UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
	)	CHAPTER 11
EQUIPMENT ACQUISITION RESOURCES, INC.,	)	Case No. 09 B 39937
Debtor.	)	Hon. Susan Pierson Sonderby
WILLIAM A. BRANDT, JR., solely in his capacity as Plan Administrator for Equipment Acquisition Resources, Inc.,	)	Adv. No. 11-02196
Plaintiff,	)	
v.	)	
U.S. BANCORP, INC. and LYON FINANCIAL SERVICES, INC. d/b/a U.S. BANCORP MANIFEST FUNDING SERVICES,	)	
Defendants.	)	

NOTICE OF MOTION

To: Jon Maxwell Beatty
Diamond McCarthy LLP
Mbeatty@diamondmccarthy.com
Attorney for William A. Brandt, Jr., solely in his capacity as Plan Adminstrator for Equipment Acquisition Resources, Inc.

PLEASE TAKE NOTICE that on February 8, 2012 at 10:30a.m., or as soon thereafter as counsel may be heard, I shall appear before the Honorable Judge Susan Sonderby, or any judge sitting in her stead, in Courtroom 642 at the Everett McKinley Dirksen United States Courthouse, located at 219 S. Dearborn St., Chicago, IL 60604, and then and there present Defendant U.S. Bank National Association, as successor by its merger to U.S. Bancorp Equipment Finance, Inc., which was the successor by its merger to Lyon Financial Services, Inc.'s *Motion to Dismiss Plaintiff's First Amended Complaint,* a copy of which is attached hereto and herewith served upon you.

U.S. BANCORP, INC. and LYON FINANCIAL SERVICES, INC. d/b/a U.S. BANCORP MANIFEST FUNDING SERVICES,

Date: January 19, 2012 By: /s/Alex Darcy

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U.S. BANK NATIONAL ASSOCIATION'S
MOTION TO DISMISS FIRST AMENDED COMPLAINT

Now Comes Defendant U.S. Bank National Association, as successor by its merger to U.S. Bancorp Equipment Finance, Inc., which was the successor by merger to Lyon Financial Services, Inc. ("U.S. Bank"), and for its Motion to Dismiss Plaintiff's First Amended Complaint (the "Amended Complaint"), pursuant to the Federal Rules of Bankruptcy Procedure 7009 and 7012, and the Federal Rules of Civil Procedure 9(b) and 12(b)(6), states as follows:

INTRODUCTION

William J. Brandt, solely in his capacity as the Plan Administrator for Equipment Acquisition Resources, Inc. (hereinafter "Plaintiff"), filed suit for fraudulent conveyances against nearly every lender and finance company that extended credit, either directly or indirectly, to

EAR. Plaintiff filed these suits despite his representations to the Court, and to the press, that Sheldon Player manipulated EAR in allowing it to defraud its creditors, such as U.S. Bank, for Player's and others' personal benefit. In his Amended Complaint, Plaintiff never alleges that U.S. Bank engaged in any of the "badges of fraud" or that U.S. Bank acted in any way other than its capacity as a third party, arm's length lender to EAR. Instead, Plaintiff seeks to take advantage of what, in the context of this case, he hopes is a loophole in fraudulent conveyance law by forcing EAR's lenders – the victims of EAR's fraud - to prove their "good faith" or else suffer further financial loss. *The injustice of Plaintiff's actions is demonstrated by the proofs of claim filed in this case, showing that lenders like U.S. Bank represent more than ninety-nine percent (99%) of the total claims*. Thus, Plaintiff's goal is to attempt to take money from the fraud victims – a second time – so he can give it back to them, less his professional fees and expenses. Plaintiff is not duty-bound to pursue dubious fraudulent conveyance claims, as many trustees recognize the inefficiency and absurdity of this approach. For example, of five large scale equipment leasing frauds which were revealed generally at the same time as EAR's fraud, Plaintiff is the ***only*** trustee to pursue fraudulent conveyance claims against defrauded lenders. See, e.g. *In re Wildwood Industries, Inc.*, Case No. 09-B-70602 (Bankr. C.D. Ill. 2009) ($200,000,000 equipment leasing fraud case); *In re Sysix Technologies, LLC*, Case No. 09-B-36439 (Bankr. N.D. Ill. 2009) ($30,000,000 equipment leasing fraud case); *In re Allied Healthcare Services, Inc.*, Case No. 10-B-35561 (Bankr. D.N.J. 2010) ($85,000,000 equipment leasing fraud case); *In re American Screw & Rivet Corporation*, Case No. 10-08015 (Bankr. D.S.C. 2010) ($50,000,000 equipment leasing fraud case).

