SO ORDERED.

SIGNED this 13 day of November, 2007.

ROBERT E. NUGENT
UNITED STATES CHIEF BANKRUPTCY JUDGE

NOT DESIGNATED FOR PUBLICATION

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	
GARY E. KRAUSE,	)	**Case No. 05-17429**
	)	**Chapter 7**
Debtor.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
and	)	
	)	
LINDA S. PARKS, Trustee	)	
	)	
Intervener,	)	
v.	)	**Adversary No. 05-5775**
	)	
GARY KRAUSE and RICHARD KRAUSE,	)	
	)	
Defendants	)	
and	)	
	)	
DRAKE KRAUSE and RICK KRAUSE,	)	
	)	
Intervener.	)	

MEMORANDUM OPINION DENYING
DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter is before the Court on Intervener Drake E. Krause's and Rick Krause's motion for partial summary judgment and Defendant Gary Krause's motion for partial summary judgment.[1] This adversary proceeding was commenced by the United States of America ("the Government") in the fall of 2005 against defendant/debtor Gary E. Krause ("Gary") and his brother Richard Krause ("Dr. Krause"), in his capacity as trustee of the Krause Children Trusts I, II, III, IV and V to enforce its federal tax liens and collect Gary's $3 million income tax liability. Linda Parks ("Trustee"), the chapter 7 trustee in Gary's bankruptcy, subsequently intervened, filing a Turnover Complaint. The Government seeks to have Gary's tax debt excepted from discharge under 11 U.S.C. § 523(a)(1)(C), to have its tax lien attach to fraudulently transferred property, to have numerous trusts and entities declared to be nominees of Gary, subject to the Government's federal tax lien, and to permanently enjoin further transfers.[2] The Trustee likewise asserts that the trusts and entities are nominees of Gary and therefore are property of the estate subject to turnover under 11 U.S.C. §§ 541, 542, and 543, and to avoid alleged fraudulent transfers under §§ 544(b), 548(a)(1), and 548(e)(1). Defendants seek summary judgment on (1) the nominee/alter ego claims, (2) the claims arising out of allegations of fraud based on KAN. STAT. ANN. §§ 33-101, 33-102, 33-103, 33-204, 33-205 and the common law ("fraudulent conveyance-based claims") and (3) the Trustee's § 548 claims.

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[1] Dkt. 400-401 and 410-11. The summary judgment motions of Gary and his intervener sons are substantially the same. For ease of reference in this opinion, the Court will refer to their motions for partial summary judgment and their positions collectively as the Defendants'.

[2] All future statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq. unless otherwise noted.

The Government and Trustee oppose Defendants' summary judgment motion.[3] Defendants have filed their respective replies.[4]

The Government and the Trustee have also filed their own motions for summary judgment.[5] The Court will address those summary judgment motions in a separate opinion.[6]

Summary Judgment Standards

The Court set forth the applicable summary judgment standards in its Memorandum Opinion on Plaintiffs' summary judgment motions and will not repeat them here.

Findings of Fact

The Court notes that most of Plaintiffs' controversions are based on Defendants' characterizations of certain transfers as "gifts" or "sales" or an implication that Dr. Krause or Teresa Briggs acted independently rather than at Gary's direction. The characterization of a transaction is a question of law for the Court. Conclusory terms or characterizations without any concrete facts to support the characterizations are afforded no weight by the Court. Likewise, factual disputes that are not material to the outcome under governing law will be disregarded.[7]

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[3] Dkt. 445 and 456. The responses of the Government and the Trustee are similar. For ease of reference in this opinion, any arguments or position jointly shared by the Government and Trustee shall be referred to as "Plaintiffs." Independent arguments will be identified separately.

[4] Dkt. 461, 462, 470, 471 and 474.

[5] Dkt. 405-407 and 415.

[6] *Atlantic Richfield Co. V. Farm Credit Bank ov Wichita*, 226 F.3d 1138, 1148 (10th Cir. 2000) (Cross-motions for summary judgment are to be treated separately; the denial of one does not require the grant of another).

