

FILED DISTRICT COURT  
Third Judicial District

OCT 29 2012

SALT LAKE COUNTY

By \_\_\_\_\_ Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT, SALT LAKE COUNTY  
STATE OF UTAH

R. WAYNE KLEIN, RECEIVER FOR  
FFCF INVESTORS, LLC, ASCENDUS  
CAPITAL MANAGEMENT, LLC, and  
SMITH HOLDINGS, LLC,

Plaintiffs,

vs.

CAPITAL ONE BANK (USA), N.A.,

Defendant.

RULING

Case No. 100925562

Judge: L.A. DEVER

The above entitled matter is before the Court on cross-motions for summary judgment. Having reviewed the motions and, having heard oral arguments on the matter on August 27, 2012, the Court hereby makes the following Ruling.

The Court first reiterates the standard for a summary judgment review.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any *material fact* and that the moving party is entitled to a judgment as a matter of law. Gudmundson v. Del Ozone, 2010 UT 33, ¶44, 232 P.3d 1059 (citation and quotations omitted)(emphasis added).

"A disputed fact is '*material*' if it might affect the outcome of the suit under the governing law, and the dispute is '*genuine*' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Schutz v. Thorne, 415 F.3d 1128, 1132

(10th Cir.2005)(citation omitted)(emphasis added).

Moreover, in its review of summary judgment motions, the court does not weigh evidence or assess credibility, rather the court's sole inquiry is to determine whether there is a genuine issue of material fact. A.C. Fin. v. Salt Lake County, 948 P.2d 771, 785 (Utah 1997) (citation omitted); see also Draper City v. Estate of Bernardo, 888 P.2d 1097, 1101 (Utah 1995) ("It is not the purpose of the summary judgment procedure to judge the credibility of the averments of parties, or witnesses, or the weight of evidence. Neither is it to deny parties the right to a trial to resolve disputed issues of fact. Its purpose is to eliminate the time, trouble and expense of trial when upon any view taken of the facts as asserted by the party ruled against, he would not be entitled to prevail." (citation omitted)).

**1. Substitution of Defendant**

On February 15, 2012, the Court entered an Order granting the parties Stipulated Motion to Substitute Capital One Bank (USA), N.A., as Defendant in place of Capital One, N.A.

**2. Statute of Limitations**

Plaintiffs' Complaint sets forth two causes of action against Defendant: (1) Fraudulent Transfer pursuant to the Uniform Fraudulent Transfer Act, ("UFTA") Utah Code Annotated Section 25-6-1 et. seq., and, (2) Unjust Enrichment.



## Fraudulent Transfers under UFTA

Utah Code Annotated Section 25-6-10, of the Uniform Fraudulent Transfer Act,

provides in relevant part:

A claim for relief or cause of action regarding a fraudulent transfer or obligation under this chapter is extinguished unless action is brought:

- (1) under Subsection 25-6-5 (1)(a)<sup>1</sup>, 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 Subsection 25-6-5 (1)(b)<sup>2</sup> or 25-6-6 (1)<sup>3</sup>, within four years

---

<sup>1</sup>States:

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

- (a) with actual intent to hinder, delay, or defraud any creditor of the debtor;]

(West 2012).

<sup>2</sup>States:

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

- (a) with actual intent to hinder, delay, or defraud any creditor of the debtor; or
- (b) without receiving a reasonably equivalent value in exchange for the transfer or obligation; and the debtor:
  - (i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
  - (ii) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

Id.

<sup>3</sup>States:

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if:

- (a) the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or

after the transfer was made or the obligation was incurred[.]

(West 2012)(emphasis added).