Plaintiff's Amended Complaint, however, fails to satisfy the Seventh Circuit's standards for pleading fraudulent conveyance claims, because Plaintiff fails to allege any facts

demonstrating U.S. Bank was anything other than an arm's length creditor receiving payment on an antecedent debt. *B.E.L.T., Inc. v .Wachovia Corp*., 430 F.2d 474, 477-78 (7th Cir. 2005) (affirming dismissal of Fourth Amended Complaint where plaintiffs failed to allege that defendant bank acted in bad faith through specific acts when it received alleged fraudulent conveyances). Furthermore, half of Plaintiff's $2,000,000 claim under the Uniform Fraudulent Transfer Act is time barred. As more specifically set forth below, the Amended Complaint should be dismissed with prejudice.

FACTUAL BACKGROUND

Plaintiff alleges that between "2005 and 2007, [U.S. Bank] acquired an interest in seven different agreements with EAR . . . ." *See* Amended Complaint, ¶ 20. According to Plaintiff, EAR used Machine Tools Direct ("MTD") as a sham vendor from which EAR's various lenders - defined by Plaintiff as the "Financing Entities" - would unwittingly purchase either non-existent equipment or grossly over-valued equipment, and either sell or it lease it to EAR, with MTD funneling the sales proceeds back to EAR. *See* Amended Complaint, ¶¶ 14, 15. The Agreements, although not attached to the Amended Complaint, are equipment leases. *See* Amended Complaint. U.S. Bank is not alleged to be one of the "Financing Entities." *Id*. Plaintiff further alleges that Mr. Player "upon information and belief . . . caused EAR to enter into the Agreements" in furtherance of "his fraudulent scheme." *Id*., ¶ 21. Plaintiff alleges that, since EAR was a Ponzi-like scheme, any funds transferred to U.S. Bank pursuant to the Agreements "were made with actual intent to hinder, delay or defraud entities to which EAR was or became indebted . . ." *Id*., ¶¶ 13, 16, 26. Plaintiff alleges that U.S. Bank received approximately $1,005,950.06 from EAR under the Agreements between November 13, 2007 and July 13, 2009.

Id., Exhibit A. He also alleges that U.S. Bank received $1,150,961 from EAR under the Agreements between April 10, 2006 and October 10, 2007. *Id.*, Exhibit B.

In Count I of his Amended Complaint, Plaintiff seeks recovery of the amounts listed on Exhibit A thereto pursuant to § 548(a)(1)(A) of the Bankruptcy Code. *See* Amended Complaint, ¶¶ 23-27. In Count II, Plaintiff seeks the amounts listed under both Exhibits A and B of the Amended Complaint, pursuant to section 5(a)(1) of the Illinois' Uniform Fraudulent Transfer Act ("UFTA"). *Id.*, ¶¶ 28-32; 740 ILCS 160/5(a)(1) (West 2012). Plaintiff includes additional counts pursuant to § 550 of the Bankruptcy Code to the extent the "[U.S. Bank] transferred funds between themselves" (Count III), and he seeks disallowance of U.S. Bank's claim under § 502 of the Bankruptcy Code, pending U.S. Bank's payment of any liability to EAR (Count IV). *See* Amended Complaint., ¶¶ 33-39. Plaintiff is not suing U.S. Bank for preference liability. Plaintiff filed his original Complaint on October 21, 2011. All amounts listed on Exhibit B were paid more than four years before the filing of the original Complaint. *See* Amended Complaint.