[7] *See Cease v. Safelite Glass Corp.*, 911 F. Supp. 477 (D. Kan. 1995) (Only disputes over facts that might affect the outcome under governing law will preclude summary judgment); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (Factual disputes that are irrelevant or unnecessary will not be considered); *Richards v. City of Topeka*, 934 F. Supp. 378 (D. Kan. 1996). Although not required to, the Court has attempted to indicate those factual disputes that are not material.

The following facts are either uncontroverted or, if controverted, construed in the light most favorable to the Government and the Trustee, the nonmoving parties:

Relevant Individuals and Entities:

1. Teresa Briggs ("Teresa") and Gary were married on April 5, 1986.

2. Prior to their marriage, Teresa and Gary executed an Antenuptial Agreement which required Gary to establish a spendthrift trust upon the birth of their first child and fund it with an initial amount of $50,000. The corpus of the trust was to be increased by $50,000 upon the birth of a second child or upon the fifth birthday of the first child, whichever event occurred first.

3. Teresa and Gary had two sons. The eldest, Drake Krause, was born on May 4, 1988 and his brother, Richard ("Rick") Krause, was born on November 28, 1989.

4. On December 5, 1988, Gary Krause established the Krause Children's Irrevocable Trust I ("KCT1") for the benefit of Drake; on December 23, 1989, he established the Krause Children's Irrevocable Trust II ("KCT2") for the benefit of his sons; and on May 18-19, 1990, he established three additional trusts for the benefit of his sons: the Krause Children's Irrevocable Trust III ("KCT3"), the Krause Children's Irrevocable Trust IV ("KCT4"), and the Krause Children's Irrevocable Trust V ("KCT5"). Dr. Krause, is (and always has been) the named trustee for the KCTs.

Transfers from Gary to the KCTs

5. On the following dates in the following amounts, Gary, either individually or jointly with Teresa, contributed cash to the KCTs as follows:[8]

[8] Defendants characterize numerous transactions as "gifts". See Dkt. 411, Attachment 1, Gary's Uncontroverted Statement of Facts (SOF) 10 and 11. The Government objects to this characterization. Because the characterization of these transactions does not impact the legal issues presented (*i.e.*, statute of limitations), it is immaterial and the Court need not make a finding that characterizes the transfers. Accordingly, the Court will

A. December 30, 1988, $20,000 jointly to KCT1;
B. January 9, 1989, $10,000 jointly to KCT1;
C. March 3, 1989, $20,000 jointly to KCT1;
D. July 30, 1990, $20,0000 individually to KCT2;
E. July 30, 1990, $20,000 individually to KCT3;
F. August 22, 1991, $7000 individually to KCT1;
G. August 22, 1991, $7000 individually to KCT2;
H. August 22, 1991, $7000 individually to KCT3;
I. December 31, 1992, $2000 individually to KCT2;
J. December 31, 1992, $2000 individually to KCT3;
K. May 10, 1993, $10,000 individually to KCT2;
L. May 10, 1993, $10,000 individually to KCT3.

6. On the following dates, Gary transferred the following insurance policies to the KCTs:

A. on July 12, 1991, he conveyed Prudential life insurance policy #31889332 to KCT1;
B. on July 31, 1991, he conveyed The New England, now Met Life, life insurance policies numbered 06688112, 06615461, 08392342, 06070162, 02526725, and 06162499 to KCT4;
C. on June 4, 1991, he conveyed Maccabees Life Insurance Company, life insurance policy numbered 4108-193 to KCT4;
D. on August 31, 1991, he conveyed Maccabees Life Insurance Company, life insurance policy numbered 4110-925 to KCT 2 and 3;
E. on July 30, 199, he conveyed Maccabees Life Insurance Company, life insurance policy numbered 21N7001592 to KCT 3; and
F. on June 8, 1994, he conveyed Aurora life insurance policy numbered C11324399L to KCT3.

Transfers of real property:

7. Prior to their marriage, Teresa was the sole owner of real property commonly described as 805 N. Armour, Wichita, Kansas and Gary was the sole owner of real property commonly described as 37 North Mission, Wichita, Kansas ("the Mission house").

8. On or about April 5, 1988, Teresa and Gary executed a quit claim deed on the Mission house naming themselves joint tenants with rights of survivorship.

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generally describe these transactions as transfers, conveyances, or contributions.

