346**
Defendants.	§	

REPUBLICAN POLITICAL COMMITTEE DEFENDANTS' BRIEF IN SUPPORT OF THEIR PARTIAL MOTION TO DISMISS UNDER RULE 12(b)(6)

Respectfully submitted,

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I.
INTRODUCTION

Ralph S. Janvey (the "Receiver") filed the present action seeking avoidance of political contributions made by persons and entities associated with R. Allen Stanford. The Receiver's claims related to contributions made more than four years before he brought the present action are extinguished. They no longer exist. This is not a matter where the Receiver is procedurally barred from bringing the claim; there is simply no claim to bring. The plain language of Section 24.010 of the Texas Uniform Fraudulent Transfer Act ("UFTA"),[1] a statute of repose, states that claims brought outside of the prescribed period cease to exist. There is no claim to toll. With only one exception, which applies to transfers made with actual intent to defraud, Section 24.010 extinguishes a fraudulent transfer claim at most four years after the transfer was made. But even the one exception operates to extinguish a claim, not merely to procedurally bar the claim, unless the claim is brought within four years after the transfer was made, or, if later, within one year after the transfer was or could have reasonably been discovered by the claimant.

Although the Texas UFTA's statute of repose is not subject to judicial tolling doctrines, these doctrines nonetheless would have required the Receiver to bring the Stanford Entities' claims within one year of his appointment. The Receiver was appointed on February 16, 2009, but did not file suit until February 19, 2010. The Stanford Entities, in whose shoes the Receiver stands, have no cognizable action under the Texas UFTA, and the Receiver's claims must be dismissed.[2]

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[1] Codified in the Tex. Bus. & Comm. Code § 24.001 et seq.

[2] According to the Receiver, R. Allen Stanford allegedly made a contribution to the NRCC on May 21, 2008 for $28,500.00. Pl. Appx. at 1. This is the only contribution that falls within the four-year repose period, but it is not within the one-year period required by Section 24.010(a)(3). Thus, the Republican Political Committees only seek dismissal of this claim to the extent the claim is based on Section 24.006(b).

II.
LEGAL STANDARD

To survive a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face."[3] A claim has facial plausibility when the plaintiff pleads factual content that allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged.[4] In reviewing a Rule 12(b)(6) motion, the Court is not bound to accept legal conclusions as true.[5] When there are well pleaded factual allegations, the Court assumes their veracity and then determines whether they plausibly give rise to an entitlement to relief.[6]

In ruling on a motion to dismiss under 12(b)(6), the Court cannot look beyond the pleadings.[7] The pleadings, however, include the complaint and any documents attached to it.[8]

III.
ARGUMENT AND AUTHORITIES

A. Section 24.010 of the Texas UFTA is a statute of repose that substantively extinguishes a claim rather than merely barring the claim procedurally.

The Texas UFTA governs all transfers made after September 1, 1987.[9] In relevant part, the Texas UFTA allows a creditor to void transfers by a debtor that are deemed fraudulent.[10]

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[3] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

[4] *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009).

[5] *Iqbal*, 129 S.Ct. at 1949 50.

[6] *Id.*

[7] *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999).

[8] *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 99 (5th Cir. 2000).

[9] Tex. Bus. & Comm. Code § 24.012. The Receiver hints that there may be "other applicable law," but makes no attempt to identify any other law under which he can bring a fraudulent transfer action. Complaint ¶ 36.

Four sections generally govern whether a transfer is fraudulent: Sections 24.005(a)(1), 24.005(a)(2), 24.006(a), and 24.006(b).[11]

Causes of action arising under the Texas UFTA are subject to extinguishment under Section 24.010. Aptly captioned "Extinguishment of Cause of Action," Section 24.010, states in Subsection (a), that a claim "is extinguished unless" it is brought:

> (1) under Section 24.005(a)(1) of this code, within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant;
>
> (2) under Section 24.005(a)(2) or 24.006(a) of this code, within four years after the transfer was made or the obligation was incurred; or
>
> (3) under Section 24.006(b) of this code, within one year after the transfer was made.

The statute's use of the term *extinguished unless* is important. Its use is one of the key reasons courts have held that Section 24.010 is a statute of repose, rather than a mere statute of limitations.[12] Federal courts interpreting the Texas UFTA agree.[13] Section 24.010 serves to

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[10] *Id.* § 24.008.

[11] Section 24.005(a)(1) deems a transfer fraudulent when the debtor makes the transfer "with actual intent to hinder, delay, or defraud any creditor of the debtor." Sections 24.005(a)(2) and 24.006(a) require a transfer be made "without receiving a reasonably equivalent value in exchange for the transfer or obligation," when the debtor is (or is nearly) insolvent. Finally, Section 24.006(b) requires a transfer be made to an insider for an antecedent debt where the debtor is insolvent, and the insider should have known the debtor was insolvent.

[12] *See, e.g., Cadle Co. v. Wilson*, 136 S.W.3d 345, 350 (Tex. App.--Austin 2004, no pet.) (use of the word "extinguishment" indicates strict construction and §24.010 is "technically a statute of repose"); *Duran v. Henderson*, 71 S.W.3d 833, 838 (Tex. App.--Texarkana 2002, pet. denied) ("We find that Section 24.010 operates as a statute of repose rather than as a procedural statute of limitations."); *and Williams v. Performance Diesel, Inc.*, No. 14-00-00063-CV, 2002 Tex. App. LEXIS 2735 at *15 (Tex. App.--Houston[14th Dist.] April 18, 2002,) (referring to § 24.010 as imposing a four-year statute of repose based on the date of the transfers at issue).

In determining the law of the forum state, a federal court must apply the law as interpreted by the state's highest court. That said, a decision by an intermediate appellate state court must not be disregarded by a federal court unless the federal court is convinced by other data that the highest court of the state would decide otherwise. *See Texas Dep't of Hous. & Community Affairs v. Verex Assurance*, 68 F.3d 922, 928 (5th Cir. Tex. 1995).

"ensure that the lapse of the statutory periods prescribed by the section bars the right and not merely the remedy."[14] The statute's plain language—*extinguished unless*—clearly manifests this stated goal. For these and other reasons, Section 24.010 is construed as a statute of repose under Texas law.[15]

Categorizing Section 24.010 as a statute of repose rather than simply a statute of limitations carries significance. The two categories of statutes are treated very differently. A statute of limitations is a procedural mechanism that is a defense to limit the remedy available from an otherwise extant claim when the claim is brought outside the limitations period.[16] Judicially created doctrines of tolling generally apply to statutes of limitations.[17]

In contrast, a statute of repose substantively takes away a claim.[18] A claimant is not merely procedurally barred from bringing his claim; no cognizable claim exists. One of the key

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[13] *See, e.g., Smith v. Am. Founders Fin., Corp.*, 365 B.R. 647, 676 (S.D. Tex. Mar. 10, 2007) (holding that TUFTA § 24.010 is a statute of repose).

Indeed, many courts nationwide construing analogous statutes of other jurisdictions have determined that provisions similar to the Texas Extinguishment Provision are statutes of repose. *See, e.g., In re G-I Holdings, Inc.*, 2006 U.S. Dist. LEXIS 45510 (D.N.J. 2006) (collecting cases and identifying New Jersey among the jurisdictions recognizing the Extinguishment Provision as a statute of repose) ("The limitations period under the Uniform Fraudulent Conveyance Act is recognized by many jurisdictions as a statute of repose."); *Epperson v. Entm't Express, Inc.*, 159 Fed. Appx. 249, 252 (2d Cir. 2005) (Connecticut UFTA) (finding no error in the trial court's refusal to apply the tolling doctrine of fraudulent concealment to toll the "statute of repose"); *and First Southwestern Fin. Servs. v. Pulliam*, 912 P.2d 828, 830 (N.M. Ct. App. 1996) (New Mexico UFTA) ("[T]he UFTA operates in the same manner as other statutes of repose that extinguish a cause of action as of a certain date rather than simply blocking the remedy."); *Warfield v. Alaniz*, 453 F. Supp. 2d 1118, 1130 (Arizona UFTA) ("The only Arizona case interpreting the statute has referred to it as a 'statute of repose.'"); *but cf., Warfield v. Carnie*, No. 3:04-cv-633-R, 2007 U.S. Dist. LEXIS 27610 at *41 n.11 (Washington UFTA) (questioning whether the Washington UFTA was a statute of repose).

[14] *Duran v. Henderson*, 71 S.W.3d at 838.

[15] *See, e.g., Smith v. Am. Founders Fin., Corp.*, 365 B.R. at 676 ("Section 24.010 states that a fraudulent-transfer claim is 'extinguished' after four years. *Cadle* and *Duran* find this language determinative. This court agrees. Section 24.010 of the TUFTA is a statute of repose.") (citations omitted).

[16] *See Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 866 (Tex. 2009).

[17] *Methodist*, 2010 Tex. LEXIS 211 at *5.

[18] *Galbraith Eng'g*, 290 S.W.3d at 866.

purposes of a repose statute is "to create a final deadline for filing suit that is not subject to any exceptions, except perhaps those clear exceptions in the statute itself."[19] For this reason, courts do not apply judicially created doctrines to extend these periods.[20] This necessarily means that some claims are barred through no fault of the plaintiff.[21] The Legislature, however, weighed this and other public policy concerns in deciding to enact a statute of repose where a traditional statute of limitations would be inadequate.[22]

B. The statute of repose extinguished the Receiver's claim with respect to each contribution.

1. *Each claim for contributions brought under Section 24.005(a)(2) or 24.006(a) was extinguished four years after its respective contribution was made.*

According to Section 24.010(a)(2), a claim brought under Sections 24.005(a)(2) or 24.006(a) is extinguished unless it is brought within four years of the transfer. Section 24.010(a)(2) contains no exception to the four-year repose period, and claims subject to this provision are extinguished after the four-year period ends. The Receiver filed his complaint on February 19, 2010. Therefore, all claims brought under Sections 24.005(a)(2) or 24.006(a) relating to contributions made before February 19, 2006, are extinguished.

2. *Each claim for contributions brought under Section 24.006(b) was extinguished one year after its respective contribution was made.*

According to Section 24.010(a)(3), a claim brought under Section 24.006(b) is extinguished unless it is brought within one year of the transfer. Similar to Section 24.010(a)(2), Section 24.010(a)(3) contains no exception to the one-year repose period, and claims subject to

[19] *Methodist,* 2010 Tex. LEXIS 211 at *6.

[20] *Galbraith Eng'g,* 290 S.W.3d at 866-67.

[21] *Id.*

[22] *Galbraith Eng'g,* 290 S.W.3d at 866.

this provision are extinguished after the one-year period ends. The Receiver filed his complaint on February 19, 2010. Therefore, all claims brought under Sections 24.006(b) relating to contributions made before February 19, 2009, are extinguished.

3. *Each claim for contributions brought under Section 24.005(a)(1) was extinguished four years after its respective contribution was made because the Stanford Entities "discovered" each contribution at the time each was made.*

According to Section 24.010(a)(1), a claim brought under Section 24.005(a)(1) is extinguished unless it is brought within four years of the transfer or, if later, within one year after the claimant discovers or could have reasonably discovered the transfer. Section 24.010(a)(1) operates differently from two previously discussed subsections. The legislature crafted a single exception extending, if later, the otherwise definite four-year period, to one year after the claimant discovered or could have reasonably discovered the transfer. After this one-year period, however, under the plain language of the statute, the claim is extinguished just as it would otherwise have been after the four-year period, and no substantive claim exists.

The use of the term *extinguish* lends the Section 24.010 to strict construction.[23] Because only "creditors" are entitled to relief under the Texas UFTA, the "claimant" referred to in the discovery clause is the person with the "right to payment."[24]

An equity receiver has standing only to bring claims on behalf of the entities of the receivership to which he is appointed, and stands in the shoes of the receivership entities. As succinctly put by the First Circuit:

> Since 1935 it has been well settled that "the plaintiff in his capacity of receiver has no greater rights or powers than the corporation itself would have." *McCandless v. Furlaud*, 296 U.S. 140, 148, 80 L. Ed. 121, 56 S.

[23] *Cadle*, 136 S.W.3d at 350.

[24] *See* Texas Bus. & Comm. Code § 24.008 ("In an action for relief against a transfer or obligation under this chapter, *a creditor*, subject to the limitations in Section 24.009 of this code, may obtain [the listed remedies].") (emphasis added); *Id.* § 24.002(3)-(4) (defining the term creditor and claim).

> Ct. 41 (1935). In *McCandless*, Justice Cardozo "clearly emphasized that the receiver in that case was suing on behalf of the corporation, not third parties. . . ." *In other wards, the receiver can only make a claim which the corporation could have made. Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 429, 32 L. Ed. 2d 195, 92 S. Ct. 1678 (1972) (citing *McCandless*, 296 U.S. 140, 80 L. Ed. 121, 56 S. Ct. 41).[25]

Because "the receiver can only make a claim which the corporation could have made," the claimants for purposes of evaluating whether a claim is extinguished are the Stanford Entities.[26] The Stanford Entities knew of each allegedly fraudulent transfer the moment that each transfer was made. Therefore, the date of the transfer started the one-year period in which to bring a claim. So, in this instance, the one-year period was not "later" than the four-year period, and does not delay extinguishing the claims within four years of the transfer.

The Receiver cannot assert an extinguished claim. The Receiver has no greater right to bring a claim than the entities to which he has been assigned receiver.[27] Because the statute actually extinguished the claims before the Receiver was even appointed, rather than merely procedurally barred bringing the claims, the Receiver has no cognizable claim under the Texas UFTA for political contributions made more than four years before he filed suit.

C. Even if tolling were to apply, the claims would have been extinguished one year after the Receiver's appointment at the latest.

When state statutes of limitations are "borrowed," federal courts use the state tolling principles as the "primary guide."[28] Because these claims are governed by the Texas UFTA statute of repose, Texas law regarding tolling applies. As mentioned before, Texas courts do not

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[25] *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 25 (1st Cir. 1990) (emphasis added).

[26] *Id.*

[27] *See id.*

[28] *FDIC v. Dawson*, 4 F.3d 1303, 1306 (5th Cir. 1993).

apply judicially created tolling principles to the statutes of repose.[29] But even if tolling were to apply, the tolling of the Stanford Entities' discovery would have ended, at the latest, the day the Receiver was appointed. From that day, the Receiver would have had one year to bring the claims before they were extinguished.

Texas courts have applied the doctrine of adverse domination to toll statutes of limitations, but not statutes of repose,[30] In the limited context where the directors controlling the corporation "have been active participants in wrongdoing or fraud."[31] To the extent the adverse domination doctrine were to apply to toll the one-year period after a corporation "discovers" a particular transfer, it would toll the limitations period only while the wrongdoer retains control of the corporation.[32] To state it another way, the date of discovery remains the date that the Stanford Entities discovered the transfers, but the doctrine, if applicable, would only stop the one-year limitations period from running while the Stanford Entities were under control of the wrongdoer. So even if the doctrine were applicable, discovery by the Receiver is irrelevant where the corporation had previously discovered the transfers. This difference is particularly important here, where the running of the statute operates to substantively extinguish the claim.

The Receiver may try to argue that as of the date that he was appointed he exercised diligence in uncovering the extent of the alleged fraud and could not have reasonably known about these transfers until February 19, 2009, or thereafter. However, this argument is inconsequential. As demonstrated above, it is not the Receiver's knowledge that matters, but the

[29] *Galbraith Eng'g*, 290 S.W.3d at 866-67.

[30] *See id.* (stating that judicial tolling doctrines do not apply to statutes of repose).

[31] *Dawson*, 4 F.3d at 1306.

[32] *Id.* at 1312.

knowledge of those in whose stead he stands, that is, the actual claimants.[33] In this case, the Stanford Entities had actual knowledge of the transfers for years. The rationale for tolling under a theory that the entities were unable to act on this knowledge due to adverse domination was no longer applicable after the Receiver's appointment.[34] As of that date, the organization was no longer under Stanford's control, its earlier "discovery" could no longer be tolled, and the one-year period began to tick. The Receiver did not bring his claims until February 19, 2010, three days after the claims would have had been extinguished, even if tolling were to apply.

IV.
PRAYER

For the reasons stated above, Plaintiffs respectfully request that the Court dismiss with prejudice all of the Receiver's claims under the Texas UFTA §§ 24.005(a)(1), 24.005(a)(2), and 24.006(a) relating to political contributions made before the February 19, 2006, claims under the Texas UFTA § 24.006(b) relating to political contributions made before February 19, 2009, and that the Court grant Republican Political Committee Defendants any other relief to which they are entitled.

[33] *Cadle*, 136 S.W.3d at 350.

[34] *See Scholes v. Lehman*, 56 F.3d 750, 754 (7th Cir. 1995) ("The appointment of the receiver removed the wrongdoer from the scene. The corporations were no more Douglas's evil zombies.").

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of March, 2010, I electronically filed the foregoing document with the Clerk of the Court, using the CM/ECF system, and that I have served all counsel of record electronically.

/s/ Mark A. Shank

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

RALPH S. JANVEY, in his capacity as Court-Appointed Receiver for the Stanford International Bank, Ltd., et al.,	§	
Plaintiff	§	
vs.	§	**NO. 3:10-CV-0346**
DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE, INC.; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE, INC.; REPUBLICAN NATIONAL COMMITTEE; and NATIONAL REPUBLICAN SENATORIAL COMMITTEE,	§	
Defendants.	§	

DEMOCRATIC COMMITTEE DEFENDANTS'
BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

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I. INTRODUCTION

Plaintiff Ralph S. Janvey, Receiver for Allen Stanford and his affiliated entities, seeks avoidance of political contributions made by Mr. Stanford, his associates and his companies, some of which date back more than ten years. Plaintiff is not entitled to disgorgement of the funds transferred to defendants Democratic Senatorial Campaign Committee, Inc. ("DSCC") and Democratic Congressional Campaign Committee, Inc. ("DCCC") for two independent reasons.

First, any cognizable claims Plaintiff may have had against defendants have been extinguished under the statute of repose incorporated in the Texas Uniform Fraudulent Transfer Act ("TUFTA"), Tex. Bus. & Com. Code § 24.001 et seq. TUFTA's statute of repose is strictly construed to establish deadlines by which Plaintiff's claims are not simply procedurally barred, but are extinguished altogether. TUFTA's extinguishment provision requires that fraudulent transfer claims be brought within four years of the transfers, and as Plaintiff seeks avoidance of transfers made over four years ago, his claims are extinguished. Furthermore, even if equitable tolling principles and the discovery rule applied to their fullest extent, Plaintiff's claims still would have been extinguished before he filed suit.

Second, Plaintiff's state law claims are preempted by federal law. Federal election law expressly preempts any provision of state law regarding elections to federal office, including those that affect the financing of federal political committees. Moreover, federal law provides a comprehensive scheme setting forth the grounds on which political funds are subject to disgorgement, preempting Plaintiff's attempt to carve out a new basis for a mandatory refund. Finally, the ultimate disposal of the vast majority of political contributions at issue here was subject to a specific federal statute, which does not permit disgorgement to this Plaintiff at this late hour.