Absent from the Amended Complaint is any allegation that U.S. Bank had reason to know of EAR's or Sheldon Player's scheme. Furthermore, Plaintiff does not allege that U.S. Bank: knew of the scheme when it received any payments; knew whether EAR was insolvent; took payment in bad faith; or participated in any badges of fraud with respect to any specific payments received by U.S. Bank. Moreover, Plaintiff does not allege that U.S. Bank earned a return on its "investment" or that, in the context of the "Ponzi-like" scheme, it was a "net winner" by receiving more than it paid its assignors for the Agreements. Plaintiff neglects to mention that U.S. Bank filed a $1,183,737.48 Proof of Claim, representing the unpaid balance on its Agreements, a copy of which is attached hereto as Exhibit 1.

ARGUMENT

If a plaintiff fails to plead sufficient facts to state a claim that is plausible on its face, his complaint should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009); Fed. R. Civ. P. 12(b)(6) (West 2012). Here, the Amended Complaint contains three fatal deficiencies. First, in pleading a fraud claim, Plaintiff must satisfy Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure (Bankruptcy Rules 7009 and 7012) by alleging specific details on how U.S. Bank, as an assignee of the lease paper, can have transfers avoided on fraudulent conveyance grounds when the payments U.S. Bank received were made pursuant to an arm's length, written debt obligation. Second, EAR's payment on an arm's length, antecedent debt without any allegations of fraud or bad faith by U.S. Bank defeats a fraudulent conveyance claim as a matter of law. Finally, claims for the transfers identified on Exhibit B are barred by the applicable four year statute of limitations under the UFTA, calculated from the date of the filing of the original complaint, not the date of the bankruptcy petition.

A. Plaintiff Fails to Allege a Plausible and Specific Claim in Violation of Rules 12(b)(6) and 9(b), Where U.S. Bank is Admitted to be an Arm's Length Lender Which Received Payments from EAR on an Antecedent Debt.

Even in the absence of fraud, plaintiffs must plead sufficient detail to make their claims plausible. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1944 (2009); *In re Text Messaging Antitrust Litigation*, 630 F.3d 622, 629 (7th Cir. 2010). The purpose of this rule is to prevent a plaintiff with a groundless claim from inflicting the expense of discovery on a non-culpable defendant. *Bell Atlantic v. Twombley*, 127 S. Ct. 1955, 1967 (2007). A bankruptcy trustee's fraudulent conveyance claims are subject to the heightened pleading standard of Rule 9(b) which requires fraud to be pled with specificity. *In re Life Fund 5.1, LLC*, 2010 WL2650024, at 3 (Bankr. N.D.

Ill. 2010). Typically, a plaintiff asserting a fraud claim must assert the who, what, when, where, and how of the fraud, unless the information is alleged to be in the possession of another party and the plaintiff alleges the basis of his beliefs. *Uni*Quality, Inc. v. Infotrax, Inc*., 974 F.2d 918, 924 (7th Cir. 1992). Although normally ruling on the merits of an affirmative defense is not appropriate on a motion to dismiss, doing so is appropriate where the facts establishing the defense are plain on the face of a complaint. *U.S. Gypsum Co. v. Ind. Gas Co., Inc.*, 350 F.3d 623, 626 (7th Cir. 2003) ("A litigant may plead itself out of court by alleging (and thus admitting) the ingredients of a defense[.]").

For the purposes of a motion to dismiss, § 548 (a)(1)(A) of the Bankruptcy Code and the UFTA are identical. *In re Lancelot Investors Fund, L.P.*, 451 B.R. 833, 838 (Bankr. N.D. Ill. 2011). To assert a claim for fraudulent conveyance, a plaintiff must allege the debtor made *each* transfer with actual intent to hinder, delay or defraud a creditor. *Grede v. Bank of New York Mellon*, 441 B.R. 864 (Bankr. N.D. Ill. 2010); *see also B.E.L.T., Inc.*, 430 F.2d at 477-78. The plaintiff cannot simply recite the elements of the claim without filling in the background facts, and must allege sufficient details to show a fraud, even if the fraud is alleged to be a Ponzi-like scheme. *See e.g. In re First Commercial Mgmt. Group, Inc.*, 279 B.R. 230, 235 (Bankr. N.D.Ill. 2010).