9. On November 29, 1989, Gary conveyed all of his interest in the Mission house to Teresa by quit claim deed.

10. On January 2, 1996, Teresa transferred her interest in the Mission house to Drake Enterprises, Inc. by warranty deed.

11. On March 4, 1998, Gary executed a quit claim deed conveying any interest he may have had in the Mission house to Drake Enterprises, Inc.[9]

12. On or about March 4, 1998, Drake Enterprises, Inc. sold the Mission house to Stephen J. Burns and Judy A. Burns.[10]

13. In late August 1995, Teresa obtained title to property located at 7711 Oneida, Wichita, Kansas from Dan and Diana Paxton.[11]

14. On or about September 22, 1995, Teresa executed a promissory note in favor of KCT5 in the amount of $305,000 and a mortgage on the Oneida property to secure the note. Title to the property remained in Teresa's name and KCT5, as the mortgagee, filed the mortgage statement with Sedgwick County. Teresa never received $305,000 from KCT5, and she never made any payments on this "mortgage."

15. On February 15, 1999, Teresa executed a warranty deed, conveying the Oneida

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[9] Defendants contend that this was simply a formality to keep the chain of title clear on the property. The Government objects to this characterization. Because the characterization of this transaction does not impact the legal issues presented, it is immaterial and the Court need not make a finding regarding Gary's motive in executing the subject quit claim deed.

[10] Defendants contend Drake Enterprises sold the Mission house to the Burns for good and valuable consideration. This statement is refuted by the fact that the proceeds from the sale were deposited into Teresa's Paine Webber account. This factual dispute is not material to the determination of summary judgment.

[11] Defendants contend Teresa purchased the Oneida property. Plaintiffs claim Gary paid for the Oneida property. This factual dispute is not material to the limitations challenge and the Court will disregard inferences relating to whose money paid for the Oneida property.

property to KCT1.

16. On May 4, 2005, Dr. Krause, as Trustee of KCT1, signed a contract to purchase real property located at 14215 E. Wentworth Ct., Wichita, Kansas (the "Wentworth property").

17. On August 5, 2005, KCT1 conveyed title to the Oneida property to PHR, LLC.[12] This Court has already ruled that PHR, LLC holds title to the Oneida property as a nominee of Gary Krause. *See* June 4 Order (Dkt. 311) at 59.

Transfers of intangible assets from Gary to Teresa:

18. Gary assigned certain notes owed to him by various companies to Teresa as follows:

A. on November 29, 1989, notes owed by Federal Gasohol Corporation, Rural Housing Associates, Inc., Liberal Commons, Ltd., Barton Oil Corporation, Kanzoil Corporation, were assigned;
B. on June 27, 1990, a $3,276.37 note from Norton Commons Ltd was assigned; and
C. on December 1, 1990, a $37,015.44 note from Liberal Commons Ltd was assigned.

19. Gary executed two Security Agreements on November 29, 1989, granting Teresa a security interest in all of his rights and interests in Hutchinson Duplex Housing, Ltd. and Great Bend Duplex Housing, Ltd.[13]

20. Pursuant to the assignment of the notes and the conveyances of the security interest, the obligors on those notes and interests made payments to Teresa as follows:

A. June 28, 1991, Liberal Commons, Limited, $150,000;
B. August 29, 1991, Liberal Commons, Limited, $11,851;
C. August 29, 1991, Liberal Commons, Limited, $39,676;

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[12] Defendants claim the Oneida property was transferred to PHR, LLC so that a tax free exchange involving the Oneida and Wentworth property could be accomplished. The Government disputes the stated purpose for this transfer. Because the characterization of this transfer does not impact the legal issues presented, it is immaterial and the Court need not make a finding regarding the motive for this transfer.

[13] Plaintiffs dispute whether the security agreement effectively granted a security interest since there was no identifiable debt between Teresa and Gary. This does not effectively controvert that these security agreements were executed. Moreover, this dispute is immaterial to the disposition of the legal issues raised.

