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 themselves 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

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[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,

GRUBER, HURST, JOHANSEN & HAIL LLP

/s/ Mark A. Shank
MARK A. SHANK
State Bar No. 18090800
G. MICHAEL GRUBER
State Bar No. 08555400
BRIDGET A. BLINN
State Bar No. 24045510
DEMARRON A. BERKLEY
State Bar No. 24050287

1445 Ross Avenue, Suite 2500
Dallas, Texas 75202
214.855.6800 – phone
214.855.6808 – fax

ATTORNEYS FOR DEFENDANTS NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, REPUBLICAN NATIONAL COMMITTEE; and NATIONAL REPUBLICAN SENATORIAL COMMITTEE

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