For each of these reasons, defendants DSCC and DCCC seek dismissal of the Complaint.

II. STATEMENT OF FACTS

The bulk of Plaintiff's Complaint relates to allegations of fraud against Mr. Stanford, his associates and companies (collectively, the "Stanford Defendants"). According to Plaintiff, the Stanford Defendants operated a fraudulent Ponzi scheme, Compl. ¶ 28, by marketing high-yield certificates of deposit to investors, id. ¶ 20, and fabricating the performance of the investment portfolio maintained by Stanford International Bank, Ltd., id. ¶ 25. Plaintiff alleges that the Stanford Defendants misappropriated investor funds to gamble on speculative investments and finance Mr. Stanford's "lavish lifestyle." Id. ¶ 24.

On February 16, 2009, the Securities and Exchange Commission ("SEC") filed suit against the Stanford Defendants. Id. ¶ 18. On the same date, the Court appointed Plaintiff as Receiver "over all property, assets, and records of the Stanford Defendants, and all entities they own or control." Id. The suit against the Stanford Defendants drew immediate attention in the national media to their past political contributions, including those made to the DSCC and DCCC (together, the "Committees"), which had long been a matter of public record. See, e.g., Stephen Labaton & Charlie Savage, S.E.C. Fines Didn't Avert Stanford Group Case, N.Y. Times, Feb. 18, 2009 (Democratic Committee Defendants' Appendix in Support of Their Motion to Dismiss ("Appendix") Ex. A).[1]

More than a year after Plaintiff's appointment as Receiver, Plaintiff filed this suit claiming that funds from the alleged Ponzi scheme were transferred by the Stanford Defendants

[1] The Committees request that the Court take judicial notice of the news articles cited in this brief and included as Exhibits A through F in the attached Appendix. "Courts have the power to take judicial notice of the coverage and existence of newspaper and magazine articles." United States ex rel. Lam v. Tenet Healthcare Corp., 481 F. Supp. 2d 673, 680 (W.D. Tex. 2006); see also id. (noting that the existence and coverage of newspaper and magazine articles "are both generally known and capable of accurate determination by resort to sources whose accuracy cannot reasonably be questioned").

to the Committees. Compl. ¶ 29. Citing political contributions ranging from February 2000 to July 2005, Plaintiff asserts that the Committees received a total of $1,150,000 from Mr. Stanford, his associate James Davis and Stanford Financial Group ("SFG"). Id. ¶ 30; Compl. app. at 1-2. Plaintiff does not allege that the Committees knew or had reason to suspect that Mr. Stanford or his affiliated entities were operating a fraudulent scheme. Still, Plaintiff contends that he is entitled to disgorgement of the funds "because such payments constitute fraudulent transfers under Texas law and other applicable law." Compl. ¶ 36.

III. ARGUMENT

Plaintiff's Complaint should be dismissed for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6) on either of two separate grounds. First, Plaintiff failed to timely file his fraudulent transfer claims under TUFTA. Second, Plaintiff's fraudulent transfer claims are preempted by the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 et seq. For the reasons discussed more fully below, the Committees urge the Court to dismiss this action.

A. Legal Standard

To survive a motion to dismiss under Rule 12(b)(6), the plaintiff's factual allegations "must be enough to raise a right to relief above the speculative level[.]" Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). The plaintiff's allegations must plausibly suggest, and not merely be consistent with, the claimed wrongful conduct. Id. at 557. Thus, although the factual allegations of the complaint are assumed to be true, the plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action[.]" Id. at 555. Moreover, courts do not accept as true factual allegations that are contradicted by judicially noticeable facts or by documents referenced in the complaint. Sprewell v. Golden State

Warriors, 266 F.3d 979, 988 (9th Cir. 2001), amended, 275 F.3d 1187 (9th Cir. 2001); WesternGeco v. Ion Geophysical Corp., No. 09-cv-1827, 2009 WL 3497123, at *2 (S.D. Tex. Oct. 28, 2009).

In accord with these standards, dismissal under Rule 12(b)(6) is proper when the plaintiff either lacks a "cognizable legal theory" or has failed to present "sufficient facts alleged under a cognizable legal theory." Vaughn v. Fedders Corp., No. 4:04-CV-313-Y, 2005 WL 5569953, at *4 (N.D. Tex. Aug. 29, 2005), rev'd on other grounds, 239 Fed.Appx. 27 (5th Cir. 2007) (citing Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)). Here, even accepting Plaintiff's allegations as true for purposes of this motion, and drawing all reasonable inferences in favor of Plaintiff, Plaintiff's Complaint fails to state a claim on which relief can be granted. Accordingly, Plaintiff's Complaint must be dismissed.

B. Plaintiff's Claims Are Extinguished.

Causes of action arising under TUFTA are subject to extinguishment under Section 24.010. A TUFTA fraudulent transfer claim "is extinguished unless" the action is brought:

> (1) under Section 24.005(a)(1) of this code, within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant;
>
> (2) under Section 24.005(a)(2) or 24.006(a) of this code, within four years after the transfer was made or the obligation was incurred; or
>
> (3) under Section 24.006(b) of this code, within one year after the transfer was made.

Tex. Bus. & Com. Code Ann. § 24.010(a). Section 24.010(a)(1) thus provides a plaintiff with the longest possible limitations period in which to file suit.[2] Here, Plaintiff filed suit only after his claims were extinguished by Section 24.010(a)(1).

1. Section 24.010 of TUFTA Is a Statute of Repose and Must Be Strictly Construed.

Texas and federal courts alike have held that Section 24.010 of TUFTA operates as a statute of repose rather than as a procedural statute of limitations. See Smith v. Am. Founders Fin., Corp., 365 B.R. 647, 676 (S.D. Tex. 2007); Cadle Co. v. Wilson, 136 S.W.3d 345, 350 (Tex. App.—Austin 2004, no pet.); Duran v. Henderson, 71 S.W.3d 833, 837-38 (Tex. App.—Texarkana 2002, pet. denied).[3] "[T]here are significant differences between the two." Galbraith Eng'g Consultants, Inc. v. Pochucha, 290 S.W.3d 863, 866 (Tex. 2009). While a statute of limitations is a procedural device that merely bars enforcement of a right, a statute of repose "takes away the right altogether after the specified time period has expired," Duran, 71 S.W.3d at 838, "creat[ing] a substantive right in those protected to be free from liability after a legislatively-determined period," id. at 837. Most importantly, "unlike statutes of limitations, a statute of repose is not subject to judicially crafted rules of tolling or deferral." Methodist

[2] Although the Complaint broadly refers to causes of action under "Texas law and other applicable law," Compl. ¶ 36, its allegations only refer to fraudulent transfer claims brought under Section 24.005(a)(1) of TUFTA. See id. (referring to the Stanford Defendants' "actual intent to hinder, delay, or defraud" creditors); id. ¶ 40 (citing the limitations period provided in Section 24.010(a)(1)). To the extent Plaintiff raises any claims under Section 24.005(a)(2), 24.006(a) or 24.006(b) of TUFTA, those claims are extinguished on the same basis as his Section 24.005(a)(1) claims. As discussed below, all of the allegedly fraudulent transfers occurred more than four years before Plaintiff filed suit.

[3] "When adjudicating claims for which state law provides the rules of decision," federal courts must "apply the law as interpreted by the state's highest court." Ladue v. Chevron USA, Inc., 920 F.2d 272, 274 (5th Cir. 1991). Where the state's highest court has not yet spoken on an issue, however, federal courts may look to the state's appellate courts for guidance. Am. Nat'l Gen. Ins. Co. v. Ryan, 274 F.3d 319, 328 (5th Cir. 2001).

Healthcare Sys. of San Antonio, Ltd. v. Rankin, No. 08-0316, 2010 WL 852160, at *2 (Tex. Mar. 12, 2010).[4]

As a statute of repose, TUFTA's extinguishment provision is "intended to be strictly construed," Cadle, 136 S.W.3d at 350, in order to "'mitigate the uncertainty'" surrounding the filing of fraudulent transfer actions, Duran, 71 S.W.3d at 838 (quoting Uniform Fraudulent Transfer Act ("UFTA") § 9, 7A-2 U.L.A. 266, 359 cmt. (1999)). By promoting fixed and inflexible filing deadlines that are not subject to equitable tolling principles, TUFTA's statute of repose protects good faith transferees from the burden of indefinite potential liability. See Galbraith Eng'g Consultants, 290 S.W.3d at 866.

2. Plaintiff's Fraudulent Transfer Claims Extinguished Four Years After Each Respective Transfer.

TUFTA provides that an action brought under Section 24.005(a)(1) is extinguished unless it is brought "within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant." Tex. Bus. & Com. Code Ann. § 24.010(a)(1). Thus, "[i]t is clear from the text of the statute that the legislature has chosen to preserve application of the discovery rule to some extent within the provisions of TUFTA." Cadle, 136 S.W.3d at 350. However, because the Stanford entities represented by Plaintiff "discovered" the transfers the moment they occurred, the discovery rule is not triggered.

There is no question that the contributions to the Committees were made well outside the four-year period. Plaintiff alleges that the Stanford Defendants contributed $200,000 to the DCCC between 2000 and 2003, with the last transfer occurring on May 31, 2003. Compl. app.

[4] State tolling principles are to be the "'primary guide'" for federal courts applying state statutes of limitations. FDIC v. Dawson, 4 F.3d 1303, 1309 (5th Cir. 1993) (quoting Johnson v. Ry. Express Agency, 421 U.S. 454, 465 (1975)).

at 2. He further alleges that the DSCC received $950,500 from the Stanford Defendants between 2000 and 2005, with the last transfer occurring on July 20, 2005. Id. app. at 1. Plaintiff filed his Complaint on February 19, 2010, four years and six months after the last alleged transfer to either of the Committees.

Nor is there any doubt that Mr. Stanford and the Stanford entities Plaintiff represents knew of each contribution the moment it was made. "A receiver stands in the place of the individuals and entities over whose property he has been appointed receiver," Reneker v. Offill, No. 3:08-CV-1394-D, 2009 WL 804134, at *5 (N.D. Tex. Mar. 26, 2009), and therefore he "'has no greater rights or powers than the [entity] itself would have.'" Fleming v. Lind-Waldock & Co., 922 F.2d 20, 25 (1st Cir. 1990) (quoting McCandless v. Furlaud, 296 U.S. 140, 148 (1935)). Because "the receiver can only make a claim which the [entity] could have made," id., the Stanford Defendants' knowledge of the contributions the moment they occurred is imputed to the receiver. Consequently, Plaintiff's discovery date is not "later" than the date of each transfer, and the one-year discovery period does not operate to extend the four-year period of repose after which the fraudulent transfer claims were extinguished.

Some courts applying other states' laws have held that the doctrine of adverse domination tolls the date of discovery of a fraudulent transfer as long as a corporation remains under the control of the alleged wrongdoers. See Warfield v. Carnie, No. 3:04-cv-633-R, 2007 WL 1112591, at *17 (N.D. Tex. Apr. 13, 2007) (applying Washington state law); Quilling v. Cristell, No. 304CV252, 2006 WL 316981, at *6 (W.D.N.C. Feb. 9. 2006) (applying North Carolina and Florida law). But statutes of repose are "not subject to judicially crafted rules of tolling or deferral," Methodist, 2010 WL 852160, at *2. TUFTA's statute of repose thus prevents Plaintiff

from reaping the benefits of equitable tolling principles in pursuing his fraudulent transfer claims.

Plaintiff failed to bring his claims within the four-year period of repose, and therefore they "may not be brought at all." Duran, 71 S.W.3d at 838.

3. Even if TUFTA's Extinguishment Provision Operated as a Statute of Limitations, Plaintiff's Claims Would Have Extinguished One Year from the Date of His Appointment as Receiver.

Even if TUFTA's extinguishment provision were subject to equitable tolling doctrines, Plaintiff's fraudulent transfer claims would still be time-barred. "Equitable tolling principles recognize that so long as a corporation remains under the control of the wrongdoers, it cannot be expected to take action to vindicate the harms and injustices perpetrated by the wrongdoers." Quilling, 2006 WL 316981, at *6. Once the alleged wrongdoer is removed from control, however, the entities are "[f]reed from his spell," Scholes v. Lehmann, 56 F.3d 750, 754 (7th Cir. 1995), and can act on their knowledge of the transfers through the receiver who represents their interests. Thus, the doctrine of adverse domination tolls the one-year discovery period only during the period of domination and control.

Under the doctrine of adverse domination, the transfers at issue here "could reasonably have been discovered," Tex. Bus. & Com. Code Ann. § 24.010(a)(1), on February 16, 2009, the day Mr. Stanford was removed from control of the Stanford entities and Plaintiff was appointed as Receiver. In fact, the very cases Plaintiff cites to support his reliance on equitable tolling principles held that transfers are discoverable once the receiver is placed in control of the receivership entities. Wing v. Kendrick, No. 2:08-CV-01002-DB, 2009 WL 1362383, at *3 (D. Utah May 14, 2009) ("The discovery rule generally applies in cases involving Ponzi scheme entities that have been placed in the hands of an equity receiver because the fraudulent nature of

the transfers can only be discovered once the Ponzi operator has been removed from the scene. . . . The Receiver was appointed on May 5, 2008 and filed this case on New Year's Eve of the same year; accordingly his claims against Kendrick are not barred by the UFTA's statute of limitations."), recons. denied, 2009 WL 2477639 (D. Utah Aug. 10, 2009); Quilling, 2006 WL 316981, at *7 ("The Receiver was appointed on May 21, 2003. *Once he was appointed, the illegitimate nature of the transfers involved in this lawsuit could be discovered.* This lawsuit was filed on May 20, 2004, which is within one year of when the fraudulent transfer was or reasonably could have been discovered.") (emphasis added). Thus, even if the adverse domination principle were to toll TUFTA's one-year discovery period, the domination in this case ended on February 16, 2009, more than one year before suit was filed on February 19, 2010. Plaintiff's failure to file suit until three days after his claims were extinguished bars any claim to relief.

4. Plaintiff Reasonably Could Have Discovered the Transfers More than One Year Before He Filed Suit.

Finally, any additional inquiry into when Plaintiff himself could have discovered these transfers once he was appointed does not save Plaintiff's claims from extinguishment. The question under TUFTA's extinguishment provision "is not whether the particular plaintiff was able to discover the injury at issue in the particular case within the statutory period," but rather "would a plaintiff exercising reasonable diligence discover the injury within the limitations period?" Cadle, 136 S.W.3d at 351. Here, a reasonably diligent receiver could not but discover these political contributions before February 19, 2009.

First, the political contributions had been openly disclosed by the Committees upon their receipt. On February 16, 2009, they were on the public record and accessible on the Internet, barring any claim that these transfers were concealed in any manner that would toll Plaintiff's

reasonable discovery beyond the date he was charged with investigating and recovering receivership assets. Cf. Warfield, 2007 WL 1112591, at * 17-18 (applying Washington's doctrine of fraudulent concealment to toll the receiver's reasonable discovery date); Shell Oil Co. v. Ross, No. 01-08-00713-CV, 2010 WL 670549, at *7 (Tex. App.—Houston 1st Dist. Feb. 25, 2010, no pet. hist.) ("To prove fraudulent concealment, a plaintiff must show that the defendant actually knew a wrong occurred, had a fixed purpose to conceal the wrong, and did conceal the wrong."). Under federal law, all of the contributions are a matter of public record. See 2 U.S.C. § 434 (public disclosure requirements); id. § 438(a) (requiring the Federal Election Commission ("FEC") to make contribution reports available for public inspection). In addition, several Web sites provide information on political contributions with just a few clicks of a mouse. For example, www.opensecrets.org, the Web site maintained by the Center for Responsive Politics, reveals the precise date, amount and recipient of each contribution from Mr. Stanford and his affiliated entities.[5] Information regarding the contributions at issue was thus readily available as of the date Plaintiff was appointed Receiver.

Additionally, media reports about Mr. Stanford's political contributions were widespread during the days following Plaintiff's appointment. For example, a New York Times article published on February 18, 2009 noted that "since 2000, Mr. Stanford and his firm, along with its employees and its political action committee, have given $2.4 million in campaign contributions, according to the Center for Responsive Politics – about two-thirds to Democrats." Stephen

[5] The Committees request that the Court take judicial notice of the availability of the information contained on this Web site, as it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" pursuant to Fed. R. Evid. 201(b)(2). See Coleman v. Dretke, 409 F.3d 665, 667 (5th Cir. 2005) (taking judicial notice of Texas agency's Web site); O'Toole v. Northrop Grumman Corp., 499 F.3d 1218, 1225 (10th Cir. 2007) ("It is not uncommon for courts to take judicial notice of factual information found on the world wide web."); cf. Truk Int'l Fund LP v. Wehlmann, No. 4:09-CV-308-A, 2009 WL 4496225, at *11 n.10 (N.D. Tex. Dec. 3, 2009) ("On a motion to dismiss, a court may take judicial notice of publicly reported stock prices. . . ."). Screen shots of this Web site are attached as Appendix Exhibit G.

Labaton & Charlie Savage, S.E.C. Fines Didn't Avert Stanford Group Case, N.Y. Times, Feb. 18, 2009 (Appendix Ex. A). Information discoverable and published by the New York Times must also have been discoverable by the Receiver for the Stanford Defendants, who is "held to the highest standard of due diligence," Hunt v. Am. Bank & Trust Co., 606 F. Supp. 1348, 1358 (N.D. Ala. 1985), aff'd, 783 F.2d 1011 (11th Cir. 1986). This article is just one of scores of media reports providing notice of Mr. Stanford's support for the Democratic Party.[5] Accordingly, there can be no doubt that the cause of action accrued before February 19, 2009.

In sum, even under the most expansive construction of TUFTA's extinguishment provision, Plaintiff's suit is untimely. The political contributions to the Committees were immediately discoverable on February 16, 2009 for any reasonably diligent plaintiff. Moreover, Plaintiff's failure to discover these transfers before February 19, 2009 could only result from inexcusable ignorance of widespread media coverage. Regardless of any added protections that may be afforded him by equitable tolling doctrines and the discovery rule, Plaintiff failed to bring his claims within the statutory time limitations.