D. August 29, 1991, Norton Commons, Limited, $3,276;
E. November 24, 1993, Great Bend Duplex Housing, $99,000;
F. November 24, 1993, Great Bend Duplex Housing, $16,000;
G. December 17, 1993, Hutchinson Duplex Housing, $50,000;
H. December 31, 1993, Great Bend Duplex Housing, $7,425;
I. December 31, 1993, Great Bend Duplex Housing, $1,200;
I.(sic) May 4, 1994, Hutchinson Duplex Housing, $7,324;
J. May 13, 1994, Great Bend Duplex Housing, $11,137;
K. May 13, 1994, Great Bend Duplex Housing, $1,800;
L. August 1, 1994, Rural Housing Associates, $100,000;
M. January 10, 1995, Rural Housing Associates, $88,938;
N. January 12, 1996, Norton Commons Limited, $18,325;
O. January 16, 1996, Liberal Commons Limited, $18,062;
P. October 11, 1996, Norton Commons Limited, $14,606;
Q. October 11, 1996, Liberal Commons Limited, $12,236;
R. November 22, 1998, Norton Commons Limited, $23,393;
S. October 15, 1999, Norton Commons Limited, $18,109;
T. November 1, 1999, Kanzoil, $12,651.

21. On November 29, 1989, Gary also transferred all of his shares of stock in Quivira Associates, Inc. to Teresa. On or before April 30, 1998, Teresa had her 4,000 shares of the Quivira Associates, Inc. reissued to her sons equally. Quivira's tax return indicates that, in 1999, Teresa's interest in Quivira was transferred to the Gary E. Krause Trust.

Transfers from Teresa to the KCTs

22. On the following dates, Teresa made the following cash contributions to the KCTs:

A. December 30, 1993, $4000 to KCT1;
B. March 31, 1998, $50,000 to KCT1;
C. March 31, 1998, $50,000 to KCT1;
D. March 31, 1998, $40,000 to KCT1;
E. December 2, 1999, $30,000 to KCT1;
F. March 31, 1998, $50,000 to KCT2;
G. March 31, 1998, $90,000 to KCT2;
H. March 31, 1998, $50,000 to KCT3; and
I. March 31, 1998, $90,000 to KCT3.

23. On December 3, 1990, Teresa obtained $56,318.92 from the Executive Life Insurance

Policy and gave it to KCT1.[14] That same day, Dr. Krause, as Trustee of the KCT1, executed a $56,318.26 promissory note, promising to pay Teresa said amount upon demand. On January 1, 1993, Teresa forgave $10,000 of the Note. On January 1, 1994, Teresa forgave $10,000 of the Note. On January 1, 1996, Teresa forgave $20,000 of the Note. On January 1, 1997, Teresa forgave the balance of the Note.

Contributions to the KCTs from other family trusts

24. On or about December 27, 1991, Dr. Krause received a final distribution in the amount of $33,681.40 from the Adam L. Krause Trust and a final distribution in the amount of $66,725.25 from the Florence Mae Krause Trust, for a total of $100,406.74.

25. On or about February 23, 1999, Dr. Krause received a final distribution in the amount of $39,141,87 from the Lawrence E. Krause Trust.

26. On or about February 23, 1999, KCT1 received a final distribution in the amount of $39,141,87 from the Lawrence E. Krause Trust. On February 24, 1999, Dr. Krause opened a checking account in the name of the KCT1 at Nations Bank (NOA Bank of America) with an initial deposit of $4,141.87 and also purchased a $35,000 certificate of deposit.[15]

27. On or about February 23, 1999, the Lawrence E. Krause Trust received a federal tax refund in the amount of $11,829.81. Because the Lawrence E. Krause Trust had been closed, Dr.

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[14] Defendants allege Teresa loaned $56,318.26 to KCT1, hence the promissory note. The Government contends Teresa never loaned any money to KCT1. Instead, Gary controlled and managed accounts titled in Teresa's name and directed where the money should go. The Government's position is supported by a letter dated November 27, 1990 from Rossmore Insurance Services to Energy Associates c/o Gary which establishes that a check in the amount of $56,318.26, representing a loan from an Executive Life Insurance policy was received by Gary. Considering the record in the light most favorable to the nonmovants, the Court will disregard Defendants' characterization of this transaction as a loan.