Where the payments are made on account of an antecedent, arm's length debt, the payments are presumed to be made for value and in good faith, unless the plaintiff alleges extenuating circumstances, such as the creditor's bad faith or participation in the badges of fraud. *See B.E.L.T., Inc.* 430 F.2d at 477-78. Critically, *B.E.L.T.* stands for the proposition that the plaintiff must plead some nexus between the badges of fraud and defendant's bad faith or wrongfulness, when all the defendant has done is receive payment on an arm's length, antecedent

debt. *Id*. Finally, a plaintiff is required to allege that the circumstances of ***each*** transfer sought to be avoided is tainted with fraud. *Freeland v. Enodis Corp*., 540 F.3d 721, 734 (7th Cir. 2008) (whether a transfer is fraudulent is determined by the circumstances existing when the transfer was made).

Here, Plaintiff fails to satisfy the specificity requirements of Rule 9 and the plausibility requirements of Rule 12(b)(6) by failing to allege with any specificity or even generally that U.S. Bank participated in any badges of fraud. Similarly, Plaintiff fails to allege that U.S. Bank acted in bad faith at any point during the alleged scheme. He fails to allege any facts implying or supporting any allegation of bad faith ***when any of the transfers listed on Exhibits A and B were actually made***. *Freeland*, 540 F.3d at 734. This lack of specificity combined with the Plaintiff's aim of taking money from U.S. Bank, after it has been defrauded just to return the funds to U.S. Bank later, exemplifies the complete unproductiveness of this lawsuit. In short, Plaintiff fails to allege ***any*** detail of how U.S. Bank should be a defendant in this case, other than the fact that it received payments on contracts it allegedly acquired from other lenders. Based on the holding in *B.E.L.T.*, Plaintiff's bare bones pleading fails to satisfy the pleading requirements under Rules 9 and 12 of the Federal Rules (Rules 7009 and 7012 of the Federal Rules of Bankruptcy Procedure). Therefore, the Amended Complaint should be dismissed with prejudice.

B. A Preferential Payment on an Arm's Length, Antecedent Debt, in the Absence of Fraud by the Entity Receiving the Payment, is Not a Fraudulent Conveyance as a Matter of Law.

Payment on arm's length, antecedent debt, in the absence of a plaintiff alleging facts that the entity receiving the payment acted in bad faith, is not a fraudulent conveyance ***as a matter of law***. *See B.E.L.T., Inc.*, 430 F.2d at 477-78. In *B.E.L.T.*, the plaintiffs alleged the borrower made a fraudulent transfer to the defendant, a bank, using funds the borrower had solicited from the

plaintiffs. *Id*. 477-78. The plaintiffs sued the bank that received the payment from the borrower, alleging that the bank knew of the borrower's insolvency. *Id*. The plaintiffs alleged that their funding allowed the borrower to keep his scheme of duping creditors going longer than it should have lasted (much like EAR), such that the defendant-bank improperly benefitted from the transfer. *Id*. The plaintiffs sued the bank alleging that the borrower made the transfer to the bank with the actual intent to hinder, delay or defraud any creditor of the borrower. *Id*. at 478.

The Seventh Circuit affirmed dismissal of the complaint, holding that even if the bank knew of the debtor's insolvency, the transfer would only be a preference, and not a fraudulent conveyance, in the absence of the plaintiff pleading any facts alleging that badges of fraud were attributable to the bank, or that the bank acted in bad faith. *B.E.L.T., Inc.*, 430 F.2d 474. Both the District Court and the Seventh Circuit rejected the plaintiffs' argument that the bank's acceptance of a payment, knowing the creditor intended to defraud its creditors, was a fraud or bad faith by the defendant, when the payment was made pursuant to an antecedent, arm's length debt. *Id*. at 477-48. **"Knowledge on the part of the creditor receiving the preference that the debtor acted with fraudulent intentions is immaterial if the creditor has done nothing except receive payment of his claim."** *B.E.L.T., Inc. v. LaCrad Internat'l Corp*., 2002 WL31761400, at 2 (N.D. Ill. 2002), quoting, 37 AM.JUR.2d *Fraudulent Conveyances and Transfers* §71, affirmed, *B.E.L.T. Inc.*, 430 F.2d 474; *see e.g. In re Sharp Int'l* Corp., 403 F.3d 43, 55-56 (2d Cir. 2005) (affirming dismissal of debtor's adversary complaint for fraudulent conveyance under New York law, and stating that a lender's knowledge of a debtor's fraud, "without more, does not allow an inference that [the lender] received the $12.25 million payment in bad faith."); Boston *Trading Group, Inc. v. Burnazos*, 835 F.2d 1504, 1510 (1st Cir. 1987) ("Suppose that S&K, officers of Corporation C, obtain C's money through dishonest means