C. Plaintiff's Fraudulent Transfer Claims Are Preempted by Federal Law.

Plaintiff seeks to disgorge the Committees of political contributions made by the Stanford Defendants. However, the Federal Election Campaign Act of 1971 ("FECA") expressly preempts any state laws that affect the financing of federal elections. FEC regulations promulgated pursuant to the Act further establish a comprehensive scheme regarding when and

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[6] See, e.g., Martha Brannigan, SEC Accuses Stanford Group Owner of Massive Ongoing Fraud, Miami Herald, Feb. 18, 2009 (Appendix Ex. B); Marc DeCambre, Billionaire Schmoozed Sports Bigs, Pols, N.Y. Post, Feb. 18, 2009 (Appendix Ex. C) ("Since 1996, Stanford has donated $861,000 to various political causes and candidates, most of them Democrats, including $500,000 to the Democratic Senatorial Campaign Committee, President Barack Obama, Sen. Chuck Schumer and US Rep. Charlie Rangel."); Todd Gillman, Texas billionaire Stanford accused of $8B banking fraud supplied Cornyn trip, political donations, Dallas Morning News, Feb. 18, 2009 (Appendix Ex. D) ("Stanford donated heavily to both sides."); Tom Hamburger & Peter Wallsten, President's fund gives value of tainted Stanford campaign donation to charity, Chi. Trib., Feb. 18, 2009 (Appendix Ex. E); Stanford was looking for Washington's embrace, Reuters, Feb. 17, 2009 (Appendix Ex. F).

how contributions received by political committees are subject to disgorgement. Finally, the Bipartisan Campaign Reform Act of 2002 ("BCRA") established the exclusive means by which the majority of the contributions at issue could be used.

1. Congress Intended to Preempt State Law.

Acts of Congress may preempt state laws under the Supremacy Clause. U.S. Const. art. VI, § 2. There are generally three broad categories of federal preemption. See English v. Gen. Elec. Co., 496 U.S. 72, 78-79 (1990). Express preemption occurs where Congress has explicitly declared its intent to preclude state regulation in a given area. Id. at 78. Implied preemption occurs where the federal statutory scheme reflects Congress's intent to "occupy a given field." Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984). Conflict preemption occurs where Congress has not entirely displaced state regulation in a specific area, but where a state law actually conflicts with federal law, making compliance with both state and federal requirements impossible. English, 496 U.S. at 79. Express preemption is the least ambiguous and the most powerful: "[W]hen Congress has made its intent known through explicit statutory language, the courts' task is an easy one." Id.

Congress made its intent to preempt state law explicit in FECA. FECA provides that "the provisions of this Act, and of rules prescribed under the Act, supersede and preempt any provision of State law with respect to election for Federal office." 2 U.S.C. § 453(a). Thus, on its face the Act's preemptive reach extends to the regulation of campaign financing for federal elective office through federal political committees. See also 11 C.F.R. § 108.7(b) ("Federal law supersedes State law concerning the . . . [l]imitation on contributions and expenditures regarding Federal candidates and political committees.").

The legislative history demonstrates the intended sweep of this provision. The House Committee drafting the preemption provision intended it "to preempt all state and local laws . . . [and] to make certain that the Federal law is construed to occupy the field." H.R. Rep. No. 93-1239, at 10 (1974), reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1974, at 631, 644 (1977). The Senate Conference Report further "make[s] it clear that the Federal law occupies the field with respect to . . . the sources of campaign funds used in Federal races." S. Conf. Rep. No. 93-443 (1974), reprinted in 1974 U.S.C.C.A.N. 5618, 5638. In accordance with Congress's legislative intent, the FEC, charged by Congress to formulate policy with regard to the Act, has broadly interpreted FECA's preemption provision. See FEC Adv. Op. 1999-12, at 6 (June 25, 1999) ("In numerous advisory opinions, the Commission has applied the Act's broad preemptive power.").

2. State Law Claims Seeking to Define Political Contributions as Illegal Are Preempted by FECA.

Because Congress has explicitly preempted state law in Section 453 of FECA, the Court's "task is only to 'identify the domain expressly pre-empted.'" Weber v. Heaney, 995 F.2d 872, 875 (8th Cir. 1993) (quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992)). A federal preemption provision "displaces all state laws that fall within its sphere, even including state laws that are consistent" with the federal requirements. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 387 (1992) (internal quotations and citation omitted). Furthermore, "it is the *effect* of the state law that matters in determining preemption, not its intent or purpose." Teper v. Miller, 82 F.3d 989, 995 (11th Cir. 1996) (applying FECA preemption). State laws are preempted even if their purpose is completely unrelated to elections if, as applied, they encroach on federal law. See id.

"Various FECA provisions . . . place limitations on the amounts of campaign contributions and expenditures by individuals and corporations, and restrict the use of such funds." Teper, 82 F.3d at 994. Specifically, Sections 441a through 441f of FECA provide a comprehensive list of source restrictions on political contributions. See 2 U.S.C. § 441a(a)(1)(B) (prohibiting individual contributions to national party committees in excess of $25,000 a year); id. § 441a(a)(2)(B) (prohibiting contributions from a multicandidate political committee to a national political committee in excess of $15,000 a year); id. § 441b(a) (prohibiting contributions from national banks, corporations and labor unions); id. § 441c (prohibiting contributions from certain federal government contractors); id. § 441e (prohibiting contributions from foreign nationals); id. § 441f (prohibiting contributions made in the name of another). This list makes plain Congress's intent to occupy the domain of defining illegal sources of political contributions. Plaintiff's fraudulent transfer claims seek to supplement this list of illegal sources to include Ponzi scheme funds, but because federal law "occupies the field with respect to . . . the sources of [federal] campaign funds," S. Conf. Rep. No. 93-443 (1974), reprinted in 1974 U.S.C.C.A.N. at 5638, Plaintiff's attempt to impose yet another source restriction on political contributions is preempted.

Furthermore, allowing Plaintiff to pursue his fraudulent transfer claims would compromise the certainty provided by FECA's source restrictions. These detailed and comprehensive statutory provisions tell political committees specifically which contributions they may use toward influencing federal elections, and which contributions must be returned or refunded. The Committees have invested considerable sums in FECA compliance procedures and planned their political activities in accordance with the fund-raising restrictions imposed by the Act. If federal political committee funds are deemed subject to state law restrictions in

addition to the numerous federal restrictions, the Committees could not safely amass funds to engage in core First Amendment activity.[7]

Thus, as federal law has explicitly and comprehensively defined all illegal sources of political contributions, Plaintiff may not broaden that definition under a state law theory of recovery.

3. FEC Regulations Establish When and How Political Contributions Must Be Disgorged.

Not only does federal law enumerate the illegal sources of political contributions, it also establishes a comprehensive regulatory scheme regarding the specific manner and timing in which illegal contributions must be returned or refunded.

FECA's preemption provision makes clear that the "rules prescribed under this Act" have the same preemptive effect as the Act itself. 2 U.S.C. § 453. See also Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985) ("We have held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes."). Pursuant to its delegated authority, the FEC has set forth the circumstances governing contribution refunds. FEC regulations provide that political committee treasurers are "responsible for examining all contributions received for evidence of illegality and for ascertaining whether contributions received . . . exceed the contribution limitations." 11 C.F.R. § 103.3(b). Any contributions that present "genuine questions" as to whether they were made by an illegal source must be either returned to the contributor or deposited into a campaign depository within ten days of the treasurer's receipt. Id. § 103.3(b)(1) . If the contribution "cannot be determined to be legal"

[7] This is why, inter alia, the FEC has found various state law funding restrictions to be preempted. See, e.g., FEC Adv. Op. 1988-21, at 3 (May 16, 1988) (holding that FECA preempted an Orange County, California ordinance restricting contributions by so-called "County Influence Brokers," saying that Congress "has not only expressly preempted the field of Federal election regulation, [but] has . . . created a uniform Federal regulatory scheme for the financing of Federal elections").

after the treasurer has made his or her "best efforts" to determine its legality, the treasurer shall, within thirty days of receipt, refund the contribution. Id. If the treasurer later discovers that contribution is illegal, he or she must refund the contribution within thirty days of the date on which the illegality was discovered. Id. § 103.3(b)(2). Contributions which are illegal "on their face" because they exceed contribution limits or are from illegal sources must be either returned, redesignated or refunded within fixed time periods. Id. § 103.3(b)(3). FEC regulations also detail the precise manner in which political committees must report refunds of illegal contributions. See id. § 104.8(d)(4).[8]

The federal regulatory scheme instructs political committee treasurers on how to assess the legality of contributions in accordance with FECA and sets the conditions and timetable for each contribution refund. It therefore leaves no room for additional mandatory refunds at the behest of state law plaintiffs. Federal law enumerates the what, why, how and when of illegal contributions, preempting Plaintiff's attempt to impose additional circumstances under which the Committees must identify political contributions as illegal and disgorge them.

4. BCRA Provided An Exclusive Statutory Process to Dispose of "Soft Money" Contributions.

In the eyes of federal election law, not all monetary contributions are created equal. Rather, federal law strictly regulates how each category of funds may be raised and spent. The law distinguishes between "hard money" contributions that are subject to FECA's disclosure requirements and source and amount limitations, and "nonfederal money" or "soft money" contributions, which, prior to the enactment of BCRA, were left unregulated by FECA requirements other than disclosure. McConnell v. FEC, 540 U.S. 93, 122 (2003), overruled in

[8] FEC regulations further set a fixed timetable by which a federal candidate must dispose of funds raised for the general election if he or she fails to qualify for the general election. See 11 C.F.R. § 102.9(e).

part on other grounds, Citizens United v. FEC, 130 S. Ct. 876 (2010). While hard money was used to influence elections for federal office, soft money was used by political parties for activities intended to influence state or local elections. Id. Before enactment of BCRA, the FEC allowed political parties to fund mixed-purpose activities with soft money. Id. at 123. "As the permissible uses of soft money expanded, the amount of soft money raised and spent by the national political parties increased exponentially." Id. at 124; see also Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 406 (2000) ("Soft money [could] be contributed to political parties in unlimited amounts . . . .").

In 2002, Congress enacted BCRA, popularly known as the McCain–Feingold Act, to "plug the soft-money loophole." McConnell, 540 U.S. at 133. BCRA "regulates the use of soft money by political parties, officeholders, and candidates." Id. at 94. The "cornerstone" of BCRA "prohibits national party committees and their agents from soliciting, receiving, directing, or spending any soft money." Id. (citing 2 U.S.C. § 441i(a)). Thus, as of November 6, 2002, the date BCRA went into effect, soft money contributions to national party committees were prohibited by federal law. National party committees like the DSCC and DCCC were required to purge their soft money by December 31, 2002. See BCRA, Pub. L. No. 107-155, § 402(b)(2)(B)(i), 116 Stat. 81, 113 (2002); 11 C.F.R. § 300.12(a).

Nearly all of the transfers at issue in this case were soft money contributions made prior to the enactment of BCRA. Because any amounts contributed by corporations before November 6, 2002 were not subject to FECA contribution limits, all transfers made by SFG to the Committees were soft money contributions. See 2 U.S.C. § 441b(a); BCRA § 101(a)(1), 116 Stat. at 82. In addition, all of Mr. Stanford's contributions made before November 6, 2002 that exceeded $20,000 in a calendar year were nonfederal funds later prohibited by BCRA. See

BCRA § 307(a), 116 Stat. at 102; id. § 323(a)(1), 116 Stat. at 82. This encompasses $1,040,500 out of the $1,150,500 in fraudulent transfers Plaintiff alleges. See Compl. app. at 1-2. Therefore, BCRA specifically addressed the majority of the funds Plaintiff seeks to disgorge from the Committees.

BCRA prescribed specific, exclusive rules for how national party committees could spend those soft money contributions after November 6, 2002. BCRA § 402(b)(2), 116 Stat. at 113. A national party committee could use those funds "*solely for the purpose* of – (I) retiring outstanding debts or obligations that were incurred solely in connection with an election held prior to November 6, 2002; or (II) paying expenses or retiring outstanding debts or paying for obligations that were incurred solely in connection with any runoff election, recount, or election contest resulting from an election held prior to November 6, 2002." Id. § 402(b)(2)(B)(i), 116 Stat. at 113 (emphasis added); see also 11 C.F.R. § 300.12(a). The transfers at issue were thus specifically targeted by BCRA, which mandated that the Committees use them only in the manner prescribed by law. Plaintiff's attempt to craft another use for those funds is preempted by federal law. Because federal law dictated when and how money received from the Stanford Defendants could be disposed of, Plaintiff's state law claim that he is now entitled to those funds is preempted.

D. Dismissal Should Be With Prejudice.

A complaint should be dismissed with prejudice when its defects are incurable. Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 329 (5th Cir. 2002). Here, it would be futile to allow Plaintiff to amend his Complaint because no factual allegations can cure his failure to file within the statutory time limitations, and no repleading can overcome FECA's broad preemption of Plaintiff's state law claim.

IV. CONCLUSION

For the foregoing reasons, the Committees respectfully submit that their motion to dismiss should be granted and Plaintiff's Complaint dismissed in its entirety.

Dated: April 23, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of April, 2010, I electronically filed the foregoing document with the Clerk of the Court, using the CM/ECF system, and that I have served all counsel of record electronically.

/s/ Matt C. Acosta
Matt C. Acosta

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

RALPH S. JANVEY, IN HIS CAPACITY AS COURT-APPOINTED RECEIVER FOR THE STANFORD INTERNATIONAL BANK, LTD., ET AL.,	§	
Plaintiff,	§	
v.	§	CASE NO. 3:10-CV-0346
DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE, INC.; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE, INC.; REPUBLICAN NATIONAL COMMITTEE; and NATIONAL REPUBLICAN SENATORIAL COMMITTEE,	§	
Defendants.	§	

RECEIVER'S RESPONSE TO REPUBLICAN COMMITTEE DEFENDANTS' PARTIAL MOTION TO DISMISS UNDER RULE 12(b)(6)

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Cases

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Other Authorities

Receiver Ralph S. Janvey (the "Receiver") files this Response to the Republican Political Committee Defendants' (the "Defendants")[1] Partial Motion to Dismiss Under Rule 12(b)(6)[2] and respectfully shows the Court as follows:

SUMMARY

Section 24.010 of the Texas Uniform Fraudulent Transfer Act ("TUFTA") states that for claims asserted under Section 24.005(a)(1) of the Act, *i.e.*, claims based on transfers made "with actual intent to hinder, delay, or defraud any creditor of the debtor," a claimant must bring his cause of action "within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant." TEX. BUS. & COMM. CODE § 24.010(a)(1) (Vernon 2009). The claimant here is the Receiver, and the Defendants cannot show, and have not even attempted to show, that, as a matter of law, the Receiver failed to bring this lawsuit within one year after the Receiver discovered or could reasonably have discovered his claims.

Instead, the Defendants argue that the Receiver's claims are barred because the vaguely identified "Stanford Entities" knew of the fraudulent transfers at issue at the time the transfers were made and, thus, that the Receiver's claims were extinguished even before the Receiver was appointed. The Defendants cite no case that supports their novel theory, and the Receiver has found none. Quite to the contrary, the Defendants' theory is at odds with numerous federal cases in which courts have given receivers the benefit of the UFTA discovery rule in the receivers' prosecution of fraudulent transfer claims.

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[1] The "Defendants" refers to the Republican National Committee, the National Republican Senatorial Committee, and the National Republican Congressional Committee.

[2] At the Receiver's request, the Republican Committee Defendants agreed to a 2-week extension of the Receiver's deadline to respond to the Republican Committee Defendants' Motion to Dismiss, from April 21, 2010 to May 5, 2010. Pursuant to that agreement, the Receiver hereby files this response.

Further, the Defendants have failed to point to any facts in the complaint that establish as a matter of law that any Stanford entity, much less all of them, knew about the fraudulent nature of the transfers at issue more than one year before this lawsuit was filed. Pursuant to the adverse domination doctrine and settled agency law, even the entity that actually made the transfers at issue is not charged with knowledge of the transfers' fraudulent nature, where the fraud was carried out by individuals acting adversely to the entity's interests.

Finally, the Court should reject the Defendants' attempt to support their motion to dismiss by arguing that claims the Receiver has not asserted are time-barred. The Court cannot dismiss claims that have not been pled, and the Court should decline the Defendants' invitation to issue advisory rulings regarding such claims.

For these reasons, the Court should deny the Defendants' motion to dismiss.

FACTUAL BACKGROUND

Allen Stanford ("Stanford"), James Davis ("Davis"), and others operated an elaborate Ponzi scheme to defraud thousands of investors of billions of dollars. (*See* Compl. at ¶¶1, 28.) The engine of the fraud was the sale of fraudulent certificates of deposit. (*See id.* at ¶¶2, 19.) Revenue from these sales generated substantially all of the income for Stanford, Davis, Stanford Financial Group ("SFG"), and the many related Stanford entities. (*See id.* at ¶2.) The revenue from these sales was not used for any proper purpose, but instead was misappropriated by Stanford and others, and was principally used for Allen Stanford's personal benefit. (*Id.* at ¶24.)

Between 2000 and 2008, Stanford and SFG distributed more than $450,000 of fraudulently-obtained investor money to the Republican National Committee, the National Republican Senatorial Committee, and the National Republican Congressional Committee. (*See*

id. at ¶37; Doc. 1-3 at 4-5.) The payments to the Defendants were made with actual intent to hinder, delay, and defraud creditors. (*See* Compl. at ¶¶36-37.)

The Court has appointed the Receiver to act as the receiver for the assets of Stanford, Davis, SFG, Stanford International Bank, Ltd., Stanford Group Company, Stanford Capital Management, LLC, Laura Pendergest-Holt, the Stanford Financial Group Bldg., Inc., and all entities the foregoing persons and entities own or control (the "Receivership Assets"). (*Id.* at ¶11.) Further, the Court has ordered the Receiver to take control of all Receivership Assets in order to make an equitable distribution to claimants injured by the massive fraud orchestrated by Stanford, Davis, and others. (*Id.* at ¶1.) Pursuant to this authority, the Receiver filed this lawsuit to recover the investor money that was improperly provided to the Defendants. (*See id.* at ¶32.)

LEGAL STANDARD

When considering a 12(b)(6) motion, the Court "accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007) (internal quotations omitted). "A claim cannot be dismissed under rule 12(b)(6) unless the plaintiffs would not be entitled to relief under any set of facts or any possible theory that [they] could prove consistent with the allegations in the complaint." *Ferrer v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007) (internal quotations omitted). "The issue is not whether the plaintiffs will ultimately prevail, but whether they are entitled to offer evidence to support their claims." *Id.* at 280-81.

ARGUMENT & AUTHORITIES

I. The Receiver's fraudulent transfer claims pursuant to Section 24.005(a)(1) are not time-barred.

A. Section 24.005(a)(1) only requires that the Receiver assert his fraudulent transfer claims within one year of when he discovered or reasonably could have discovered the claims.

For claims under Section 24.005(a)(1), the TUFTA provides that a claimant must bring his cause of action "within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant." TEX. BUS. & COMM. CODE § 24.010(a)(1). The statute does not define "could reasonably have been discovered," so courts have relied on the traditional, common law discovery rule when interpreting and applying this provision. *See, e.g., Cadle Co. v. Wilson*, 136 S.W.3d 345, 351 (Tex. App.—Austin 2004, no pet.) ("Although we note that the supreme court's discovery-rule analysis has focused on whether the discovery rule is available under the common law—whereas here, the discovery rule is explicitly available by statute—the court's 'inherently undiscoverable' analysis, which focuses on a plaintiff's exercise of reasonable diligence, is relevant to the statutory issue here of when this transfer *could reasonably have been discovered.*") (emphasis in original) (citing TEX. BUS. & COMM. CODE § 24.010(a)(1)); *Duran v. Henderson*, 71 S.W.3d 833, 839 (Tex. App.—Texarkana 2002, pet. denied) ("[W]e find it helpful to analogize to the discovery rule."); *see also Crook v. Johnston*, 93 S.W.3d 263, 271 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) ("issue of material fact about when Receiver discovered, or in the exercise of reasonable diligence should have discovered, the allegedly fraudulent transfer").