[15] The Government attempts to controvert this statement by arguing Dr. Krause's actions were at Gary's direction. The Court need not make a finding regarding whether Dr. Krause acted independently or at Gary's direction to determine the outcome.

Krause deposited that amount into his account, issued a check to KCT1 for one half that amount and deposited same into its Bank of America account.

Transfers from Gary to the GEKT

28. Prior to his death in 1990, Dr. L. E. Krause contributed approximately $30,000 to the Gary E. Krause Trust ("GEKT").

29. On or about July 26, 1989, Gary transferred his shares in Development Associates, Inc. to the GEKT, which Gary is (and was) the sole beneficiary.

30. On or about October 30, 1989, Gary transferred his shares in Federal Gasohol Corporation to the GEKT.[16]

31. On or about September 1, 1992, Gary transferred his 510 shares in Financial Investment Management Corporation to C. Norris Taylor. On or about September 9, 2002, C. Norris Taylor transferred his 5000 shares in FIMCO to the Krause Irrevocable Trust (for its net book value, which was $0).

32. On or about April 20, 1994, the GEKT deposited a $50,000 check from Teresa's Paine Webber account.[17]

33. This Court has ruled that the Gary E. Krause Trust is a nominee of Gary Krause. *See* June 4 Order (Dkt. 311) at 59.

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[16] Defendants allege these "share" transfers were sales to the GEKT. No consideration, however, were ever paid for these shares. There is no legitimate factual distinction between paying "no consideration" and paying "book value"which happened to be zero. The Court will disregard Defendants' characterization that these were "sales."

[17] Defendants allege Teresa loaned the GEKT $50,000. The Government contends Teresa never loaned any money to the GEKT. Instead, Gary controlled and managed accounts titled in Teresa's name and directed where the money should go. Considering the record in the light most favorable to the nonmovants, the Court will disregard Defendants' characterization of this transaction as a loan.

Gary's tax liability

34. On December 1, 1999, the IRS assessed federal income taxes, interest and penalties against Gary for the years 1994 and 1995 in the amounts of $60,725.01 and $239,267.18, respectively.

35. In 2001, the IRS assessed federal income taxes, interest and penalties against Gary totaling $2,314,041.77 for the tax years 1975, 1978-1983 and 1986.

Relevant bankruptcy dates

36. On October 10, 2005, the Debtor sought relief from the IRS collection summons by filing a Chapter 7 bankruptcy petition.

37. The Government brought this adversary proceeding on November 1, 2005.

38. The Trustee intervened and filed her Turnover Complaint on January 26, 2006.

Analysis and Conclusions of Law

A. Applicable Limitations

Defendants contend (1) K.S.A. § 60-513(a) and § 33-209 apply to bar the Government's fraudulent conveyance-based claims and (2) K.S.A. § 60-513(a), (b) and § 33-209 apply to bar the Trustee's fraudulent conveyance-based claims brought under § 544(b). The Court begins its analysis by first determining whether these statutes apply to the Government, and if they do not, which statutes of limitations are applicable.

1. K.S.A. § 60-513(b) and K.S.A. § 33-209 do not apply to the Government's fraudulent conveyance-based claims; instead, 26 U.S.C. § 6502 is the applicable statute of limitations.

Defendants contend the ten-year repose period in K.S.A. § 60-513(b) and the four-year extinguishment provision in K.S.A. § 33-209, working in combination, bars/extinguishes the

Government's fraudulent conveyance-based claims.[18] The Court disagrees. These statutes do not apply to the Government.

Defendants argue that K.S.A. § 60-513(b) and K.S.A. § 33-209 are statutes of repose which operate to extinguish causes of actions following the passage of a stated period of time. Because of their substantive nature (*i.e.*, they affect a party's right to bring an action), the Government is bound by these statutes of repose and cannot avoid their application under the guise of sovereign power. Defendants correctly assert that state statutes of repose are ordinarily binding on the federal government. The key word is ordinarily. State statutes of repose are binding against the Government only when it is relying on a state statute for its right of recovery.[19] In *California II*, the United States Supreme Court reinforced the principle in *Summerlin* that the Government cannot be deemed to have abdicated its governmental authority so as to become subject to a state statute putting a time limit upon enforcement of a claim in that right. The Supreme Court identified two relatively functional considerations on when to apply the *Summerlin* rule: (1) when the right at issue was obtained by the government through, or created by, a federal statute, and (2) when the government was proceeding in its sovereign capacity.[20]