(larceny, fraud, etc.) and use it to pay a debt that S&K owe B, a transferee who knows of, *but did not participate in*, S&K's dishonesty . . . . we have found no modern case (nor any reference in any modern case, treatise, or article . . . in the past 400 years) that has found a fraudulent conveyance in such circumstances.") (emphasis original).

Here, Plaintiff alleges that U.S. Bank is an assignee of various finance agreements originated by other lenders, under which EAR was obligated to make monthly payments. EAR's monthly payments allegedly made to U.S. Bank are set forth in the Exhibits to the Amended Complaint. These allegations establish that U.S. Bank is nothing but an arm's length lender, like the defendant-bank in the *B.E.L.T.* case. That Sheldon Player is alleged to have directed EAR to make the payments set forth on Exhibits A and B with actual intent to hinder, delay, or defraud any of EAR's creditors is of no consequence when Plaintiff fails to allege that U.S. Bank participated in any badges of fraud or acted in bad faith. The holding in *B.E.L.T.* effectively raises the pleading threshold for plaintiffs where the defendant receiving the alleged fraudulent conveyance is simply accepting repayment of an arm's length, antecedent debt, by requiring the plaintiff to allege that the defendant is affirmatively tarnished with the badges of fraud or bad faith. Accordingly, the Court should exercise its gate keeper function by dismissing Plaintiff's claim with full confidence that U.S. Bank did absolutely nothing unlawful, because, as Plaintiff admits, the payments were all made long before the fraud was revealed. The implied, un-pled premise of Plaintiff's claim is implausible – that a large commercial bank purchased lease paper and then somehow unlawfully induced the borrower to make contractually obligated payments years before it was revealed that the borrower's business was largely a scam. Plaintiff's suit is exactly the kind of *in terrorem* claim the Supreme Court held should be dismissed at the pleading stage. *Twombley*, 550 U.S. at 558.

Undoubtedly, Plaintiff will attempt to argue that his Ponzi-like scheme allegations change the analysis, but this argument should be rejected. First, as noted by other adversary defendants, Sheldon Player's and EAR's fraud is not technically a Ponzi scheme since it was not an investment scheme where investors hoped to earn returns. *See Hayes v. Palm Seedlings Partners-A*, 916 F.2d 528, 531 (9th Cir. 1990). Instead, as Plaintiff concedes, it is alleged to be a "Ponzi-like" scheme where Sheldon Player and EAR are alleged to have obtained bulk payments (for the equipment) from various lenders, which EAR paid back to its lenders over time pursuant to its contractual commitments. Significantly, the plaintiffs in *B.E.L.T*. asserted that the borrower fleeced one set of lenders to pay another lender, a bank, just as EAR and Sheldon Player are alleged to have done here. As noted above, the Seventh Circuit held that the plaintiffs must allege how badges of fraud were apparent in the bank's conduct *when it received the transfers*. In other words, even in a Ponzi-like scheme, an arm's length creditor receiving payment on an antecedent debt can retain payments in the absence of allegation that the lender's receipt of the payment was clouded by badges of fraud attributable to the lender. *B.E.L.T. Inc.*, 430 F.2d 474.

Furthermore, even if the Court applies the analysis offered in other Ponzi cases, Plaintiff still has not alleged that U.S. Bank was a "net winner" in this transaction. *See Picard v. Katz*, 2011 WL4448638, at 4 (S.D.N.Y. 2011). Bankruptcy courts generally allow Ponzi scheme investors to retain payments up to the amount of their principal. *Id*. Here, Plaintiff fails to allege that U.S. Bank recovered more than it paid for the leases. What Plaintiff is doing is akin to Irving Picard, the trustee in the *Madoff* case, suing all the investors in Bernie Madoff's scheme, regardless of whether the particular investor turned a profit or not. This approach is nonsensical, inefficient, and should be rejected.