Therefore, the Receiver was entitled to assert his claims against the Defendants up to one year after he discovered or reasonably could have discovered such claims. *See, e.g., Wing*

v. Kendrick, No. 2:08-CV-01002-DB, 2009 WL 1362383, at *3 (D. Utah May 14, 2009) (holding, with respect to UFTA claim, that the "discovery rule generally applies in cases involving Ponzi scheme entities that have been placed in the hands of an equity receiver because the fraudulent nature of the transfers can only be discovered once the Ponzi operator has been removed from the scene."). When the Receiver could have reasonably discovered the transfers to the Defendants is a question of reasonable diligence, which is ordinarily "a question of fact for the jury." *See Duran*, 71 S.W.3d at 839 ("Unless the evidence is such that reasonable minds may not differ as to its effect, the question of whether a party has exercised diligence in discovering fraud is for the fact finder."). Accordingly, the Court cannot determine the issue as a matter of law on a motion to dismiss.

B. The Receiver is not charged with the knowledge of the "Stanford Entities."

The Defendants do not argue that the Receiver knew or reasonably should have known about his claims more than a year before he filed it. Instead, the basic premise of the Defendants' motion is that a receiver can never take advantage of the one-year discovery rule because a receiver stands in the shoes of the entities he represents, and the entities he represents necessarily know of any fraudulent transfers at the time the transfers are made. Thus, the Defendants argue, the entities and, by imputation, the receiver, know of the fraudulent transfers at the time the transfers occur, which causes the one-year discovery period to begin running immediately from the date of the transfers. The Defendants' overly simplistic argument is flawed.

1. Federal courts have applied the discovery rule by analyzing the receiver's knowledge—not the knowledge of the entities in receivership.

First, the Defendants have cited no case holding that the one-year discovery rule period for a receiver's fraudulent transfer claim is triggered by the receivership entity's

knowledge of the fraud. To the contrary, courts routinely determine the timeliness of a receiver's fraudulent transfer claim based on the one-year discovery period, despite the fact that the receivership entities arguably had "knowledge" of fraudulent transfers more than one year before the receiver's appointment. *See, e.g.*, *Wing*, 2:08-CV-01002-DB, 2009 WL 1362383, at *3 (addressing claim that UFTA's discovery rule barred receiver's claim, "[t]he discovery rule generally applies in cases involving Ponzi scheme entities that have been placed in the hands of an equity receiver because the fraudulent nature of the transfers can only be discovered once the Ponzi operator has been removed from the scene."); *Warfield v. Carnie*, No. 3:04-CV-633-R, 2007 WL 1112591, at *14 (N.D. Tex. Apr. 13, 2007) (applying Washington UFTA, holding "the statute of limitations does not begin to run when the mere transfer itself is discovered. Instead, a claim under § 19.40.091 accrues upon discovery of the fraudulent nature of the conveyance.") (internal citations omitted); *Quilling v. Cristell*, No. 304CV252, 2006 WL 316981, at *6 (W.D.N.C. Feb. 29, 2006) (applying UFTA discovery rule, "while Gilliland remained in control of the Gilliland Entities, the fraudulent transfers were concealed and could not reasonably be discovered.").

2. *The Receiver is not limited to standing in the shoes of the entities in receivership.*

Second, the Defendants' legal premise—that the Receiver can only assert claims of the entities in receivership—is incorrect. In fact, courts have long held that receivers are permitted to assert fraudulent transfer claims *on behalf of creditors*. *See McCandless v. Furlaud*, 296 U.S. 140, 159, 56 S. Ct. 41, 47 (1935) ("If the shareholders and the directors had combined with the promoters to despoil the corporation and defeat the remedies of creditors by a gift of half the assets, the gift could have been anulled either by the creditors directly or in their behalf by a receiver."); *SEC v. Cook*, No. CA 3:00-CV-272-R, 2001 WL 256172, at *2 (N.D. Tex. Mar.

8, 2001) ("[W]hile the debtor would not be entitled to 'set aside a transfer in fraud of his creditors . . . the receiver acting for the creditors may attack it.' . . . Given the foregoing exception, the Court holds that the Receiver has standing to sue to avoid fraudulent transfers on behalf of the creditors of Dennel."); *see also McGinness v. United States*, 90 F.3d 143, 146 (6th Cir. 1996) ("Upon his appointment, the receiver succeeded to the rights of not only the debtor, but also the creditor."); *cf. Wing v. Hammons*, No. 2:08-CV-00620, 2009 WL 1362389, at *3 (D. Utah May 14, 2009) ("a receiver in a Ponzi case *is* defined as a creditor for the purposes of establishing standing" (emphasis in original)).[3]

Because the Receiver is entitled to represent the interests of creditors with respect to fraudulent transfer claims, whether any putative fraudulent transfer claim by the transferors, *i.e.*, Stanford and SFG,[4] would be time-barred is simply not relevant to the question of whether the Receiver's claims—asserted on behalf of creditors[5]—are time-barred.

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[3] It has also been established in cases in the Fifth Circuit and in Texas that, in addition to the claims of the entities in receivership, a receiver can assert claims belonging to the shareholders and creditors of such entities. *See Meyers v. Moody*, 693 F.2d 1196, 1206 (5th Cir. 1982) (analyzing standing of receiver appointed pursuant to Alabama law by reference to the law of forum state (Texas) and stating, "Moody also argues that Receiver did not have standing to sue on behalf of Empire's shareholders, policyholders or creditors. The law in Texas is to the contrary. . . . Moody's challenges to plaintiff's standing are without merit."); *Fla. Dept. of Ins. v. Chase Bank of Tex. Nat'l Assoc.*, No. CIV.A. 3:99CV1254G 2000 WL 36065, at *4, 7 (N.D. Tex. Jan. 14, 2000) (rejecting the argument that the receiver lacked standing because he "stands in the shoes" of the entity in receivership and "find[ing] that, under Texas law and as a matter of public policy, the receiver here has standing to bring its claims against Chase on behalf of [the entity in receivership's] shareholders"); *Cotten v. Republic Nat'l Bank of Dallas*, 395 S.W.2d 930, 941 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.) ("Certainly a receiver . . . has a right to maintain a suit which is necessary to preserve the corporation's assets and to recover assets of which the corporation has been wrongfully deprived through fraud. In such a suit the receiver may be said to sue as the representative of the corporation and its creditors, stockholders, and policyholders . . . ."); *Guardian Consumer Fin. Corp. v. Langdeau*, 329 S.W.2d 926, 934 (Tex. Civ. App.—Austin 1959, no writ) ("acknowledging the general rule that 'the receiver has not greater powers or authority than' the entity in receivership but holding that the 'only exception to the general rule is when the receiver acts to protect innocent creditors of insolvent corporations in which instance the receiver acts in a dual capacity, as a trustee for both the stockholders and the creditors, and as trustee for the creditors he can maintain and defend actions done in fraud of creditors even though the corporation would not be permitted to do so'").

[4] (*See* Doc. 1-3 at 4-5.)

[5] Even if he were limited to asserting the claims of receivership entities, the Receiver's claims still would not be barred. The Defendants' argument is that the transferors are charged with knowledge of the transfers at the time they made them. The transfers at issue, however, were made only by Stanford and SFG. (*See* Doc. 1-3 at 4-5.) As to Stanford, the Receiver is not asserting any fraudulent transfer claim belonging to Stanford, as Stanford cannot

C. The doctrine of adverse domination tolled the start of the discovery period until the Receiver became aware, or reasonably could have become aware, of the fraudulent nature of the transactions at issue.

Federal courts have recognized that the doctrine of adverse domination applies to toll limitations on a Ponzi scheme receiver's fraudulent transfer claim. *See, e.g., Quilling v. Cristell*, No. Civ. A. 304CV252, 2006 WL 316981, at *6 (citing principle of adverse domination). Without citing any cases directly on point, the Defendants argue that the adverse domination doctrine cannot apply to the Receiver's claims because the TUFTA limitations provision is a statute of repose. The Defendants also argue that, if the adverse domination doctrine applies, the tolling period ends instantly upon the appointment of the receiver, and, thus, that the Receiver's claims were time-barred three days before the Receiver filed this lawsuit. Both arguments are flawed.

As to the first argument, the case law cited by the Defendants is inapplicable where, as here, the statute at issue contains an exception to the strict repose deadline. Unlike the statute in *Galbraith*, in which the legislature evinced a clear intent not to create any exception to

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seek to recover transfers he voluntarily made. *See, e.g., Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995) ("The rule is that the maker of the fraudulent conveyance and all those in privity with him—which certainly includes the corporations—are bound by it."). However, the Receiver represents numerous Stanford entities with claims against Stanford (the individual) based on the fact that Stanford unlawfully caused the entities to divert their assets to unauthorized purposes. *See, e.g., Cotten*, 395 S.W.2d at 941 ("Certainly a receiver . . . has a right to maintain a suit which is necessary to preserve the corporation's assets and to recover assets of which the corporation has been wrongfully deprived through fraud. In such a suit the receiver may be said to sue as the representative of the corporation and its creditors, stockholders, and policyholders . . . ."). As a consequence, the Receiver directly represents Allen Stanford's creditors. *See* TEX. BUS. & COMM. CODE §§ 24.002(3), 24.002(4) (Vernon 2009) (defining "creditor" to include "a person . . . who has a claim" and "claim" to mean "a right to payment or property, whether or not the right is reduced to a judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured"). The Defendants have not shown, and cannot show at the motion to dismiss stage, that the Stanford entities were aware of the fraudulent nature of Stanford's transfers to the Defendants. *See Cadle Co. v. Wilson*, 136 S.W.3d 345, 350 (Tex. App.—Austin 2004, no pet.) (holding that for the purposes of applying the discovery rule under the TUFTA, the question is not whether the claimant knew about the transfers but is instead whether the claimant knew of their fraudulent nature).

Similarly, the Receiver is entitled to assert claims on behalf of the many Stanford entities who have claims against, or who are owed debts by, SFG. The Defendants have not shown, or even made any attempt to show, that any entity other than SFG had knowledge of the fraudulent transfers at issue at any time before the Receiver did. Accordingly, the Receiver is entitled to assert fraudulent transfer claims on behalf of any of the Stanford entities other than SFG.

the strict repose time period, Section 24.005(a)(1) claims are subject to a statutory discovery rule. *Cf. Methodist Healthcare Sys. of San Antonio, Ltd. v. Rankin*, ___ S.W.3d ___, 2010 WL 852160, at *2 (Tex. 2010) ("[T]he key purpose of a repose statute is to eliminate uncertainties under the related statute of limitations and to create a final deadline for filing suit that is not subject to any exceptions, *except perhaps those clear exceptions in the statute itself*." (emphasis added)).

Accordingly, the courts are left to determine under what circumstances a fraudulent transfer claimant—in this context, a corporation subject to adverse domination—knew or reasonably could have known about its claim. This is a question of statutory interpretation—not a question of imposing a judicially created exception to an otherwise strict repose deadline. *Cf. Duran*, 71 S.W.3d at 839 ("[W]e find it helpful to analogize to the discovery rule."). Pursuant to the recognized adverse domination doctrine, the corporation does not become aware of its claim until the wrongdoers are removed from the scene. *See, e.g., Quilling v. Cristell*, No. Civ. A. 304CV252, 2006 WL 316981, at *6; *Wing*, No. 2:08-CV-01002-DB, 2009 WL 1362383, at *3; *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995).[6] The application of adverse domination here simply gives effect to the discovery rule embedded in the statute. *See In re*

[6] The "adverse interest" doctrine, which is also applicable in Texas and which is not a tolling doctrine and thus not subject to the Defendants' arguments about the nature of a statute of repose, leads to the same result. SFG, as an entity, can only act through natural persons, and, as such, one or more natural persons, acting with fraudulent intent, caused SFG to make the transfers at issue. Because those transfers were made with the intent to defraud creditors, the individuals who caused the transfers to be made were acting adversely to SFG. *Resolution Trust Corp. v. Acton*, 49 F.3d 1086, 1090 (5th Cir. 1995) (interests adverse when "directors have been active participants in wrongdoing or fraud"). Where an agent acts adversely to his principal, the principal is not charged with the knowledge of the agent's acts. *See Askanase v. Fatjo*, 828 F. Supp. 465, 470 (S.D. Tex. 1993) ("imputation turns on whether the agent was acting for or against the principal's interests; knowledge acquired by an agent acting adversely to his principal is not attributable to the principal"); *Arabesque Studios, Inc. v. Academy of Fine Arts Int'l*, 529 S.W.2d 564, 568 (Tex. Civ. App.—Dallas 1975, no writ) ("The knowledge of an agent cannot be imputed to a principal if the agent has a personal adverse interest in not revealing it."). Thus, SFG did not "know" of the fraudulent transfers, either at the time the transfers were made, or at any time until someone without an interest adverse to SFG discovered their fraudulent nature. Nothing in the Defendants' motion to dismiss establishes as a matter of law that anyone acting in SFG's interest knew of the fraudulent transfers at issue more than a year before the Receiver filed this civil action.

Reading Broad., Inc., 390 B.R. 532, 553 (Bankr. E.D. Pa. 2008) ("The tolling doctrine of 'adverse domination' has been described as 'merely a corollary of . . . [the] discovery rule, applied in the corporate context.'"). Accordingly, application of the adverse domination rule is not inconsistent with the idea that the limitations period in the TUFTA is actually a statute of repose.

As to the second argument, the tolling period does not end instantly upon removal of the adverse parties, as the Defendants contend. Instead, the tolling period ends once disinterested parties gain control of the corporation and "discover or are put on notice of a cause of action." *Askanase v. Fatjo*, 828 F. Supp. 425, 471 (S.D. Tex. 1993); *see also FDIC v. Nathan*, 804 F. Supp. 888, 894 (S.D. Tex. 1992) ("FDIC cites Texas and federal law which holds that while culpable individuals continue to have superior power over a corporation, limitations is tolled until a majority of disinterested directors discover or are put on notice of a cause of action."). The *FDIC v. Dawson* case, cited by Defendants, does not hold otherwise. 4 F.3d 1303 (5th Cir. 1993). In fact, the *Dawson* court expressly recognized that, under Texas law, the adverse domination tolling period continues to run until disinterested directors have "notice" of a claim. *Id.* at 1310 (citing *Allen v. Wilkerson*, 396 S.W.2d 493, 500 (Tex. Civ. App.—Austin 1965, writ ref'd n.r.e.).[7]

If the rule were otherwise, a party desiring to commit fraud could avoid liability by simply hiding the fraud sufficiently well so as to make it undiscoverable until the expiration of the limitations period. That would defeat the purpose of the adverse domination rule, which is

[7] The Defendants are presumably relying on *Dawson*'s quotation of a California opinion that stated, "it is generally held that an action *for fraud* committed against a corporation is tolled for the period that those responsible for the fraud remain in control of the corporation." *FDIC v. Dawson*, 4 F.3d 1303, 1312 (5th Cir. 1993). Leaving aside that the California court's statement is hardly an express holding that the tolling period ends instantly upon the removal of the defrauding parties, the outcome in *Dawson*, like in this case, was controlled by Texas law, and *Dawson* concluded that Texas law provided for continuation of the tolling period until disinterested directors acquired notice of the claim at issue. *See id.* at 1310.

essentially just a corollary of the discovery rule. *See, e,g., In re Reading Broadcasting, Inc.*, 390 B.R. at 553.

Because the Defendants have not established as a matter of law that the Receiver discovered or was put on notice of his claims more than a year before he filed this lawsuit, the Receiver's claims are not time-barred.

II. The Receiver has only asserted claims pursuant to Section 24.005(a)(1) of the TUFTA; thus, Defendants' arguments with respect to other sections of the TUFTA are moot and do not support dismissal.

The Defendants also argue that the Receiver's claims under Sections 24.005(a)(2), 24.006(a), and 24.006(b) are time-barred, pursuant to Sections 24.010(a)(2) and (a)(3) of the TUFTA. (Br. in Support of Mot. to Dismiss at 5-6.) The Receiver, however, has not pled any claims under Sections 24.005(a)(2), 24.006(a), or 24.006(b). Paragraph 36 of the Receiver's Original Complaint clearly states the basis for his cause of action: "Stanford, Davis, and the Stanford Financial Group made the payments to the Committee Defendants with *actual intent to hinder, delay, or defraud creditors*; as a result, the Receiver is entitled to the disgorgement of those payments." (Compl. ¶36 (citing TEX. BUS. & COMM. CODE § 24.005(a)) (Vernon 2009) (emphasis added).) This language tracks exactly the language in Section 24.005(a)(1), which defines a fraudulent transfer as one made "with actual intent to hinder, delay, or defraud any creditor of the debtor." TEX. BUS. & COMM. CODE § 24.005(a)(1); *see also Quilling v. Gilliland*, Cause No. 3-01-CV-1617, 2002 WL 373560, at *2 (N.D. Tex. March 6, 2002) ("[I]ntent to hinder, delay or defraud is established by the mere existence of the Ponzi scheme."). Because the Receiver has not pled any cause of action under Sections 24.005(a)(2), 24.006(a), or 24.006(b) of the TUFTA, there is no such cause of action to dismiss, and it is neither necessary nor appropriate to ask the Court to issue any kind of advisory opinion with respect to claims the Receiver has not even asserted. *See SEC v. Box*, 721 F.2d 134, 136 (5th Cir. 1983) ("In essence,

both the district court and this court have been asked to render an advisory opinion on pleadings, or perhaps on a set of facts, not before us. We decline to do so.").

CONCLUSION & PRAYER

For the foregoing reasons, the Receiver respectfully requests that the Court deny the Defendants' Partial Motion to Dismiss Under Rule 12(b)(6). The Receiver further requests any further relief to which he may be entitled.

Dated: May 5, 2010

Respectfully submitted,

BAKER BOTTS L.L.P.

By: /s/ Kevin M. Sadler

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ATTORNEYS FOR RECEIVER RALPH S. JANVEY

CERTIFICATE OF SERVICE

On May 5, 2010, I electronically submitted the foregoing document with the clerk of the court of the U.S. District Court, Northern District of Texas, using the electronic case filing system of the Court. I hereby certify that I will serve the Democratic Senatorial Campaign Committee ("DSCC"); the National Republican Congressional Committee ("NRCC"); the Democratic Congressional Campaign Committee ("DCCC"); the Republican National Committee ("RNC"); and the National Republican Senatorial Committee ("NRSC") individually or through their counsel of record, electronically, or by other means authorized by the Court or the Federal Rules of Civil Procedure.