Here, the Government is proceeding in its sovereign capacity to collect unpaid taxes. The

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[18] In their reply briefs, Defendants clarify they do not argue that K.S.A. 60-513(a) applies to the Government. Indeed, it is well-settled that the Government is not bound by state statute of limitations in enforcing its rights. *United States v. Summerlin*, 310 U.S. 414, 426 (1940); *United States v. Spence*, 242 F.3d 392 (table), 2000WL 1715216 (10th Cir. 2000) (unpublished decision); and *United States v. Cody*, 961 F. Supp. 220 (N.D. Ind. 1996)(Federal courts have repeatedly held that federal law, not state law, controls the time within which the government must bring suit to set aside an allegedly fraudulent conveyance in the course of efforts to collect federal taxes).

[19] *United States v. California*, 507 U.S. 746 (1993)(*California II*).

[20] *Id.* at 757.

Government's right to collect taxes is created by federal statute. Under these circumstances, holding the claim-extinguishment provision in K.S.A. § 33-209 and the repose period in K.S.A. § 60-513(b) applicable to the Government would be inconsistent with the core teachings of *Summerlin*. Because the Government is acting in its sovereign capacity in an effort to enforce rights ultimately grounded on federal law, the Court will treat K.S.A. § 33-209 and K.S.A.§ 60-513(b) like ordinary statutes of limitation and hold them inapplicable to the Government.[21]

2. K.S.A. § 60-513(a), (b) and § 33-209 do not apply to bar the Trustee's § 544(b) fraudulent conveyance-based claims.

Defendants contend K.S.A. § 60-513(b) and K.S.A. § 33-209 apply to the Trustee because bankruptcy trustees occupy the same position as the debtor's creditors in adversary proceedings.[22] This argument is flawed to the extent it assumes these statutes apply to the Government. As noted above, they do not.

Section 544(b) permits bankruptcy trustees to avoid any transfer that an actual creditor of the estate could under state law. The Government is such a creditor. The Trustee has clearly asserted a § 544(b) action based on the Government's fraudulent conveyance-based claims. Indeed, the Trustee asserts the same facts and legal theories.[23]

Section 544(b) gives the Trustee the rights and powers of the creditor whose cause of action she pursues. As explained in Collier on Bankruptcy:

The general rule is that section 544(b) confers upon the trustee no greater rights of avoidance

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[21] *See Bresson v. C.I.R.*, 213 F.3d 1173, 1178 (9th Cir. 2000) (The *Summerlin* rules applies to claim-extinguishment provisions just as it applies to traditional statutes of limitations.).

[22] Dkt. 401 at 14; Dkt. 411 at 28.

[23] *See* Trustee's Motion for Summary Judgment, Dkt. 415.

> than the creditor himself would have if he were asserting invalidity on his own behalf. Consequently, if the creditor is deemed estopped to recover upon his claim, or is barred from recovery because of the running of a statute of limitations prior to the commencement of the case, the trustee is likewise estopped or barred.[24]

The Trustee is entitled to any benefits the Government may possess, as well as being subject to the same limitations and infirmities.[25] Because the Government is unaffected by K.S.A. § 60-513(b) or K.S.A. § 33-209, they likewise do not apply to the Trustee.

Defendants contend that to the extent the Trustee is pursuing her action as a creditor other than the Government, Kansas' general two-year statute of limitations, K.S.A. § 60-513(a), applies to her. This argument is groundless. Defendants devote time in their briefs discussing K.S.A. § 60-513(a) and claim it bars the Trustee's§ 544(b) claim. Defendants, however, did not specifically refer to K.S.A. § 60-513(a) in their request for relief.

Defendants complain that this case is complicated by the fact that the Trustee has not yet indicated in which creditor's shoes she stands. This complaint is disingenuous as the Government is the debtor's principal creditor and no other creditor has actively participated in Gary's bankruptcy, which suggests no other creditor has a worthwhile claim. The Court finds K.S.A. § 60-513(a) inapplicable here.