C. The Plain Meaning Rule of Statutory Interpretation Demonstrates that the Transfers Identified on Exhibit B Cannot be Avoided, Because the Claim Is Time Barred.

Plaintiff's UFTA claim with respect to the transfers identified on Exhibit B to the Amended Complaint violates the four year statute of limitations which runs from the date the suit is filed. Section 10 of the UFTA provides, "[a] cause of action with respect to a fraudulent transfer or obligation under this Act is extinguished unless action is brought: (a) under paragraph (1) of subsection (a) of Section 5, *within 4 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." 740 ILCS 160/10(a) (West 2012) (emphasis supplied). All transfers on Exhibit B occurred more than four years before October 21, 2011, so claims for these transfers are time barred.

Plaintiff maintains that the statute of limitations is tolled under § 546 of the Bankruptcy Code by the filing of EAR's bankruptcy petition, giving him an additional two years to bring the state law claim. Section 546 provides:

> (a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of--
>
> (1) the later of--
>
> (A) 2 years after the entry of the order for relief; or
>
> (B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or
>
> (2) the time the case is closed or dismissed.

11 U.S.C. § 546(a) (West 2012). The bankruptcy courts in this district have conflicting opinions on whether the state law statute of limitations is tolled. *See Old Orchard Bank & Trust Co. v.*

Josefik, 72 B.R. 393, 397 (Bankr. N.D.Ill. 1987) (stating that state law statute of limitations controls deadline for filing fraudulent conveyance claim); *but see*, *Bay State Milling Co. v. Martin*, 142 B.R. 260, 266 (Bankr. N.D.Ill. 1992) (stating that state law statute of limitations is tolled under § 546 of the Bankruptcy Code). Although the weight of authority from other jurisdictions favors Plaintiff's interpretation that the statute of limitations is tolled, this conclusion is based on policy arguments favoring debtor's rights in bankruptcy cases, rather than the express terms of the statutes. This conclusion is inconsistent with the rule that statutes are to be construed according to their plain meaning. *Kovacs v. U.S.*, 614 F.3d 666, 673 (7th Cir. 2010).

Where statutes reference each other, they should be construed to be consistent with each other whenever possible. *Se, In re Johnson*, 787 F.2d 1179, 1181 (7th Cir. 1986); *see also, In re Murray*, 276 B.R. 869, 876 (Bankr. N.D. Ill. 2002). Generally, a high threshold is required to preempt a state law for conflicting with a federal law. *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1985 (2011). Preemption can take on three different forms: express preemption, field preemption, and conflict preemption. *Hoagland v. Town of Clear Lake,* 415 F.3d 693, 696 (7th Cir. 2005). "Express preemption occurs when a federal statute explicitly states that it overrides state or local law." *Id.* As for field preemption, it exists "when federal law so thoroughly 'occupies a legislative field' as to make it reasonable to infer that Congress left no room for the states to act." *Id.* The *Bay State Milling Co.* court, however, limited its finding of preemption to the third type, conflict preemption, which "exists if it would be impossible for a party to comply with both local and federal requirements or where local law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Hoagland*, 415 F.3d at 696; *Bay State Milling Co.*, 142 B.R. at 266.

To determine whether state and federal law are in conflict, it is necessary to "examin[e] the federal statute as a whole and identify its purpose and intended effects." *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 373 (2000). This analysis requires that the court "consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." *Frank Bros. v. Wis. Dep't of Transp.,* 409 F.3d 880, 894 (7th Cir.2005). Furthermore, "mere differences between state and federal regulation of the same subject are not conclusive of preemption . . . the crucial inquiry is whether [state law] differs from [federal law] in such a way that achievement of the congressional objective ... is frustrated." *Id.*

Here, the congressional objective, beyond allowing a trustee to pursue state law fraudulent conveyance claims, is unclear. Section 544(b)(1) provides:

> Except as provided in paragraph (2), the trustee may avoid *any transfer of an interest of the debtor in property* or any obligation incurred by the debtor *that is voidable under applicable law by a creditor holding an unsecured claim* that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