/s/ Kevin M. Sadler
Kevin M. Sadler

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

RALPH S. JANVEY, IN HIS CAPACITY AS COURT-APPOINTED RECEIVER FOR THE STANFORD INTERNATIONAL BANK, LTD., ET AL.,	§	
Plaintiff,	§	
v.	§	CASE NO. 3:10-CV-0346
DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE, INC.; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE, INC.; REPUBLICAN NATIONAL COMMITTEE; and NATIONAL REPUBLICAN SENATORIAL COMMITTEE,	§	
Defendants.	§	

RECEIVER'S RESPONSE TO DEMOCRATIC COMMITTEE DEFENDANTS' MOTION TO DISMISS

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ATTORNEYS FOR RECEIVER RALPH S. JANVEY

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Receiver Ralph S. Janvey (the "Receiver") files this Response to the Democratic Senatorial Campaign Committee's and Democratic Congressional Campaign Committee's (the "Defendants") Motion to Dismiss and respectfully shows the Court as follows:

SUMMARY

The Defendants' Motion to Dismiss relies on two basic principles, neither of which is supported by case law or any other applicable authority.

First, the Defendants argue that the Receiver's fraudulent transfer claims were time-barred before he was appointed, because he is charged with the knowledge of the entities he now represents, and those entities knew about the transfers at issue. This argument, however, is inconsistent with cases from Texas and around the country that have determined the timeliness of a receiver's fraudulent transfer claim based—not on when the receivership entity learned of the transfer—but on when the *receiver* should have reasonably discovered his claim. In this case, the Receiver learned of his claim, through the exercise of reasonable diligence, no earlier than February 19, 2009, and, as such, the Receiver's claim is timely.

Second, the Defendants assert that federal election law preempts the Receiver's state fraudulent transfer claims. Notably, the Defendants do not cite a single case standing for that proposition. Federal campaign finance laws only preempt state *election* laws that conflict with the federal election law scheme. Federal candidates and political committees remain exposed to liability pursuant to state laws of general applicability, such as contract or tort law, as courts, including the Fifth Circuit, have recognized. Further, contrary to the Defendants' apparent attempt to reframe the core issue, the Receiver is not seeking a return of political contributions; he is asserting—on behalf of creditors of the political donors—that the Defendants are liable under state fraudulent transfer law. Accordingly, federal election statutes and

regulations that govern the return of political contributions are simply inapposite to the Receiver's claims.

For these reasons, the Defendants' Motion to Dismiss should be denied.

FACTUAL BACKGROUND

Allen Stanford ("Stanford"), James Davis ("Davis"), and others operated an elaborate Ponzi scheme to defraud thousands of investors of billions of dollars. (*See* Doc. 1 at ¶¶1, 28.)[1] The engine of the fraud was the sale of fraudulent "certificates of deposit."[2] (*See id.* at ¶¶2, 19.) Revenue from these sales generated substantially all of the income for Stanford, Davis, Stanford Financial Group ("SFG"), and the many related Stanford entities. (*See id.* at ¶2.) The revenue from these sales was not used for any proper purpose, but instead was misappropriated by Stanford and others, and was principally used for Allen Stanford's personal benefit. (*Id.* at ¶24.)

On February 16, 2009, the SEC filed a civil suit against Stanford, Davis, and multiple Stanford entities owned or operated by Stanford and Davis, alleging that Stanford, Davis, and others were engaged in a scheme to defraud investors through the sale of fraudulent certificates of deposit. *SEC v. Stanford Int'l Bank, Ltd., et al.*, Civil Action No. 3-09-CV-0298-N, SEC's Original Complaint (Doc. 1), ¶¶1-2 (N.D. Tex.) ("SEC Lawsuit"). The SEC Lawsuit generated an avalanche of news coverage about the lawsuit itself and the fallout for Stanford, his companies, and the many individuals and entities affected by Stanford's fraudulent scheme,

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[1] Unless otherwise stated, citations to Court records herein are from the case styled *Janvey v. Democratic Senatorial Campaign Comm., Inc.*, Civil Action No. 3:10-CV-346.

[2] The Receiver notes that while these instruments were marketed as "certificates of deposit," they, in fact, bore little resemblance to certificates of deposit in domestic banks. For the sake of convenience and consistency, though, the Receiver will refer to these instruments as certificates of deposit.

including investors, charities, and the local communities where Stanford operated. (*See* Appx 1-82.)[3]

In connection with the SEC Lawsuit, the Court appointed the Receiver on February 16, 2009 to act as the receiver for the assets of Stanford, Davis, SFG, Stanford International Bank, Ltd., Stanford Group Company, Stanford Capital Management, LLC, Laura Pendergest-Holt, the Stanford Financial Group Bldg., Inc., and all entities the foregoing persons and entities own or control (the "Receivership Assets"). (SEC Lawsuit, Order Appointing Receiver, Doc. 10 at ¶11.) The Court further ordered the Receiver to take control of all Receivership Assets in order to make an equitable distribution to claimants injured by the massive fraud orchestrated by Stanford, Davis, and others. (*Id.* at ¶1.) Pursuant to the Court's authority, on February 17, 2009, the Receiver began the process of assuming control of the approximately 200 Stanford entities, closing Stanford offices around the world and beginning the process of accounting for the entities' assets, which were spread among real estate holdings, private and public equity holdings, and various international bank accounts.

The Receiver filed this lawsuit to recover investor money that was improperly provided to the Defendants. (Doc. 1 at ¶32.) Specifically, between 2000 and 2008, Stanford, Davis, and SFG distributed $1,150,500 of fraudulently-obtained investor money to the Democratic Senatorial Campaign Committee and Democratic Congressional Campaign Committee. (SEC Lawsuit, Order Appointing Receiver, Doc. 10 at ¶30; Doc. 1-2 at 4-5.) The payments to the Defendants were made with actual intent to hinder, delay, and defraud creditors. (*See* Doc. 1 at ¶¶36-37.) Accordingly, the Receiver first requested that the Defendants reimburse the Receiver for the value of the payments at issue on February 23, 2009. (*See id.* at ¶32.) Less

[3] To the extent that the Court takes judicial notice of the newspaper articles attached to the Defendants' Motion to Dismiss, the Receiver requests that the Court similarly take judicial notice of the newspaper articles attached to this Response.

than one year later, the Receiver filed this lawsuit, alleging that the payments to Defendants constituted fraudulent transfers and seeking a judgment for the value of those transfers. (*See id.* at ¶42.)

LEGAL STANDARD

When considering a 12(b)(6) motion, the Court "accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007) (internal quotations omitted). "A claim cannot be dismissed under rule 12(b)(6) unless the plaintiffs would not be entitled to relief under any set of facts or any possible theory that [they] could prove consistent with the allegations in the complaint." *Ferrer v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007) (internal quotations omitted). "The issue is not whether the plaintiffs will ultimately prevail, but whether they are entitled to offer evidence to support their claims." *Id.* at 280-81.

ARGUMENT & AUTHORITIES

I. The Receiver's fraudulent transfer claims are not time-barred.

A. The Receiver's claims were not barred four years after the transfers at issue, because the Receiver is not charged with the knowledge of the Stanford entities.

The Defendants essentially argue that a receiver can never take advantage of the one-year discovery rule because a receiver stands in the shoes of the entities he represents, and the entities he represents necessarily know of any fraudulent transfers at the time the transfers are made. The Defendants' argument is flawed for two reasons.

1. Federal courts have applied the discovery rule by analyzing the receiver's knowledge—not the knowledge of the entities in receivership.

First, the Defendants have cited no case holding that the one-year discovery rule period for a receiver's fraudulent transfer claim is triggered by the receivership entity's

knowledge of the fraud. To the contrary, courts routinely determine the timeliness of a receiver's fraudulent transfer claim based on the one-year discovery period, irrespective of the "knowledge" of the receivership entities. *See, e.g., Wing v. Kendrick*, No. No. 2:08-CV-01002-DB, 2009 WL 1362383, at *3 (D. Utah May 14, 2009) (addressing claim that UFTA's discovery rule barred receiver's claim, "[t]he discovery rule generally applies in cases involving Ponzi scheme entities that have been placed in the hands of an equity receiver because the fraudulent nature of the transfers can only be discovered ome the Ponzi operator has been removed from the scene"); *Warfield v. Carnie*, No. 3:04-CV-633-R, 2007 WL 1112591, at *14 (N.D. Tex. Apr. 13, 2007) (applying Washington UFTA, holding "the statute of limitations does not begin to run when the mere transfer itself is discovered. Instead, a claim under [the UFTA] accrues upon discovery of the fraudulent nature of the conveyance.") (internal citations omitted); *Quilling v. Cristell*, No. 304CV252, 2006 WL 316981, at *6 (W.D.N.C. Feb. 29, 2006) (applying UFTA discovery rule, "while Gilliland remained in control of the Gilliland Entities, the fraudulent transfers were concealed and could not reasonably be discovered.").

2. The Receiver is not limited to standing in the shoes of the entities in receivership.

Second, the Defendants' legal premise—that the Receiver can only assert claims of the entities in receivership—is incorrect. In fact, courts have long held that receivers are permitted to assert fraudulent transfer claims *on behalf of creditors*. *See McCandless v. Furlaud*, 296 U.S. 140, 159, 56 S. Ct. 41, 47 (1935) ("If the shareholders and the directors had combined with the promoters to despoil the corporation and defeat the remedies of creditors by a gift of half the assets, the gift could have been anulled either by the creditors directly or in their behalf by a receiver."); *SEC v. Cook*, No. CA 3:00-CV-272-R, 2001 WL 256172, at *2 (N.D. Tex. Mar. 8, 2001) ("[W]hile the debtor would not be entitled to 'set aside a transfer in fraud of his

creditors . . . the receiver acting for the creditors may attack it.' . . . Given the foregoing exception, the Court holds that the Receiver has standing to sue to avoid fraudulent transfers on behalf of the creditors of Dennel."); *see also McGinness v. United States*, 90 F.3d 143, 146 (6th Cir. 1996) ("Upon his appointment, the receiver succeeded to the rights of not only the debtor, but also the creditor."); *cf. Wing v. Hammons*, No. 2:08-CV-00620, 2009 WL 1362389, at *3 (D. Utah May 14, 2009) ("a receiver in a Ponzi case *is* defined as a creditor for the purposes of establishing standing" (emphasis in original)).[4]

Because the Receiver is entitled to represent the interests of creditors with respect to fraudulent transfer claims, whether any putative fraudulent transfer claim by the transferors, *i.e.*, Stanford, Davis, and SFG,[5] would be time-barred is simply not relevant to the question of whether the Receiver's claims—asserted on behalf of creditors[6]—are time-barred.

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[4] It has also been established in cases in the Fifth Circuit and in Texas that, in addition to the claims of the entities in receivership, a receiver can assert claims belonging to the shareholders and creditors of such entities. (*See* Doc. 21 at 7 n.3.)

[5] (*See* Doc. 1-2 at 4-5.)

[6] Even if he were limited to asserting the claims of receivership entities, the Receiver's claims still would not be barred. The Defendants' argument is that the transferors are charged with knowledge of the transfers at the time they made them. The transfers at issue, however, were made only by Stanford, Davis, and SFG. (*See* Doc. 1-2 at 4-5.) As to Stanford and Davis, the Receiver is not asserting any fraudulent transfer claim belonging to Stanford or Davis, as Stanford and Davis cannot seek to recover transfers they voluntarily made. *See, e.g., Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995) ("The rule is that the maker of the fraudulent conveyance and all those in privity with him—which certainly includes the corporations—are bound by it."). However, the Receiver represents numerous Stanford entities with claims against Stanford (the individual) and Davis based on the fact that Stanford and Davis unlawfully caused the Stanford entities to divert their assets to unauthorized purposes. *See, e.g., Cotten v. Republic Nat'l Bank of Dallas*, 395 S.W.2d 930, 941 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.) ("Certainly a receiver . . . has a right to maintain a suit which is necessary to preserve the corporation's assets and to recover assets of which the corporation has been wrongfully deprived through fraud. In such a suit the receiver may be said to sue as the representative of the corporation and its creditors, stockholders, and policyholders . . . ."). As a consequence, the Receiver directly represents Allen Stanford's and James Davis's creditors. *See* TEX. BUS. & COMM. CODE §§ 24.002(3), 24.002(4) (Vernon 2009) (defining "creditor" to include "a person . . . who has a claim" and "claim" to mean "a right to payment or property, whether or not the right is reduced to a judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured"). The Defendants have not shown, and cannot show at the motion to dismiss stage, that the Stanford entities were aware of the fraudulent nature of Stanford's and Davis's transfers to the Defendants. *Duran v. Henderson*, 71 S.W.3d 833, 839 (Tex. App.—Texarkana 2002, pet. denied) (applying TUFTA, "[t]he discovery rule provides that a claim for fraud does not accrue, and thus the limitation period does not begin to run, until the fraud is discovered, or in the exercise of reasonable diligence should have been discovered").

B. Even if the Receiver were charged with knowledge of the Stanford entities, adverse domination delayed commencement of the limitations period until the Receiver had a reasonable opportunity to discover the fraudulent nature of the transfers at issue.

Federal courts have recognized that the doctrine of adverse domination applies to toll limitations on a Ponzi scheme receiver's fraudulent transfer claim. *See, e.g., Quilling*, 2006 WL 316981, at *6 (citing principle of adverse domination). Without citing any cases directly on point, the Defendants argue that the adverse domination doctrine cannot apply to the Receiver's claims because the TUFTA limitations provision is a statute of repose. (Doc. 19 at 7.) The Defendants also argue that, if the adverse domination doctrine applies, the tolling period ends instantly upon the appointment of the receiver, and, thus, that the Receiver's claims were time-barred three days before the Receiver filed this lawsuit. (*Id.* at 8.) Both arguments are flawed.

As to the first argument, the case law cited by the Defendants is inapplicable where, as here, the statute at issue contains an exception to the strict repose deadline. Unlike the statute in *Methodist*, in which the legislature evinced a clear intent not to create any exception to the strict repose time period, Section 24.005(a)(1) claims are subject to a statutory discovery rule. *See Methodist Healthcare Sys. of San Antonio, Ltd. v. Rankin*, ___ S.W.3d ___, 2010 WL 852160, at *2 (Tex. 2010) ("[T]he key purpose of a repose statute is to eliminate uncertainties under the related statute of limitations and to create a final deadline for filing suit that is not subject to any exceptions, *except perhaps those clear exceptions in the statute itself*." (emphasis added)).

Similarly, the Receiver is entitled to assert claims on behalf of the many Stanford entities who have claims against, or who are owed debts by, SFG. The Defendants have not shown, or even made any attempt to show, that any entity other than SFG had knowledge of the fraudulent transfers at issue at any time before the Receiver did. Accordingly, the Receiver is entitled to assert fraudulent transfer claims on behalf of any of the Stanford entities other than SFG.

Accordingly, the courts are left to determine under what circumstances a fraudulent transfer claimant—in this context, a corporation subject to adverse domination—knew or reasonably could have known about its claim. This is a question of interpreting the statutorily-imposed discovery rule—not a question of imposing a judicially created exception to an otherwise strict repose deadline. *Cf. Duran v. Henderson*, 71 S.W.3d 833, 839 (Tex. App.—Texarkana 2002, pet. denied) ("[W]e find it helpful to analogize to the discovery rule."). Pursuant to the recognized adverse domination doctrine, the corporation does not become aware of its claim until the wrongdoers are removed from the scene. *See, e.g., Quilling*, 2006 WL 316981, at *6; *Warfield*, 2007 WL 1112591, at *15-16.

The Defendants attempt to distinguish *Quilling* and *Warfield* by noting that statutes of repose are "not subject to judicially crafted rules of tolling or deferral." (Doc. 19 at 7.) This argument is unavailing. First, the statutes addressed in both of these cases were UFTA statutes, and thus included statutes of repose that are materially identical to the Texas statute of repose.[7] Second, *Quilling* and *Warfield* address the question of when the corporation became aware of the fraud, a concept distinct from equitable tolling.[8] The application of adverse

[7] *Compare* FLA. STAT. § 726.110 ("within 4 years after the transfer was made or the obligation was incurred or, if later, within 1 year after the transfer or obligation was or could reasonably have been discovered by the claimant"); N.C. GEN. STAT. § 39-23.9 ("within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant"); *and* WASH. REV. CODE § 19.40.091 ("within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant") *with* TEX. BUS. & COMM. CODE § 24.010(a)(1) ("within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant").

[8] The "adverse interest" doctrine, which is also applicable in Texas and which is not a tolling doctrine and thus not subject to the Defendants' arguments about the nature of a statute of repose, leads to the same result. SFG, as an entity, can only act through natural persons, and, as such, one or more natural persons, acting with fraudulent intent, caused SFG to make the transfers at issue. Because those transfers were made with the intent to defraud creditors, the individuals who caused the transfers to be made were acting adversely to SFG. *Resolution Trust Corp. v. Acton*, 49 F.3d 1086, 1090 (5th Cir. 1995) (interests adverse when "directors have been active participants in wrongdoing or fraud"). Where an agent acts adversely to his principal, the principal is not charged with the knowledge of the agent's acts. *See Askanase v. Fatjo*, 828 F. Supp. 465, 470 (S.D. Tex. 1993) ("imputation turns on whether the agent was acting for or against the principal's interests; knowledge acquired by an agent acting

domination here simply gives effect to the discovery rule embedded in the statute. *See In re Reading Broad., Inc.*, 390 B.R. 532, 553 (Bankr. E.D. Pa. 2008) ("The tolling doctrine of 'adverse domination' has been described as 'merely a corollary of . . . [the] discovery rule, applied in the corporate context.'"). Accordingly, application of the adverse domination rule is not inconsistent with the idea that the limitations period in the TUFTA is actually a statute of repose.

As to the second argument, the tolling period does not end instantly upon removal of the adverse parties, as the Defendants contend. Instead, the tolling period ends once disinterested parties gain control of the corporation and "discover or are put on notice of a cause of action." *Askanase v. Fatjo*, 828 F. Supp. 425, 471 (S.D. Tex. 1993); *see also FDIC v. Dawson*, 4 F.3d 1303, 1310 (5th Cir. 1993) (recognizing that, under Texas law, the adverse domination tolling period continues to run until disinterested directors have "notice" of a claim) (citing *Allen v. Wilkerson*, 396 S.W.2d 493, 500 (Tex. Civ. App.—Austin 1965, writ ref'd n.r.e.)); *FDIC v. Nathan*, 804 F. Supp. 888, 894 (S.D. Tex. 1992) ("FDIC cites Texas and federal law which holds that while culpable individuals continue to have superior power over a corporation, limitations is tolled until a majority of disinterested directors discover or are put on notice of a cause of action.").