3. <u>26 U.S.C. § 6502(a) is the applicable statute of limitations for the Government's fraudulent conveyance-based claims.</u>

The applicable statute of limitations for the Government's fraudulent conveyance-based

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[24] 5 Collier on Bankruptcy ¶ 544.09[3] at 544-20.1 (L. King, Rev.15th ed. 2007).

[25] *Alberts v. HCA, Inc. (In re Greater Southeast Community Hosp. Corp. I*, 365 B.R. 293, 301-304 (Bankr. D. D.C. 2006)(The estate representative steps into the shoes of each such unsecured creditor and is cloaked with the rights of that creditor. If an unsecured creditor of the estate could have avoided a transaction under state law despite the existence of a state statute of limitations on that claim because the creditor was acting in a "governmental capacity," so too can the estate representative avoid the transfer under § 544(b).).

claims is 26 U.S.C. § 6502(a), which provides the Government ten years from the date of the deficiency assessment to institute a proceeding to collect on the assessment.[26] The trigger point is the date of assessment. It is the "assessment" itself that, once made, starts the running of the ten-year period within which the Government must commence efforts to collect taxes assessed. The conveyance dates are irrelevant.[27] To hold otherwise would send the wrong message and allow taxpayers to take advantage of their own fraud to escape payment of taxes.

In this case, the Government made the first assessment against Gary in December 1999 and instituted this adversary proceeding on November 1, 2005, well within the ten-year collection period. Accordingly, the Government's fraudulent conveyance-based claims are not time-barred.

4. <u>The Trustee's § 544(b) must comply with the limitations period set forth in § 546(a) and 26 U.S.C. § 6502(a)</u>.

The timeliness of the Trustee's § 544(b) action is based on two statutes. Although an action under § 544(b) is based on state law, it is still created by the Bankruptcy Code.[28] Courts addressing this issue have held that § 546(a) is the applicable limitations provision for a § 544 action.[29]

Section 546(a) provides:

an action or proceeding under section 544, 545, 547, 548, or 533 of this title may not be

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[26] *Spence*, 2000 WL 1715216 at *3. *See also United States v. Cody*, 961 F.Supp. 220, 221 (S.D. Ind. 1996) (citing collection of federal cases, holding that federal law, not state law, controls the time within which the government must bring suit to set aside an allegedly fraudulent conveyance in the course of efforts to collect federal taxes.).

[27] *See U.S. v. Werner*, 857 F. Supp. 286 (S.D. N.Y. 1994) (statute of limitations on government's action to foreclose its tax liens against assets which taxpayer had transferred into trusts, on theory that transfers were fraudulent as to creditors, did not expire until ten years after the assessment of taxes, regardless of when the trusts were created.).

[28] *In re Mahoney, Trocki & Assoc. Inc.*, 111 B.R. 914, 917-18 (Bankr. S.D. Cal. 1990).

[29] *In re Topcor, Inc.*, 132 B.R. 119, 124 (Bankr. N.D. Tex. 1991)(collection of cases).

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.

Because the Trustee stands in the creditor's shoes and is subject to the creditor's limitations, the applicable state or nonbankruptcy limitation statute controlling the creditor's claim also applies.[30] If the applicable limitations statute governing the creditor's fraudulent conveyance action has not expired at the commencement of the bankruptcy case, § 546(a) requires the trustee to commence her § 544(b) action within two years of when the bankruptcy petition date was filed.

Gary filed his bankruptcy petition on October 10, 2005. The Government made the first tax assessment against Gary in December 1999. Under 26 U.S.C. § 6502, the Government has until December 2009 to commence its collection action. Thus, the Government's fraudulent conveyance-based claims were viable on the date of the petition. Under § 546(a) then, the Trustee has until October 10, 2007, two years from the petition date, to bring her § 544(b) action. Since the Trustee filed her complaint on January 26, 2006, her § 544(b) action is not barred.

