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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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 Notably, the Defendants do not cite a single case standing for that proposition.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 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 [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.

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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.*

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[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,

BAKER BOTTS L.L.P.

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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
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