If the rule were otherwise, a party desiring to commit fraud could avoid liability by simply hiding the fraud sufficiently well so as to make it undiscoverable until the expiration of the limitations period. That would defeat the purpose of the adverse domination rule, which is

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adversely to his principal is not attributable to the principal"); *Arabesque Studios, Inc. v. Academy of Fine Arts Int'l*, 529 S.W.2d 564, 568 (Tex. Civ. App.—Dallas 1975, no writ) ("The knowledge of an agent cannot be imputed to a principal if the agent has a personal adverse interest in not revealing it."). Thus, SFG did not "know" of the fraudulent transfers, either at the time the transfers were made, or at any time until someone without an interest adverse to SFG discovered their fraudulent nature. Nothing in the Defendants' motion to dismiss establishes as a matter of law that anyone acting in SFG's interest knew of the fraudulent transfers at issue more than a year before the Receiver filed this civil action.

essentially just a corollary of the discovery rule. *See, e,g., In re Reading Broadcasting, Inc.*, 390 B.R. at 553. Because adverse domination tolled the commencement of the one year discovery period until the Receiver had a reasonable opportunity to discover the fraudulent nature of the transfers, the Receiver's claims are not time-barred.

C. The Defendants have not established as a matter of law that the Receiver should have discovered his claims within seventy-two hours of his appointment.

Finally, the Defendants argue that, as a factual matter, the Receiver's claims are time-barred, because the Receiver should have discovered the fraudulent nature of the particular transfers at issue within the first seventy-two hours of his appointment as receiver for a multi-billion dollar enterprise, involving more than 200 entities and thousands of employees. Even if the Defendants' argument were not premature at the motion to dismiss stage, it would nevertheless fail because it grossly underestimates the complexity of the tasks facing the Receiver immediately upon his appointment.

For claims under Section 24.005(a)(1), TUFTA provides that a claimant must bring his cause of action "within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant." TEX. BUS. & COMM. CODE § 24.010(a)(1). The statute does not define "could reasonably have been discovered," so courts have relied on the traditional, common law discovery rule when interpreting and applying this provision. *See, e.g., Cadle*, 136 S.W.3d at 351 ("Although we note that the supreme court's discovery-rule analysis has focused on whether the discovery rule is available under the common law—whereas here, the discovery rule is explicitly available by statute—the court's 'inherently undiscoverable' analysis, which focuses on a plaintiff's exercise of reasonable diligence, is relevant to the statutory issue here of when this transfer *could reasonably have been discovered.*") (emphasis in original) (citing TEX.

BUS. & COMM. CODE § 24.010(a)(1)); *Duran*, 71 S.W.3d at 839 ("[W]e find it helpful to analogize to the discovery rule."); *see also Crook v. Johnston*, 93 S.W.3d 263, 271 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) ("issue of material fact about when Receiver discovered, or in the exercise of reasonable diligence should have discovered, the allegedly fraudulent transfer").

Therefore, the Receiver was entitled under the statute to a reasonable discovery period to uncover the fraudulent nature of these transfers, akin to the common law discovery rule. *See, e.g., Wing v. Kendrick*, 2009 WL 1362383, at *3 (holding, with respect to UFTA claim, that the "discovery rule generally applies in cases involving Ponzi scheme entities that have been placed in the hands of an equity receiver because the *fraudulent nature* of the transfers can only be discovered once the Ponzi operator has been removed from the scene." (emphasis added)); *Cadle*, 136 S.W.3d at 350 ("It is clear from the text of the statute that the legislature has chosen to preserve application of the discovery rule to some extent within the provisions of TUFTA."); *Duran*, 71 S.W.3d at 839 ("the limitation period does not begin to run, until the fraud is discovered, or in the exercise of reasonable diligence should have been discovered"). When the Receiver could have reasonably discovered the fraudulent nature of the transfers to the Defendants is a question of reasonable diligence, which is ordinarily "a question of fact for the jury." *See Duran*, 71 S.W.3d at 839 ("Unless the evidence is such that reasonable minds may not differ as to its effect, the question of whether a party has exercised diligence in discovering fraud is for the fact finder."); *see also Cadle*, 136 S.W.3d at 352 ("When a plaintiff knew or should have known of an injury is generally a question of fact."). Accordingly, the Court cannot determine the issue as a matter of law on a motion to dismiss.

Even if it were proper for the Court to determine the question of whether the Receiver exercised reasonable diligence on a 12(b)(6) motion, the Defendants have not shown as a matter of law that the Receiver failed to use reasonable diligence by not discovering his claim as to the particular transfers at issue until February 19, 2009—seventy-two hours after his appointment. Such a determination is fraught with factual considerations, and the Defendants simply cannot at this stage conclusively prove that the Receiver's "failure" to discover these fraudulent transfers within the first seventy-two hours of his appointment represents a failure to exercise reasonable diligence.

Reduced to its essence, the Defendants' argument is that the Receiver should have been aware of his claims as to the transfers at issue because the transfers were described in five February 18, 2009 newspaper articles and one February 17, 2009 online article. The Defendants' argument ignores the reality of the enormous complexity of the Receiver's duties, especially in the early days of the receivership. As this Court has previously stated: "The alleged Stanford Ponzi scheme was intricate and complex, involving many entities and billions of dollars. This receivership began approximately one year ago, and will in all likelihood continue for years to come." (SEC Lawsuit, Order of March 8, 2010, Doc. 1030 at 7; *see also* SEC Lawsuit, Order of February 3, 2010, Doc. 994 at 2 (recognizing the "substantial time and labor involved with unraveling such a complex scheme").)

The Defendants' argument also ignores the fact that the six articles discussing Allen Stanford's political contributions represent only a small fraction of the news reports on Stanford and the SEC Lawsuit published in the days immediately following the Receiver's

appointment. (*See* Appx. 1-82, providing sampling of media coverage from February 17 and 18.) The Receiver is charged with reasonable diligence; he is not charged with omniscience.[9]

That it took the Receiver at least seventy-two hours to discover a $1.15 million fraudulent transfer in the midst of a multi-billion fraud machine, all while the Receiver was attending to a myriad of diverse pressing duties, is hardly evidence of a lack of reasonable diligence. And, in any event, the question of reasonable diligence cannot be determined at the 12(b)(6) stage. *See Duran*, 71 S.W.3d at 839.

II. Federal election law does not preempt the Receiver's state law fraudulent transfer claim.

Although the Defendants argue that the Federal Election Campaign Act ("FECA"), Bipartisan Campaign Reform Act ("BCRA"), and associated regulations preempt state fraudulent transfer law, Defendants fail to cite a single case with that holding. In fact, in every case cited by the Defendants in which a court has found preemption, the state law in question dealt expressly with campaign finance issues. Further, the limitations on contributions and expenditures in the federal statutes and regulations cited by the Defendants are not in conflict with the TUFTA, because the TUFTA does not seek to impose any requirements with respect to campaign contributions or expenditures. By choosing to regulate campaign finance, Congress did not intend to give insolvent entities carte blanche to put money out of the reach of creditors by making political donations.

[9] The one article from February 17, 2009 the Defendants reference was an online article published by Reuters and not posted until after the close of business on February 17, 2009. Therefore, the Defendants are essentially arguing that the Receiver had twenty-four hours to not only come across the six cited articles out of the many that were published, but he also had to realize within that timeframe that these contributions could give rise to a fraudulent transfer claim. *Cf. Duran*, 71 S.W.3d at 839 ("[P]ublic filings [of real estate records] were but one consideration and do not of themselves raise a presumption of constructive knowledge.").

A. FECA does not preempt the Receiver's state law fraudulent transfer claim.

1. Congress did not intend to preempt state fraudulent transfer law when it enacted FECA.

In general, there is a "strong presumption against pre-emption." *Cipollone v. Liggett Group*, Inc., 505 U.S. 504, 523 (1992). With respect FECA, in particular, the Fifth Circuit (and multiple other courts) has explicitly held that the Act should be given "'a narrow preemptive effect in light of its legislative history.'" *Karl Rove & Co. v. Thornburgh*, 39 F.3d 1273, 1280 (5th Cir. 1994) (quoting *Stern v. Gen. Elec. Co.*, 924 F.2d 472, 475 n.3 (2d Cir. 1991); also citing *Weber v. Heaney*, 995 F.2d 872, 876 (8th Cir. 1993); *Reeder v. Ks. City Bd. of Police Comm'rs*, 733 F.2d 543, 545-46 (8th Cir. 1984); *Friends of Phil Gramm v. Americans for Phil Gramm in '84*, 587 F. Supp. 769, 772 (E.D. Va. 1984)). Indeed, the text of the FECA preemption provision limits the effect of preemption only to "provision[s] of State law with respect to election for Federal office." 2 U.S.C. § 453(a).

The Fifth Circuit examined the issue of when federal election law preempts state law in *Karl Rove & Co. v. Thornburgh*, 39 F.3d 1273 (5th Cir. 1994). *Karl Rove & Co.* involved a contract claim filed by a senatorial candidate's campaign committee, Karl Rove & Co., against the candidate, Richard Thornburgh. *Karl Rove & Co.*, 39 F.3d at 1276. Karl Rove & Co. alleged that Thornburgh failed to pay for services rendered on his behalf during his campaign. *Id.* Similar to the Defendants here, Thornburgh asserted that FECA represented both a "field preemption" and "conflict preemption" of any state law contractual claims. *Id.* at 1280-81. The court disagreed with both arguments. As to Thornburgh's field preemption argument, the court held that the federal statute's "narrow preemptive effect" could not be read to preempt all cases involving campaign financing, noting that "nowhere in the text of FECA or accompanying regulations is the personal liability of a candidate addressed." *Id.* at 1281. The court also noted

that "the Federal Election Commission ('FEC') has opined that state law supplies the answer to the question who may be held liable for campaign committee debts." *Id.* (citing Fed. Election Comm'n, Advisory Opinion 1989-2, 1989 WL 168490 (F.E.C. Apr. 25, 1989) ("The Commission has long held that State law governs whether an alleged debt in fact exists, what the amount of the debt is, and which persons or entities are responsible for paying a debt.")). The court also rejected Thornburgh's "conflict preemption" argument, holding that state contractual law did not create a conflict with the federal statute, whose "primary purpose . . . is to regulate campaign contributions and expenditures in order to eliminate pernicious influence—actual or perceived—over candidates by those who contribute large sums." *Id.*

The Defendants' preemption argument fails for the same reason. TUFTA does not concern election to Federal office, nor does it concern election law generally. In the context of this case, TUFTA has at most a "tangential" connection to federal election law, and, as such, it is not preempted by FECA. *See Teper v. Miller*, 82 F.3d 989, 995 (11th Cir. 1996) ("[C]ases in which preemption was not found invariably involve state laws that are more tangential to the regulation of federal elections." (citing *Karl Rove & Co.*, 39 F.3d at 1273)). Indeed, cases that have found preemption exclusively addressed state election statutes that conflicted with federal election statutes. *See, e.g.*, *Teper*, 82 F.3d at 995-99 (state campaign finance law conflicted with corresponding federal law); *Weber*, 995 F.2d at 876-77 (same). Like the state law contract claim in *Karl Rove & Co.*, fraudulent conveyance claims apply to myriad fact situations that have nothing to do with federal election law, and there is no evidence that Congress contemplated displacing this body of law when it enacted FECA.

2. FECA's constraints on how political committees receive, report, and return contributions do not affect whether a committee can be held liable for a money judgment.

The Defendants also argue that federal election statutes and regulations constrain the "manner and timing in which illegal contributions must be returned or refunded." (Doc. 19 at 15.) The Defendants erroneously conclude that once candidates and political committees have determined that their contributions were received legally pursuant to federal standards, Congress has effectively immunized such contributions from recovery pursuant to a state fraudulent transfer claim. As described above, the Defendants' argument is not supported by any case or by the text of FECA's preemption provision.

Further, the Defendants' argument misunderstands fraudulent transfer law. TUFTA does not restrict how or from whom committees can receive donations, nor does it affect how committees report their donations or under what circumstances donations are considered illegal and must be returned. *Cf.* Fed. Election Comm'n, Advisory Opinion, 1988-21, 1988 WL 170416 (F.E.C. May 16, 1988) (finding preemption where ordinance "encroache[d] upon the Act's and the regulations' treatment of contributions to Federal office candidates and to their committees"). Indeed, a fraudulent transfer judgment does not require the defendant to "refund" anything to the person who made the donation. A fraudulent transfer plaintiff is not the donor, but is instead the *creditor* of the donor. TEX. BUS. & COMM. CODE §§ 24.002(3), 24.002(4) (Vernon 2009). Thus, the Receiver is not seeking a "refund" of campaign contributions, and, therefore, the subject matter of FECA is simply not implicated by the Receiver's claims, which seek a money judgment against the Defendants based on state fraudulent transfer law. TEX. BUS. & COMM. CODE § 24.009(b) (Vernon 2009) ("[T]he creditor may recover judgment for the value of the asset transferred.").

As for Defendants' argument that allowing candidates and committees to be exposed to fraudulent transfer liability would "compromise the certainty provided by FECA's source restrictions," (Doc. 19 at 14), it erroneously assumes that once candidates and committees have determined the source of the contributions were legal, the contributions may be held or spent without any fear of diminution through the claims of a third-party. As the Federal Election Commission itself has recognized, candidates are not prohibited from paying judgments using campaign funds. *See* Fed. Election Comm'n, Advisory Opinion, 1995-7, 1995 WL 247476 (F.E.C. Apr. 6, 1995) (holding FECA and associated regulations do not preclude an election committee from paying a debt arising under a contract claim); Fed. Election Comm'n, Advisory Opinion, 1989-2, 1989 WL 168490 (F.E.C. Apr. 25, 1990) (same).[10] Thus, whatever certainty the Defendants believe FECA provides is illusory at best, and, in any event, fraudulent transfer statutes do not impede that certainty any more than state contract or tort law.

B. The BCRA does not affect whether the Defendants are subject to a judgment under state fraudulent conveyance law.

The Defendants also attempt to support their preemption argument by asserting that soft money donation laws found in the BCRA limit their ability to spend pre-2002 donations, thus preventing the use of those funds to a pay judgment to the Receiver. (Doc. 19 at 16-18.) The Defendants' argument, however, misses the point. The Defendants incurred liability to the Receiver as a result of pre-2002 contributions. That does not mean, however, that the Defendants are required to pay a judgment to the Receiver out of pre-2002 funds. *See Scholes v.*

[10] Several courts have considered claims based on state law liability to proceed against national political committees; if such expenditures were prohibited, presumably these courts would never have allowed these claims to go forward. *See, e.g., Gleklen v. Democratic Congressional Campaign Comm.*, 199 F.3d 1365, 1367 (D.C. Cir. 2000) (considering whether employee stated valid discrimination claim against committee); *Bell v. Nat'l Republican Congressional Comm.*, 187 F. Supp. 2d 605, 617 (S.D. W. Va. 2002) (holding plaintiff "can prevail if he demonstrates that the [National Republican Congressional Committee] was negligent in publishing the pamphlet"); *Pritt v. Nat'l Republican Comm.*, 557 S.E.2d 853, 856 (W. Va. 2001) (holding issue of fact existed on whether plaintiff had viable defamation claim against committee); *Croley v. Republican Nat'l Comm.*, 759 A.2d 682, 703 (D.C. App. 2000) (upholding tort judgment against Republican National Committee).

African Enter., Inc., 854 F. Supp. 1315, 1328 (N.D. Ill. 1994) (defendants still liable for money judgment despite fact that they "no longer possess[ed] the actual funds).

Further, the Defendants' argument misunderstands the nature of a judgment. The BCRA only limits how "a political party may use" pre-2002 funds. BCRA § 402(b)(2). If a court were to compel a political party to pay funds out of its pre-2002 accounts, that certainly would not constitute a "use" by the political party of those funds. Likewise, if a creditor were to execute a judgment by seizing all or some portion of the pre-2002 accounts of the Defendants, such seizure would hardly constitute a "use" by the political party of those funds. Accordingly, nothing in the BCRA is inconsistent with subjecting the Defendants to liability in connection with their pre-2002 donations from Stanford, Davis, and SFG.

CONCLUSION & PRAYER

For the foregoing reasons, the Receiver respectfully requests that the Court deny the Defendants' Motion to Dismiss. The Receiver further requests any further relief to which he may be entitled.

Dated: May 14, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

On May 14, 2010, I electronically submitted the foregoing document with the clerk of the court of the U.S. District Court, Northern District of Texas, using the electronic case filing system of the Court. I hereby certify that I will serve the Democratic Senatorial Campaign Committee ("DSCC"); the National Republican Congressional Committee ("NRCC"); the Democratic Congressional Campaign Committee ("DCCC"); the Republican National Committee ("RNC"); and the National Republican Senatorial Committee ("NRSC") individually or through their counsel of record, electronically, or by other means authorized by the Court or the Federal Rules of Civil Procedure.

/s/Kevin M. Sadler
Kevin M. Sadler

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RALPH S. JANVEY, IN HIS CAPACITY AS COURT-APPOINTED RECEIVER FOR THE STANFORD INTERNATIONAL BANK, LTD., ET AL.,	§	
Plaintiff,	§	
v.	§	
DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE, INC.; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE, INC.; REPUBLICAN NATIONAL COMMITTEE; and NATIONAL REPUBLICAN SENATORIAL COMMITTEE,	§	**Case No. 3:10-CV-0346**
Defendants.	§	

REPUBLICAN POLITICAL COMMITTEE DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR PARTIAL MOTION TO DISMISS UNDER RULE 12(b)(6)

I.
SUMMARY OF ARGUMENT

The Receiver concedes that the TUFTA's[1] extinguishment provision is a statute of repose—a concession fatal to equitable tolling. Yet, the Receiver urges the Court to "interpret" the statute of repose to encompass the adverse domination doctrine. To do so, this Court would have to first disregard settled Fifth Circuit law that the "very narrow doctrine" of adverse domination applies only to *claims against corporate insiders*. The Fifth Circuit has expressly refused to apply the doctrine against corporate "outsiders," such as the Republican Committees in the present case.

The Receiver's other arguments are equally flawed. The Receiver continually ignores crucial distinctions between state and federal law. For example, state court receivers' powers generally differ substantially from federal equity receivers' powers. And, federal law exclusively governs the latter. Yet, in arguing a *federal* equity receiver's ability to bring suit on behalf of investors, the Receiver relies heavily on cases involving *state* court receivers. Cases involving federal equity receivers largely contradict the Receiver's position.

Other issues (e.g., equitable tolling, imputation of knowledge, and limitations) in this diversity action turn solely on Texas state law.[2] States differ in their interpretations of whether the UFTA's extinguishment provision is a statute of repose or limitations, and each state has its own rules regarding tolling. Under Texas law, the extinguishment provision is a statute of

[1] Texas Uniform Fraudulent Transfer Act, codified in the Tex. Bus. & Comm. Code § 24.001 et seq.

[2] *Vaught v. Showa Denko K.K.*, No. 96-20200, 1997 U.S. App. LEXIS 12786 at *25-26 (5th Cir. March 10, 1997) ("[D]iversity actions ... involve state causes of action, where state law, of course, provides the rules of decision, even in federal court. In fact, the Supreme Court has stated that generally, for diversity actions, a federal court should apply not only state statutes of limitation but also any accompanying tolling rules.").

repose, and statutes of repose are not equitably tolled.[3] Yet, the Receiver ignores this point and incorrectly relies upon cases both where the extinguishment provision is considered by its enacting state a statute of limitations, and where equitable tolling applied. The Supreme Court has expressly declared that federal courts must apply the forum state's law,[4] and Texas law contradicts the application of equitable tolling to statutes of repose, such as TUFTA's extinguishment provision.