B. The Trustee's § 548 claims and the applicable look-back period

1. <u>The Trustee's § 548(a) claims are subject to the one-year look-back period</u>

Defendants claim that all transfers which occurred prior to October 7 (sic), 2004, are barred from a § 548 claim because the applicable look-back period is one year from the date of the filing of Gary's bankruptcy petition (October 10, 2005). The Trustee rejoins that several of the

[30] 5 Collier, ¶546.02[1][b] at 546-11.

transactions between Gary and Teresa were not timely recorded and could still be within the one-year look-back period. In addition, the ten-year look-back period in § 548(e) rescues her § 548 claims.

Defendants correctly assert that the applicable look-back period is one year with respect to the Trustee's § 548(a)(1) claims. Section 548(a)'s look-back period was expanded from one year to two years by Pub. L. 109-8, Title XIV, § 1402. The two-year period applies only with respect to cases commenced more than one year after the date of the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act (April 20, 2005). In other words, cases commenced after April 20, 2006. Accordingly, the Court finds the applicable look-back period is one year with respect to the Trustee's § 548(a) claims.

Because the Trustee failed to identify which transactions were not timely recorded, she has failed to establish that there is a genuine dispute regarding a material fact. The Court, however, cannot find that Defendants are entitled, as a matter of law, to summary judgment on the Trustee's § 548(a) claims. Defendants admit that one single transfer identified by the Trustee falls within the one-year look-back period. They contend, however, that the transfer of legal title of the Oneida property to PHR, LLC by KCT 1 on August 5, 2005, was not fraudulent. This is a genuine issue of material fact. Even if the Court found that all transfers occurring prior to October 10, 2004 are barred and not subject to avoidance under § 548(a), these transfers remain vulnerable to the Trustee's § 544(b) action, as well as her § 548(e) claims.

2. <u>The Trustee's § 548(e) claims are subject to the ten-year look-back period</u>

The Trustee correctly asserts that the ten-year look-back period applies to her § 548(e) claims. Defendants do not dispute this; instead, Defendants reply the Trustee has no § 548(e)(1)

claim because (1) the KCTs are not self-settled trusts and Gary is not the beneficiary of those trusts; and (2) cash contributions and transfers of various insurance policies by Gary to the KCTs occurred beyond the ten-year look-back period. The Court finds Defendants' arguments unpersuasive. Section 548(e) allows avoidance of transfers made to a self-settled trust or similar device. The Trustee asserts the KCTs are similar devices and that Gary is in fact the true beneficiary of the KCTs. The Court finds genuine issues of material fact exist which preclude summary judgment on the Trustee's § 548(e) claims.

C. The Nominee Claim

Defendants attack Plaintiffs' "nominee" theory as somehow contrary to Kansas law because, they say, it relies upon this Court determining that the KCTs are his "alter ego" and that reverse piercing of a trust is permitted. The Court addressed these arguments in its Memorandum Opinion on Plaintiffs' motions for summary judgment. For the reasons therein, the Court concludes Defendants are not entitled to judgment, as a matter of law, as to Plaintiffs' nominee claim.

D. Transfers by Non-debtors

Defendants contend K.S.A. §§ 33-102, 103 and 201 apply only to transfers by the debtor; thus, all transfers by the Adam Krause Trust, the Florence May Krause Trust, the Lawrence E. Krause Trust, Lawrence Krause, Teresa Briggs, Norris Taylor, the KCTs, the Krause Trusts, Federal Gasohol, FIMCO, Quivira Associates, Drake Enterprises, and Development Associates, Inc. cannot be considered fraudulent conveyances. First, this argument fails to acknowledge that Plaintiffs' fraudulent conveyance-based claims under K.S.A. §§ 33-102, 103 and 201 are based on the nominee theory *(i.e.*, a transfer by one of these entities equal a transfer by the debtor). Second, it fails to acknowledge that this Court has already ruled that Drake Enterprises, Inc., FIMCO, Federal

Gasohol Corporation; PHR, LLC, the Gary E. Krause Trust; and the Krause Irrevocable Family Trust are the nominees of Gary. This piecemeal attack on specific individual transfers is pointless. The Court finds genuine issues of material fact exists regarding whether these transfers should be attributed to Gary.

Conclusion

Defendants' motions for partial summary judgment (Dkts. 400 and 410) are **DENIED**.

The Court finds that the facts set out above are deemed established for trial as provided by Fed. R. Civ. P. 56(d).

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