Defendant asserts that pursuant to the Section 25-6-10, as noted above, Plaintiffs' claims under UFTA are barred by the statute of limitations. (Def.'s Mem. In Supp., 17-18). Defendant further argues that the theory of adverse domination ("Theory") does not apply pursuant to the holding in Klein v. Capital One Financial Corporation, No. 4:10-CV-00629-EJL, 2011 WL 3270438 (D. Idaho July 29, 2011). ("Based on the cases discussed above and the statutory language of Idaho's UFTA, the Court finds the time limits applicable to the Receiver's fraudulent-transfer claims began to run at the time each allegedly fraudulent transfer took place; *not on the date that the Receiver was appointed*. Like Arizona and California, Idaho's UFTA 'extinguishes' causes of actions where they are filed outside of the specified time frame." (emphasis added)). (Def.'s Reply 14-16).

Defendant's noted case is an Idaho case within the Ninth Circuit. The U.S. District Court, District of Utah *did* address the Theory in 2010 in Wing v. Dockstader, No. 2:08 CV 776, 2010 WL 5020959, \*3 (D. Utah Dec. 3, 2010), whose holdings, contrary to Klein, were then recently affirmed by the Tenth Circuit in Wing v.

---

obligation; and  
(b) the debtor was insolvent at the time or became insolvent as a result of the transfer or obligation.

Id.



Dockstader, No. 11-4006, 2012 WL 2020666, \*2-3 (10th Cir. June 6, 2012).

The Tenth Circuit court explained:

The one-year tolling period in section 25-6-10 refers to when a transfer could reasonably have been discovered "by the claimant ." (emphasis added). The district court concluded the Receiver's action was timely filed because *the Receiver could not reasonably have discovered any fraudulent transfer prior to his appointment*. Because the Receiver was appointed on May 5, 2008 and filed this action just over five months later, the court concluded the Receiver's claims were timely brought. The district court also concluded *Utah would likely adopt the "adverse domination" theory for purposes of computing the statute of limitations. Under the adverse domination theory, "as long as a corporation is controlled or 'dominated' by wrongdoers against whom a cause of action exists, the statute of limitations is tolled because the wrongdoers cannot be expected to bring an action against themselves."* Saunders v. Sharp, 793 P.2d 927, 932 (Utah App.1990) (declining to extend doctrine to excuse failure to preserve issue for appeal). *This court agrees*. A contrary rule would perversely foreclose from recovery early transfers in a Ponzi scheme which is successfully run for a long period of time. Applying the adverse domination theory to this case, all available evidence established that Southwick used the Vescor entities in a coordinated scheme to defraud investors. The entities therefore could not reasonably have been expected to bring claims against themselves, and the district court appropriately concluded the Receiver's claims were brought within the applicable statute of limitations.

Id. at \*3.

Although the Theory is applicable to the pending matter, the Court must still consider whether Plaintiffs UFTA claim was timely in light of the Receiver's appointment and Section 25-6-10(1).

The Receiver in the entitled matter was appointed on March 18, 2009, and the Complaint filed December 22, 2010. The time frame is beyond the one (1) year tolling

period. The issue is whether the Receiver could have reasonably discovered the existence of the claim during the one (1) year period. The Receiver argues that significant time was required to identify all relevant transfers, trace all funds, and identify possible claims and thus, the potential claims could not have reasonably been discovered immediately upon the Receiver's appointment. (Pl.'s Mem. in Opp. to Def.'s Mot. for Summ. J. 15-16). Defendant, however, counters that the Receiver had knowledge of the transfers to it within four (4) months of the Receiver's appointment, as revealed by the Receiver's Third Report to the court in the Barnes action<sup>4</sup>. (Def.'s Reply, 17). This fact has not been disputed.

Therefore, because the Complaint was not filed "within one year after the transfer or obligation was or could reasonably have been discovered by the claimant [Receiver]"<sup>5</sup>, Utah Code Ann. § 25-6-10(1) (emphasis added), Plaintiffs' first cause of action is HEREBY DISMISSED.

Accordingly, the issue of the standing<sup>6</sup> of the Receiver as it relates to the UFTA,

---

<sup>4</sup>Barnes v. FFCF Investors, LLC, et al, Case No. 080922273.