Finally, the Receiver urges the Court to apply the wrong standard in deciding this motion to dismiss, ignoring *Ashcroft v Iqbal*.[5]

[3] The Receiver attempts to distinguish *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 866 (Tex. 2009), but provides no Texas cases supporting equitable tolling of a statute of repose.

[4] *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 84-85, 114 S. Ct. 2048, 129 L. Ed. 2d 67 (1994) (holding that state law, not federal common law governed the issue of imputation of knowledge to a receiver).

[5] *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009).

II.
ARGUMENT AND AUTHORITIES

A. Adverse domination is inapplicable outside the narrow context of lawsuits against directors and officers.

The Receiver urges this Court to "interpret" TUFTA's statute of repose as enveloping the equitable tolling doctrine of adverse domination—a great expansion from the doctrine's currently "narrow" application. In the Fifth Circuit case, *FDIC v. Shrader & York*, a receiver attempted to apply adverse domination in a malpractice suit against a law firm accused of negligently contributing to the failure of two banks in receivership.[6] The receiver argued that adverse domination should apply because the corporate wrongdoer prevented the corporation from asserting its claims to avoid exposing his own wrongdoing.[7] Refusing to expand the doctrine, the Fifth Circuit found that adverse domination only applies to suits "by a corporation *against the officers or directors of that company*."[8] The court further noted the absence of any cases from Texas or the Fifth Circuit "that extend the adverse domination doctrine beyond corporate officers and directors."[9] The Republican Committees were not officers or directors of the entities in receivership, and the adverse domination doctrine cannot apply against them under Texas law.

[6] 991 F.2d 216, 218 (5th Cir. Tex. 1993).

[7] *Id.* at 227.

[8] *Id.* (emphasis added).

[9] *Id.*

B. A federal equity receiver can bring only claims that the receivership entities themselvus could bring.

The Receiver ignores the great weight of authority holding that a *federal* equity receiver can assert only claims that the receivership entities could assert.[10] Instead, to support his claim to represent "creditors,"[11] the Receiver relies upon cases involving receivers appointed by state courts and upon language from a 1935 Supreme Court opinion, *McCandless*.[12] The Supreme Court, in *Caplin*, rejected another receiver's similarly misplaced reliance upon *McCandless*. The Court held that the cited language from *McCandless* was taken out of context and that the remainder of the opinion "clearly emphasizes that the receiver in that case was suing on behalf of the corporation, not third parties."[13]

State court receivers generally have far greater powers than federal equity receivers.[14] Nevertheless the Receiver, a federally appointed receiver, relies primarily on cases involving state appointed receivers.[15] The Receiver, for instance, relies on *McGinness v. United States*, a

[10] *See Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 25 (1st Cir. 1990); *see, also, Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 429, 32 L. Ed. 2d 195, 92 S. Ct. 1678 (1972); *Eberhard v. Marcu*, 530 F.3d 122, 132 (2d Cir. 2008); *Donell v. Kowell*, 533 F.3d 762, 777 (9th Cir. 2008); *Wuliger v. Mfrs. Life Ins. Co. (USA)*, 567 F.3d 787, 793 (6th Cir. 2009); *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 627 (6th Cir. 2003); *Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995).

[11] The Receiver never defines the "creditors" that he purports to represent. This brief assumes the term "creditors" refers to the outside investors who allegedly purchased fraudulent CDs sold by Stanford International Bank.

[12] *McCandless v. Furlaud*, 296 U.S. 140, 56 S. Ct. 41 (1935).

[13] *Caplin*, 406 U.S. at 429; *see also Scholes v. Schroeder*, 744 F. Supp. 1419, 1423 (N.D. Ill. 1990) (citing to *Caplin*, "to the extent that the orders that appointed Scholes as receiver have purported to confer power on him to sue directly on behalf of investors, rather than in accordance with the just-stated principles, those orders exceed the power of the judiciary and will not be enforced in this action.")

[14] *See, e.g., Javitch*, 315 F.3d at 626-27 (contrasting an Ohio state court receiver who had the power to bring actions for the benefit of creditors from a federal receiver who had no such power).

[15] One case arguably supports the Receiver's proposition, but the court's reasoning is based on state law cases involving state court receivers, and the case is an outlier with respect to the otherwise well-settled law. *Compare SEC v. Cook*, 2001 U.S. Dist. LEXIS 2601, 6-7 (N.D. Tex. Mar. 8, 2001) (relying on two state cases to support assertion that a receiver can bring actions on behalf of creditors), *with, Fleming*, 922 F.2d at 25 (relying on multiple federal cases to support assertion that it is "well settled" that a receiver has no greater rights or powers than the corporation itself would have).

federal case involving a receiver appointed by the Lake County Court of Common Pleas, Ohio.[16] The Sixth Circuit, in *Javitch*, in rejecting a receiver's argument that *McGinness* had "repudiated the stand-in-shoes doctrine with respect to receivers," opined that *McGinness* merely "suggests that the question [of a receiver's powers] depends on the authority granted by the appointing court and actually exercised by the receiver."[17] A federal receiver may be charged with preserving the receivership estate for the ultimate benefit of creditors, but "that does not equate to a grant of authority to pursue claims belonging to the creditors."[18] Therefore, the Court should reject the Receiver's arguments that he represents creditors.

C. The Stanford Defendants' knowledge is imputed to the receivership entities.

The Receiver incorrectly argues that the knowledge of the individuals allegedly involved in the Ponzi scheme may not be imputed to the Stanford Entities because those individuals operated adversely to the company's interests (i.e., the "adverse interest" exception).[19] The case law and the Complaint's factual allegations do not support his assertion.

"The long-established rule is that the knowledge of individuals who exercise substantial control over a corporation's affairs is imputable to the corporation."[20] However, the adverse

[16] 90 F.3d 143, 144 (6th Cir. Ohio 1996).

[17] *Javitch*, 315 F.3d at 625-7.

[18] *Id.*

[19] The "adverse interest" exception, a creature of agency law, should not to be confused with the "adverse domination" doctrine, an equitable tolling doctrine. Adverse interest applies as an exception to the general rule that an agent's knowledge is imputed to the principal. Adverse domination, on the other hand, applies to toll statutes of limitations in cases against corporate insiders where the insider prevented the corporation from acting in its interest. As explained above and in the opening brief, the adverse domination doctrine does not apply to the present case.

[20] *Federal Deposit Ins. Corp. v. Ernst & Young*, 1991 U.S. Dist. LEXIS 13955 at *10-11 (N.D. Tex. 1991) (citing *Goldstein v. Union Nat'l Bank*, 109 Tex. 555, 213 S.W. 584 (1919); *Vogel v. Zipp*, 90 S.W.2d 668 (Tex. Civ. App.—Austin 1936, writ dism'd); *American Standard Credit, Inc. v. National Cement Co.*, 643 F.2d 248, 270-71 & n.16 (5th Cir. 1981)).

interest exception may apply depending on whether an agent's fraudulent acts were made on behalf of the corporation or against the corporation.[21]

Fraud against a corporation usually hurts only the corporation. That is, the corporation's owners are "the principal if not the only victims."[22] On the other hand, where the costs of the fraud are borne by outsiders to the corporation, the corporation's owners cannot escape liability for the fraud.[23] Thus, whether an agent's fraudulent actions were made on behalf of the corporation depends on whether the victims are the owners or outsiders to the corporation.[24]

Here, the question is whether the Stanford Defendants[25] were acting on behalf of or against the Stanford Entities,[26] a question that depends on whether the victims of the alleged fraudulent transfers were the owners of the Stanford Entities or outsiders to the corporation. According to the complaint, the alleged victims are the investors who allegedly purchased fraudulent CDs from the Stanford Defendants.[27] These investors were not owners of the receivership entities, but were outsiders to the corporation. And these outside investors bore the costs of the fraud. Thus, the adverse interest exception does not apply and any knowledge by

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[21] *Id.* at *12.

[22] *Id.* at *12-13 (quoting *Greenstein, Logan & Company v. Burgess Marketing, Inc.*, 744 S.W.2d 170, 190-91 (Tex. App.—Waco 1987, writ denied)).

[23] *Id.*

[24] *Id.* at *13.

[25] The "Stanford Defendants" as defined by the Complaint are: Allen Stanford, James Davis, Laura Pendergest-Holt, and three of *Stanford's* companies, Stanford International Bank, Ltd. ("SIB"), Stanford Group Company, and Stanford Capital Management, LLC. Compl. ¶ 18.

[26] The Receiver claims to represent "numerous Stanford entities," but factual allegations regarding any entities' involvement with the transfer of funds from the Ponzi scheme to the Republican Committee Defendants are completely missing from the Complaint, except with respect to SIB (the entity generating the income for the alleged Ponzi scheme through sales of fraudulent CDs) and Stanford Financial Group ("SFG") (the entity, along with Stanford, making contributions to the Republican Committee Defendants). Compl. ¶¶ 19, 24. Thus, the Receiver, has failed to allege enough facts to state a colorable, much less *plausible*, claim for relief as to any "Stanford entity" except for SIB and SFG, whose colorable claims nonetheless fail.

[27] Compl. ¶¶ 21-24.

those controlling the receivership entities, namely the Stanford Defendants,[28] is imputed to those entities.[29] That knowledge includes both knowledge of the alleged Ponzi scheme and knowledge of the alleged transfer of funds generated by that scheme.[30]

D. The Receiver's discovery of the transfers is irrelevant where the entities that he represents have previously discovered the transfers.

In arguing that his knowledge, not the entities' knowledge, is relevant, the Receiver wholly ignores that the Texas extinguishment provision is a statute of repose. Instead, he cites only inapposite cases interpreting the laws of other jurisdictions where the extinguishment provisions have been construed as statutes of limitations that are subject to equitable tolling doctrines, such as adverse domination.[31] In *Cumberland & Ohio Company of Texas v. Goff*, a case involving a statute of repose containing a discovery rule,[32] the receiver was not able to rely upon his discovery to revive his expired claim. There, Goff had caused two corporate entities to violate securities laws. As a result, a receiver was appointed and the corporate entities were removed from Goff's control.[33]

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[28] The Receiver was appointed only over entities owned or controlled by the Stanford Defendants. Compl. ¶ 18.

[29] *See Ernst & Young*, 1991 U.S. Dist. LEXIS 13955 at *10-11.

[30] The Complaint contains allegations that the Stanford Defendants and SFG "were running a Ponzi scheme and transferred funds generated by that scheme to the Committee Defendants." Compl. ¶ 37.

[31] *See, e.g., Warfield v. Carnie*, No. 3:04-CV-633-R, 2007 U.S. Dist. LEXIS 27610 at *41, n.11 (N.D. Tex. April 13, 2007) (explicitly rejecting the argument that the Washington UFTA's extinguishment provision was a statute of repose); *Wing v. Kendrick*, No. 2:08-CV-01002-DB, 2009 U.S. Dist. LEXIS 41923 at *8 (D. Utah May 14, 2009) ("Finally, the Receiver is not barred by the statute of limitations applicable in this case."); *and Quilling v. Cristell*, No. 3:04CV252, 2006 U.S. Dist. LEXIS 8480 at *17 (W.D.N.C. February 9, 2006) (defendant arguing that "the statute of limitations" had run).

[32] *Cumberland & Ohio Co. of Tex. v. Goff*, No. 3:09-cv-436, 2009 U.S. Dist. LEXIS 98535 at *6-11 (M.D. Tenn. October 22, 2009). Although *Goff* does not apply Texas law, it is particularly instructive because of its similarities to the present case. *Goff* squarely answered the question of whether previous discovery by the entities in receivership while the wrongdoer was in control could bar a claim under a statute of repose.

[33] *Id.* at *6-7.

The *Goff* receiver asserted a claim for contribution against Goff for violations of securities laws.[34] The contribution claim, however, could not be maintained unless brought before "the expiration of two years after the discovery of the facts constituting the violation, or after such discovery should have been made by the exercise of reasonable diligence."[35] The receiver filed suit more than two years after the violations of the securities laws (the acts giving rise to the claim for contribution), and Goff argued that the claims were untimely.[36] The Court agreed. Although silent as to "who" must discover the violation, the court concluded that the statute implicated discovery by the plaintiff.[37] "The plaintiff here is the receiver for [the affected companies], *so the relevant inquiry is the discovery by those companies.*"[38] Here, the relevant inquiry is the same.

E. The Receiver urges the Court to apply the wrong standard in deciding this motion to dismiss.

The Receiver states a claim cannot be dismissed "unless the plaintiffs would not be entitled to relief under any set of facts or any possible theory that could prove consistent with the allegations in the complaint." The Supreme Court has rejected this standard.[39] A plaintiff now must plead "enough facts to state a claim to relief that is *plausible* on its face."[40] The Receiver has failed to meet this standard, and his claims should be dismissed. Under Texas law, the claims asserted by him are extinguished.

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[34] *Id.* at *10.

[35] *Id.* at *6-7.

[36] *Id.* at *10.

[37] *Id.* at *11, n.7.

[38] *Id.* (emphasis added).

[39] *See Iqbal*, 129 S. Ct. 1937, 1949.

[40] *Id.*; *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); *see also Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. Tex. 2009.

III.
PRAYER

For the reasons stated above and in their opening brief, Defendants respectfully request that the Court dismiss with prejudice all of the Receiver's claims under TUFTA § 24.005(a)(1) relating to political contributions made before February 19, 2006, and that the Court grant Republican Political Committee Defendants such other relief to which they are entitled. Because the Receiver has stipulated that he does not bring claims under §§ 24.005(a)(2), 24.006(a), or 24.006(b), the Republican Political Committee Defendants no longer seek their dismissal.

Dated: May 26, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of May, 2010, I electronically filed the foregoing document with the Clerk of the Court, using the CM/ECF system, and that I have served all counsel of record electronically.

/s/ Mark A. Shank

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

RALPH S. JANVEY, in his capacity as Court-Appointed Receiver for the Stanford International Bank, Ltd., et al.,	§	
Plaintiffs,	§	
v.	§	**NO. 3:10-CV-0346**
DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE, INC.; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE, INC.; REPUBLICAN NATIONAL COMMITTEE; and NATIONAL REPUBLICAN SENATORIAL COMMITTEE,	§	
Defendants.		

DEMOCRATIC COMMITTEE DEFENDANTS'
REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

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I. INTRODUCTION

Plaintiff seeks unlimited tolling of TUFTA's statute of repose in order to save his claims from extinguishment. But Plaintiff's Response Brief fails to demonstrate that he should be permitted to pursue claims that no longer exist. First, this Court has limited Plaintiff to representing only the Stanford entities, and Plaintiff provides no basis for application of the adverse domination doctrine in the present case. Second, Plaintiff provides no argument why he could not have reasonably discovered the transfers upon his appointment. Plaintiff cannot refute that detailed information was available to him and "could reasonably have been discovered" over a year before he filed suit. Tex. Bus. & Com. Code Ann. § 24.010(a). Plaintiff tries to squeeze a few extra days out of TUFTA's extinguishment provision by ignoring the plain language of the statute and relying instead on the judicially crafted discovery rule.

Additionally, both TUFTA and the Federal Election Campaign Act of 1971 operate on the Stanford Defendants' political contributions to the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee (together, the "Committees"). Federal law defines these contributions as lawful, and therefore Plaintiff's state law claim deeming them unlawful and subject to disgorgement is preempted.

II. ARGUMENT

A. Plaintiff's Claims Extinguished Four Years After Each Respective Transfer.

As argued in the Committees' Opening Brief, Plaintiff's claims extinguished four years after each respective transfer because the Stanford entities' knowledge is imputed to the receiver. Opening Br. at 6-8. Plaintiff's response rests primarily on two arguments: (1) Plaintiff represents the creditors in addition to the receivership entities, Resp. Br. at 5; and (2) Plaintiff's claims are saved by the adverse domination doctrine, Resp. Br. at 7. Both arguments fail as a matter of law.

1. Plaintiff Can Bring Only Claims that the Receivership Entities Could Bring.

It is well established that "[a] receiver stands in the place of the individuals and entities over whose property he has been appointed receiver," Reneker v. Offill, No. 3:08-CV-1394-D, 2009 WL 804134, at *5 (N.D. Tex. Mar. 26, 2009), and therefore he "can only make a claim which the [entity] could have made," Fleming v. Lind-Waldock & Co., 922 F.2d 20, 25 (1st Cir. 1990). Plaintiff's claim that he also represents the interests of the creditors is belied by this Court's Order appointing him receiver for only Mr. Stanford, his associates and companies. Case No. 3:09CV298, Dkt. # 157 at 1. "[A]lthough the stated objective of a receivership may be to preserve the estate for the benefit of the creditors, that does not equate to a grant of authority to pursue claims belonging to the creditors." Javitch v. First Union Sec., Inc., 315 F.3d 619, 627 (6th Cir. 2003). Plaintiff's role has already been circumscribed by this Court, and Plaintiff has no discretion to unilaterally enlarge his powers. Consequently, Plaintiff's discovery date can be no later than the date of the transfers themselves, when the entities he represents knew of them.[1]

2. TUFTA's Statute of Repose Is Not Tolled by Adverse Domination.

Plaintiff asserts generally that "[f]ederal courts" have applied the doctrine of adverse domination to fraudulent transfer claims. Resp. Br. at 7. But Plaintiff does not cite a single Texas case applying this equitable doctrine to a statute of repose.[2] Nor can he, as Texas law provides that statutes of repose are "not subject to judicially crafted rules of tolling or deferral." Methodist Healthcare Sys. of San Antonio, Ltd. v. Rankin, 307 S.W.3d 283, 286 (Tex. 2010).

[1] Plaintiff ventures in a footnote that Mr. Stanford's knowledge cannot be imputed to the Stanford entities because he was acting adversely to his own companies. Resp. Br. at 8 n.8. But a director's fraud is adverse to the company only if "the stockholders are the principal if not only victims." FDIC v. Ernst & Young, 967 F.2d 166, 171 (5th Cir. 1992). Here, Plaintiff makes no allegation that the alleged victims of the Ponzi scheme, the defrauded investors, had any ownership interest in the Stanford entities. Rather, they were "outsiders" to the companies. Id.

[2] Notably, Plaintiff does not contest that TUFTA is a statute of repose, see Resp. Br. at 8, as every state and federal court to address the issue has held. See Smith v. Am. Founders Fin., Corp., 365 B.R. 647, 676 (S.D. Tex. 2007); Cadle Co. v. Wilson, 136 S.W.3d 345, 350 (Tex. App.—Austin 2004, no pet.); Duran v. Henderson, 71 S.W.3d 833, 866 (Tex. App.—Texarkana 2002, pet. denied).