11 U.S.C. § 544(b)(1) (West 2012) (emphasis supplied). The "applicable" state law cause of action referenced by this language is the UFTA, which provides that the "look back" period is calculated from the *filing date* of the complaint, meaning that fraudulent conveyances occurring within four years of the date of the complaint are recoverable. 740 ILCS 160/10(a) (West 2012). By contrast, under § 546 of the Bankruptcy Code, the two year "look back" date runs from the *date of the order for relief*. 11 U.S.C. § 546(a)(1) (West 2012). The difference in the start dates of the "look back" period means that the bankruptcy trustee must be diligent in bringing the UFTA claims promptly, if he wants to take advantage of the longer window (under Illinois law) to avoid transfers. Significantly, the UFTA includes a discovery rule, included in the passage above, which allows a plaintiff to bring a fraudulent conveyance claim for any transfer within

one year of its discovery (using a "knew or should have known" standard). 740 ILCS 160/10(a) (West 2012). Here, the one year deadline would have expired October 21, 2010, since the alleged fraud was exposed just before the filing of the petition on October 23, 2009.

The Official Comments to §§ 544 and 546 of the Bankruptcy Code are silent as to whether Congress intended for § 546 to toll state law the statute of limitations. *See* 11 U.S.C. § 544 and 546, Official Comments (West 2012). By its plain terms, § 546 is an administrative regulation designed to ensure that bankruptcy cases are moved forward, so as to conclude them in a reasonable amount of time. Capping the time period for allowing the trustee to investigate and file claims at two years furthers this purpose. If §546 were intended to extend the UFTA's statute of limitations, Congress would have written, "Any action under Sections 544, 545, 547, 548, and 553 can be commenced at any time until the earlier of: two years after the entry of the order for relief, or the date the case is closed…" The use of the expression "may not" in the original text is permissive rather than mandatory, suggesting that Congress did not intend to extend the UFTA's statute of limitations under § 546.

Furthermore, adopting the UFTA's four-year limitations provisions in bankruptcy court does not prejudice unfairly a bankruptcy trustee by putting him behind the eight ball from the start of a case, as the *Bay State Milling Co* court asserts. The UFTA's discovery rule allows a trustee to bring a claim occurring at any time within one year of discovering the claim. 740 ILCS 160/10(a) (West 2012). Here, Plaintiff determined the transfers to lenders were allegedly fraudulent at the outset of the case, giving him a year, or until October 2010, to bring any claim for fraudulent conveyance no matter how long ago it allegedly occurred. Plaintiff has only himself to blame for not bringing the claims in a timely fashion.

By contrast, Plaintiff's interpretation of § 546 of the Bankruptcy Code forces the Court to find unnecessarily a conflict between state and federal law (between the UFTA and § 546), and between §§ 544 and 546 of the Bankruptcy Code. Here, Plaintiff is compelled to argue that the Congress chose to incorporate a state statute under § 544, but then simultaneously desired to obviate a portion of that state statute – its statute of limitations - without expressing this intention directly. The weakness in Plaintiff's position is that § 546 covers more causes of action than just fraudulent conveyance claims under § 544, so it is ***not*** possible to argue that § 546 is rendered meaningless by construing it as U.S. Bank advocates. Section 546 as applied literally has no effect on the UFTA's statute of limitations. Reading § 546 in such a way as to extend the UFTA's statute of limitations is unwarranted under the plain meaning rule and, if anything, thwarts Congress' expressed intention of simply giving the trustee whatever rights a creditor would have under state law; no more, no less. Accordingly, this Court should conclude that Plaintiff's fraudulent conveyance claim in Count II, related to the transfers alleged in Exhibit B, is time barred and should be dismissed.

CONCLUSION

For all the foregoing reasons, Plaintiff's First Amend Complaint should be dismissed with prejudice. Alternatively, Count II of the First Amended Complaint should be dismissed as to the transfers set forth on Exhibit B.

U.S. BANCORP, INC. and LYON FINANCIAL SERVICES, INC. d/b/a U.S. BANCORP MANIFEST FUNDING SERVICES,

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