<sup>5</sup>See Wing, 2010 WL 5020959 at \*3 ("In Wing v. Kendrick, No. 2:08-cv-1002, U.S. Dist. LEXIS 41923, 2009 WL 1362383 (D.Utah May 14, 2009) the court acknowledged the four-year statute of limitations under the Uniform Fraudulent Transfer Act but also determined that the Receiver was entitled to the benefit of the discovery rule, which requires an action to be filed "within one year after the transfer or obligation was or could reasonably have been discovered." Utah Code Ann. § 25-6-10. In Kendrick, the court concluded that the Receiver's claims were timely filed because they were filed within eight months of the Receiver's appointment. Kendrick, U.S. Dist. LEXIS 41923, at \*9, 2009 WL 1362383." (emphasis added)).

<sup>6</sup>Although the particular matter is moot, the Court directs the parties to the holding on the issue of standing in Wing, 2012 WL 2020666 at \*1.



and the other arguments raised pursuant to the UFTA are HEREBY MOOT.

### Claims for Unjust Enrichment

Consistent with the findings in Wing, 2012 WL 2020666, \*2-3, this Court finds that the Receiver could not have reasonably discovered the transfers to pursue a claim of unjust enrichment while said transfers were being "controlled or dominated by wrongdoers . . . because the wrongdoers *cannot be expected to bring an action against themselves.*" Id. at 3 (citation and internal quotations omitted)(emphasis added).

Therefore, the Receiver's claim for Unjust Enrichment, filed December 22, 2010, is within the four (4) year statute of limitations period as per Utah Code Annotated Section 78B-2-307, of his appointment of March 18, 2009. See also e.g. Russell Packard Dev., Inc. v. Carson, 2005 UT 14, ¶¶ 20-30, 108 P.3d 741.

### 3. Defendant as Creditor

Plaintiffs have conceded that they will consider Defendant's claim as a creditor of the Receivership Entities *if* Defendant submits its claim(s) through the claims processing procedure in the Barnes action<sup>7</sup>, regardless of the deadline having passed. (Pls.' Mem. In Supp., iii, fn.1). See also Utah Code Ann. § 48-2c-1212(1) ("The court appointing a receiver or custodian has *exclusive jurisdiction* over the company and all of its property wherever located." (emphasis added)).

Accordingly, Defendant's claims before this Court are HEREBY STRICKEN.

---

<sup>7</sup>Barnes v. FFCF Investors, LLC, et al. Case No. 080922273.

Defendant is ORDERED to submit its claims consistent with the claims processing procedure in Barnes v. FCCF Investors, LLC, et al, Case No. 080922273.



4. Remaining Arguments

Because Defendant is ordered to submit its claim(s) through the claims processing procedure in Barnes, the remaining arguments raised by the parties pertaining to Unjust Enrichment and Alter Egos are also appropriate for consideration in Barnes, before the Honorable Denise P. Lindberg.

This Ruling stands as the Order of the Court. No further order is required.

Dated this 27<sup>th</sup> day of October, 2012.

BY THE COURT:

L.A. DEVER  
DISTRICT COURT JUDGE




**CERTIFICATE OF MAILING**

I certify that I mailed a true and correct copy of the foregoing Ruling dated this 29 day of October, 2012, postage prepaid, to the following:

David C. Castleberry  
MANNING CURTIS BRADSHAW & BEDNAR, LLC  
170 South Main Street, Suite 900  
Salt Lake City, UT 84101-1655

Mona L. Burton  
Romaine C. Marshall  
HOLLAND & HART  
222 South Main Street, Suite 2200  
Salt Lake City, UT 84101

Jarrett L. Hale  
Jesse T. Moore  
HUNTON & WILLIAMS, LLP  
111 Congress Avenue, Suite 1800  
Austin, TX 78704

  
CLERK OF COURT