Plaintiff attempts to get around this legal roadblock by pointing out that TUFTA's statute of repose is similar to other states' fraudulent transfer laws. Resp. Br. at 8. But the state laws cited by Plaintiff have been deemed statutes of limitations, not statutes of repose.[3] Plaintiff also attempts to find expression of the adverse domination doctrine in the discovery rule incorporated in TUFTA. Resp. Br. at 8-9. But the Fifth Circuit has recognized that adverse domination and the discovery rule are two distinct tolling principles. See FDIC v. Shrador & York, 991 F.2d 216, 227 (5th Cir. 1993) (refusing to apply the adverse domination doctrine, stating that "Texas's discovery rule adequately addresses the FDIC's policy concern"). Moreover, Shrader & York held that the "very narrow doctrine" of adverse domination is limited to suits against the entity's corporate officers and directors. Id.; see also Askanase v. Fatjo, 828 F. Supp. 465, 472 (S.D. Tex. 1993). Plaintiff's attempt to use adverse domination in his suit against good-faith, third-party transferees like the Committees is therefore foreclosed by Fifth Circuit precedent. Despite Plaintiff's flailing efforts, his claims find no refuge in the doctrine of adverse domination.

B. Plaintiff Could Reasonably Have Discovered the Transfers More Than One Year Before He Filed Suit.

Even if, as Plaintiff contends, TUFTA's discovery period is viewed from the receiver's perspective,[4] Plaintiff's claims are time-barred. Plaintiff maintains that the Court cannot determine as a matter of law when Plaintiff could have reasonably discovered the contributions to the Committees. Resp. Br. at 11. However, "if reasonable minds could not differ about the conclusion to be drawn from the facts in the record, then the start of the limitations period may be determined as a matter of law." Cadle, 136 S.W.3d at 352. Here, the facts apparent on the face of the Complaint, along with the news articles submitted with the Committees' Opening

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[3] See Warfield v. Carnie, No. 3:04-cv-633-R, 2007 WL 1112591, at *14 n.11 (N.D. Tex. Apr. 13, 2007) (applying Washington law); In re Hill, 332 B.R. 835, 841 (M.D. Fla. 2005); Strawbridge v. Sugar Mountain Resort, Inc., 243 F. Supp. 2d 472, 480 (W.D.N.C. 2003).

[4] But see Cumberland & Ohio Co. of Tex. v. Goff, 2009 WL 3517531, at *3 n.7 (M.D.Tenn. Oct. 22, 2009) ("The plaintiff here is the receiver for MAE and MAO & G, so the relevant inquiry is the discovery by those companies.").

Brief, make clear that the discovery period began no later than February 18, 2010, one year and a day before Plaintiff filed suit.

1. The Discovery Period Began the Day Plaintiff Was Appointed Receiver.

Plaintiff's argument about when he "should have discovered" his claims, Resp. Br. at 10, ignores the plain language of TUFTA's extinguishment provision. A TUFTA fraudulent transfer claim must be brought "within one year after the transfer or obligation was or *could* reasonably have been discovered by the claimant." Tex. Bus. & Com. Code Ann. § 24.010(a)(1) (emphasis added). Although the language is similar to the discovery rule applied by courts, it is not the same. See HECI Exploration Co. v. Neel, 982 S.W.2d 881, 886 (Tex. 1999) ("The discovery rule has been applied in limited categories of cases to defer accrual of a cause of action until the plaintiff knew or, exercising reasonable diligence, *should* have known of the facts giving rise to a cause of action.") (emphasis added). In fact, as recognized by Texas courts, there is a significant difference between TUFTA's language and the discovery rule. See Tanglewood Terrace, Ltd. v. City of Texarkana, 996 S.W.2d 330, 340 (Tex. App.—Texarkana 1999, no pet.) ("The task in deciding if the plaintiff's inquiry is inherently undiscoverable is not in deciding whether the plaintiff *could* have discovered the injury, but in deciding whether the plaintiff . . . *should* have discovered it.").[5] The question of when the transfers *could* have been discovered is solely determined by when the transfers became *discoverable*. Plaintiff's argument incorrectly assumes

[5] See also Certain Underwriters at Lloyd's v. Gray, No. 99-30985, 2001 WL 422168, at *1 (5th Cir. Mar. 26, 2001) ("[T]he court rejected the Underwriters' attempt to link what expert independent contractors perhaps could have discovered . . ., and what the Grays reasonably should have discovered or investigated . . . ."); Conoco, Inc. v. Amarillo Nat'l Bank, 950 S.W.2d 790, 800 (Tex. App.—Amarillo 1997, writ granted), vacated on other grounds, 996 S.W.2d 853 (Tex. 1999); Hellman v. Mateo, 772 S.W.2d 64, 66 (Tex. 1989); Perry Roofing Co. v. Olcott, 722 S.W.2d 538, 543 (Tex. App.—Fort Worth 1986) ("Assuming arguendo that Olcott should have discovered the defects earlier than the jury determined, the earliest he could have discovered the defect was when the roof was completed . . . ."); Gulf, C&SF Ry. v. Hockaday, 37 S.W. 475, 477 (Tex. Civ. App. 1896, writ ref'd) ("We find that the appellant, by a proper inspection, could have discovered the condition of the plank, and could have and should have discovered its dangerous condition . . . .").

he is entitled to the full breadth of the discovery rule, when, in fact, TUFTA's incorporation of the discovery rule is much more limited.[6]

The case law analyzing uniform transfer statutes also recognizes this distinction. Cadle determined that the discovery rule is preserved "to some extent" within the provisions of TUFTA, 136 S.W.3d at 350,[7] while Duran also found TUFTA's extinguishment provision "similar to the discovery rule," 71 S.W.3d at 839. Both Quilling v. Cristell and Wing v. Kendriek equated "could reasonably have been discovered" with "discoverable," finding that the transfers "became discoverable when the Receiver was appointed and placed in control of the [receivership] [e]ntities." Quilling v. Cristell, No. 304CV252, 2006 WL 316981, at *6 (W.D.N.C. Feb. 9, 2006); see also Wing v. Kendrick, No. 2:08-CV-01002-DB, 2009 WL 1362383, at *3 (D. Utah May 14, 2009).

Plaintiff cannot dispute that "[o]nce he was appointed, the illegitimate nature of the transfers involved in this lawsuit could be discovered," Quilling, 2006 WL 316981, at *7, regardless of when he actually discovered or should have discovered them. Under the plain language of TUFTA, the inquiry ends there. See Cadle, 136 S.W.3d at 350 ("[T]he limitations provision of TUFTA is intended to be strictly construed . . . ."). As set forth in the Committees' Opening Brief, all of the political contributions to the Committees were publicly available and a matter of public record on February 16, 2009, the day Plaintiff was appointed. On that date, the obstacles imposed by Mr. Stanford's control and alleged deceit were removed, and Plaintiff acquired the capability and responsibility to discover the transfers for himself. The discovery rule as incorporated in TUFTA requires no more for the limitations period to begin.

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[6] This interpretation is consistent with courts' interpretation of TUFTA as a statute of repose, which is inherently less flexible than a statute of limitations. See, e.g., Galbraith Eng'g Consultants, Inc. v. Pochucha, 290 S.W.3d 863, 866 (Tex. 2009). It makes sense that Congress would allow tolling of the repose period only where a transfer is inherently undiscoverable rather than allow indefinite potential liability of individuals who took no part in the alleged fraud. Plaintiff concedes that he may take advantage of only those exceptions to final deadlines that are "'in the statute [of repose] itself.'" Resp. Br. at 7 (quoting Methodist, 2010 WL 852160, at *2, 307 SW.2d at 286).

[7] Notably, Cadle's holding that plaintiff's claim was time-barred was based on plaintiff's actual discovery of the transfers. See 136 S.W.3d at 353.

2. Widespread Media Coverage Negates Any Remaining Claim that Plaintiff Could Not Reasonably Have Discovered the Transfers More than One Year Before He Filed Suit.

Plaintiff contends that he could not have reasonably discovered the transfers because he was preoccupied with the other duties of his position. Resp. Br. at 12.[8] As noted above, TUFTA's limited discovery rule does not grant Plaintiff the time and flexibility to discover the transfers at his convenience. All that matters for purposes of TUFTA's extinguishment provision is that he "could reasonably have discovered" the transfers as of the day of his appointment. Moreover, any contention that the transfers were undiscoverable given the scope of Plaintiff's responsibilities is foreclosed both by common sense and extensive media coverage of the contributions. Mr. Stanford's connections with the Democratic party were widely publicized by the news media in the days immediately following Plaintiff's appointment.[9] Mr. Stanford's political contributions flowed not only to the Committees but also to senior senators and even the President himself,[10] catapulting those transfers to major headlines and diminishing the possibility that they could have been lost among the mundane business transactions of the Stanford entities. Indeed, it cannot be that the receiver for the Stanford entities is held to a lesser standard than the numerous disinterested reporters who easily discovered these contributions by February 18, 2009. See Hunt v. Am. Bank & Trust Co., 606 F. Supp. 1348, 1357 (N.D. Ala. 1985) ("The Receiver must be held to the highest level of 'due diligence' in ferreting out those claims held by [the receivership entity]."), aff'd, 783 F.2d 1011 (11th Cir. 1986).

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[8] To the extent Plaintiff suggests that TUFTA's one-year discovery period began when he could reasonably have discovered both the transfers and their fraudulent nature, see Resp. Br. at 11, 13 n.9, he is mistaken. Even the traditional discovery rule starts a limitations period when plaintiff "should have known of the facts giving rise to a cause of action." HECI, 982 S.W.2d at 886. Additionally, Cadle specifically held that plaintiff must bring suit within a year after learning of the transfer, "not within a year after the allegedly fraudulent details were actually discovered." 136 S.W.3d at 353. Finally, Plaintiff's own Complaint alleges that all transfers made from a Ponzi scheme are fraudulent, Compl. ¶ 37, barring any claim that Plaintiff could have discovered the fraudulent nature of the transfers only after he could have discovered the transfers themselves.

[9] For a sampling of the media coverage, the Committees refer this Court to the news articles contained in the appendix accompanying their Opening Brief.

[10] See, e.g., Marc DeCambre, Billionaire Schmoozed Sports Bigs, Pols, N.Y. Post, Feb. 18, 2009; Tom Hamburger, President's fund gives value of tainted Stanford campaign donation to charity, Chi. Trib., Feb. 18, 2009.

Plaintiff can cite no authority for his position that the availability of a host of information delays the date he reasonably could have discovered the transfers. As receiver for the Stanford entities, Plaintiff "had reason to diligently follow the news" regarding the entities' financial transactions. Prostok v. Browning, 112 S.W.3d 876, 898 (Tex. App.—Dallas 2003), rev'd in part on other grounds, 165 S.W.3d 336 (Tex. 2005). That Plaintiff was otherwise occupied does not permit him to close his eyes to media coverage of the relationship between the very entities he represents and high-profile political figures. Nothing in Plaintiff's brief suggests that he could not have reasonably discovered these transfers by simply opening the newspaper.[11]

C. Plaintiff's Fraudulent Transfer Claims Are Preempted by Federal Law.

The Federal Election Campaign Act of 1971 ("FECA") expressly preempts any provision of state law that affects the financing of federal political committees. See 2 U.S.C. § 453(a) ("[T]he provisions of this Act, and of rules prescribed under the Act, supersede and preempt any provision of State law with respect to election for Federal office."); 11 C.F.R. § 108.7(b) ("Federal law supersedes State law concerning the . . . [l]imitation on contributions and expenditures regarding Federal candidates and political committees."). Moreover, the legislative history of FECA "make[s] . . . clear that the Federal law occupies the field with respect to . . . *the sources of campaign funds used in Federal races*." S. Conf. Rep. No. 93-1237 (1974), reprinted in 1974 U.S.C.C.A.N. 5618, 5638 (emphasis added). Political contributions to the Committees, including those from the Stanford Defendants, are subject to FECA source restrictions, see generally 2 U.S.C. § 441a-441f, and there is no question that Plaintiff's fraudulent transfer claim is predicated entirely on the source of the contributions at issue, see Compl. ¶ 29 ("Funds from the Ponzi scheme described above were transferred . . . to the Committee Defendants."); id. ¶ 37. Plaintiff's attempt to supplement the list of illegal sources to include Ponzi scheme funds,

[11] Plaintiff's failure to articulate an alternative timeline further reveals the weakness of his position. From what the Committees can discern, Plaintiff argues that the date he reasonably could have discovered the transfers was the date he actually came across them, see Resp. Br. at 1, 12, whenever that may have been. Such circular logic is not only tautological, it is entirely divorced from the proper analysis under TUFTA.

therefore, is preempted by federal law. See KVUE, Inc. v. Moore, 709 F.2d 922, 931 (5th Cir. 1983) ("If preempted, a complementary or supplementary state regulation is as invalid as one directly conflicting with the federal scheme . . . .").

1. FECA Preempts TUFTA as Applied to the Facts of This Case.

Plaintiff mistakenly contends that because "fraudulent conveyance claims apply to myriad fact situations that have nothing to do with election law," TUFTA is not subject to FECA's preemption clause. Resp. Br. at 15. Plaintiff's argument confuses the distinction between facial and as-applied preemption challenges. The Supremacy Clause contemplates preemption of "the application of an otherwise valid state enactment." Hamm v. City of Rock Hill, 379 U.S. 306, 312 (1964).[12] Nor is FECA's preemptive scope limited to state election laws. The subject matter of a state statute is irrelevant under a preemption analysis. Rather, "it is the *effect* of the state law that matters in determining preemption, not its intent or purpose. Under the Supremacy Clause, state law that in effect . . . trespasses on a field occupied by federal law, must yield, no matter how admirable or unrelated the purpose of that law." Teper v. Miller, 82 F.3d 989, 995 (11th Cir. 1996). Thus, FECA preempts state laws even if their purpose is completely unrelated to elections if, as applied, they encroach on federal law. In fact, Friends of Phil Gramm v. Americans for Phil Graham in '84, 587 F. Supp. 769 (E.D. Va. 1984), cited by Plaintiff, found FECA preemption of a state law that, on its face, had no relation whatsoever to elections. See id. at 772-73 (analyzing FECA preemption of state statutory prohibition against unauthorized use of a person's name for advertising or commercial purposes).

Although FECA and TUFTA are "aimed at distinct and different evils," here they "operate upon the same object," Napier v. Atl. Coast Line R.R., 272 U.S. 605, 612 (1926),

[12] See also KVUE, 709 F.2d at 934 ("[I]t is sufficient to invalidate the Texas statute *to the extent* that the law seeks to regulate federal candidates or committees.") (emphasis added); Bunning v. Kentucky, 42 F.3d 1008, 1012 (6th Cir. 1994) ("*On these facts*, the Registry's intrusion into Congressman Bunning's federally regulated activity constituted an attempt to impose on a federal political committee Kentucky's requirements on both [] the disclosure of expenditures and the limits on expenditures made by such a committee.") (emphasis added).

namely, political contributions made by the Stanford Defendants. On its face, TUFTA does not restrict how or from whom committees can receive donations. But Plaintiff's application of TUFTA in this case is premised on the claim that TUFTA prohibits federal political committees from accepting or retaining Ponzi scheme funds for use in federal elections. As a result, Plaintiff's fraudulent transfer claim "impermissibly stray[s] into th[e] field" of federal election law, Teper, 82 F.3d at 994, and is preempted.

Karl Rove & Co. v. Thornburgh, 39 F.3d 1273 (5th Cir. 1994), cited by Plaintiff, does not hold otherwise. In Karl Rove & Co., the Fifth Circuit found no preemption of state contract law with respect to a candidate's personal liability for committee debts. The court based its holding on the fact that "nowhere in the text of FECA or accompanying regulations is the personal liability of a candidate addressed." Id. at 1280. Here, on the contrary, multiple FECA provisions explicitly define the universe of illegal contributions. See 2 U.S.C. §441a-441f. Unlike FECA's "silence on the issue of candidate liability," Karl Rove & Co., 39 F.3d at 1281, FECA speaks directly to the contributions at issue in this case.[13] These contributions are allegedly unlawful under Plaintiff's state law claim yet lawful under FECA, and as such, Plaintiff's TUFTA claim "must yield" to FECA's occupation of the field. Teper, 82 F.3d at 995.

2. Where the Committees' Liability Is Contingent upon the Source of Political Contributions, Plaintiff's Claims Are Preempted.

Plaintiff advances the unremarkable position that national political committees are sometimes liable under state law. Resp. Br. at 17 & n.10. But Plaintiff's argument misses the point, overlooking the driving force behind his fraudulent transfer claim. Plaintiff's only basis of

[13] Moreover, Karl Rove & Co. relied on a Federal Election Commission ("FEC" or "Commission") advisory opinion that "state law supplies the answer to the question who may be held liable for campaign committee debts." 39 F.3d at 1280. Here, Plaintiff has not cited a single FEC advisory opinion addressing state fraudulent transfer laws as applied to political committees. In fact, the Commission has made clear that "the central aim of the [FECA preemption] clause is to provide a comprehensive, uniform Federal scheme that is the sole source of regulation of campaign financing . . . for election to Federal Office." FEC Advisory Op. 1988-21, at 2 (May 16, 1988). Just as FECA "does not include influence brokers or lobbyists among those who may not contribute to Federal candidates or political committees," id., so, too, it does not include Ponzi scheme operators.

recovery against the Committees springs from the allegation that the Stanford Defendants made these contributions using Ponzi scheme funds. See Compl. ¶ 37. In fact, were it later revealed that the contributions came from Mr. Stanford's separate income, Plaintiff's fraudulent transfer claim would fail. See Scholes v. Lehmann, 56 F.3d 750, 761-62 (7th Cir. 1995); Resp. Br. at 6 n.6. That federal political committees may be held liable for their own conduct under state law is beside the point. Here, the Committees' liability is based solely on whether Ponzi scheme funds constitute an illegal source of political contributions, a question already answered by federal law.

3. Federal Law Does Not Allow for Disgorgement to Plaintiff.

Finally, Plaintiff questions whether disgorgement of the contributions at issue would constitute a "refund" given that the funds would be returned to the receiver rather than the donors themselves. Resp. Br. at 16. In fact, federal law channels excess soft money contributions to only two types of recipients: donors and the United States Treasury. See 11 C.F.R. § 300.12(c) ("Any non-Federal funds remaining . . . must be either disgorged to the United States Treasury, or returned by check to the donors . . . .); cf. FEC Advisory Op. 1996-5, at 3 (Mar. 14, 1996) (advising campaign to return illegal contributions to either the original donor or the United States Treasury). Plaintiff's assumption that political committee funds are available for any and all takers, including a donor's creditors, misunderstands the strict regulatory scheme that governs the Committees' acquisition and disgorgement of political contributions.

III. CONCLUSION

For the reasons stated above and in the Committees' Opening Brief, the Committees respectfully submit that Plaintiff's Complaint should be dismissed with prejudice.

Dated: May 28, 2010

Respectfully submitted,

/s/ Marc Erik Elias

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of May, 2010, I electronically filed the foregoing document with the Clerk of the Court, using the CM/ECF system, and that I have served all counsel of record electronically.

/s/ Matt C. Acosta
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