UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THOMAS L. TAYLOR, III	§	
In his capacity as Court-Appointed	§	
temporary receiver for Breitling	§	
Energy Corporation,	§	
	§	
Plaintiff,	§	
	§	**CIV. ACTION NO. 3:19-cv-01594-D**
vs.	§	
	§	
ROTHSTEIN KASS & COMPANY	§	
and BRIAN MATLOCK,	§	
	§	
Defendants.	§	

RECEIVER'S RESPONSE AND BRIEF IN OPPOSITION TO DEFENDANTS' ROTHSTEIN KASS & COMPANY AND BRIAN MATLOCK'S MOTION TO DISMISS RECEIVER'S ORIGINAL COMPLAINT

CASTILLO SNYDER, P.C.

By: */s/ Edward C. Snyder*
Edward C. Snyder
esnyder@casnlaw.com
Jesse R. Castillo
jcastillo@casnlaw.com
700 N. St. Mary's, Suite 1560
San Antonio, Texas 78205
(210) 630-4200
(210) 630-4210 (Facsimile)

ATTORNEYS FOR PLAINTIFF

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Plaintiff Thomas L. Taylor III ("Receiver"), solely in his capacity as temporary Receiver for the Breitling group of companies,[1] hereby files this Response and Brief in Opposition to the Motion to Dismiss filed by Defendants Rothstein Kass & Company, PLLC ("Rothstein") and Brian Matlock ("Matlock") (collectively "Defendants") [Doc. 19], and would respectfully show the Court as follows:

I. BACKGROUND

This action arises out of the massive securities fraud perpetrated by Christopher A. Faulkner ("Faulkner") through which Faulkner and his cohorts used and manipulated the Breitling entities to fraudulently raise approximately $150 million in investment proceeds from investors through the offer and sale of oil and gas-related securities from 2011 to 2016. During this time Faulkner (individually and through separate entities under his control) misappropriated approximately $32.8 million in Breitling entity funds, both through the receipt of transfers from Breitling entity accounts and through the payment of personal expenses from Breitling entity bank and credit card accounts. From the inception of the fraud, Faulkner made use of the assets of the Breitling entities to fund a lavish lifestyle -- including multiple homes across the country, a fleet of luxury cars, and international travel.

Given the Court's knowledge of the overall Breitling fraud scheme, the Receiver will not burden the Court with a recitation of the facts outlined in the Complaint other than where necessary to address a specific argument raised by Defendants. In summary, the Receiver's Complaint [Doc. 1] alleges that Defendants issued a "clean" audit opinion for Breitling - despite Defendants' knowledge of a wide range of fraudulent accounting practices and misuse of funds

[1] Specifically, Plaintiff brings this action in his capacity as court-appointed Receiver for Breitling Oil & Gas Corporation ("BOG"), Breitling Royalties Corporation ("BRC"), Breitling Energy Corporation ("BECC"), and their alter egos Crude Energy, LLC ("Crude Energy") Crude Royalties, LLC ("Crude Royalties") and Patriot Energy, Inc. ("Patriot"). Complaint at ¶ 8.

by Faulkner - in support of Faulkner's bid to effectuate a reverse merger to create public company Breitling Energy Corporation ("BECC"). Complaint at ¶¶ 3-7, 22-32, 36-75. Using the newly minted and freshly audited BECC, Faulkner proceeded to lure an additional $68.5 million of investor funds, and in the process Faulkner looted at least $18.5 million more from the entities. *Id.*, at ¶ 25. The Complaint sets forth detailed facts supporting causes of action for professional negligence/malpractice, participation in breach of fiduciary duty and fraudulent schemes, fraudulent transfers, and aiding and abetting liability.

The question this case presents is why – given their knowledge of the accounting manipulation and improprieties and outright fraud occurring at the Breitling entities - Defendants issued a clean audit opinion for the Breitling entities in order to support Faulkner's reverse merger creation of public company BECC, and whether Defendants' issuance of the audit was negligent or grossly negligent, and whether it rises to the level of knowing participation in Faulkner's breaches of fiduciary duty and fraudulent schemes.

A 12(b)(6) motion is clearly not the appropriate vehicle to resolve such questions. Defendants' arguments in favor of early dismissal fail. As demonstrated below, the Receiver's claims are not barred by limitations, are properly pled and well-stated under applicable law.

II. ARGUMENT

A. Standard for Dismissal under Rule 12(b)(6)

In reviewing a motion to dismiss under FED. R. CIV., the Court must accept all well-pleaded allegations as true and view them in the light most favorable to the plaintiff. *Martin K. Eby Constr. Co., v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004); *SEC v. Reynolds*, 2008 WL 3850550, at *3 (N.D. Tex. Aug. 19, 2008). Motions to dismiss are viewed with disfavor and rarely granted. *Priester v. Lowndes County*, 354 F.3d 414, 418 (5th Cir. 2004); *SR Int'l Bus. Ins. Co. v. Energy Future Holdings Corp.*, 539 F. Supp. 2d 871, 874-75 (N.D. Tex.

2008). A motion under Rule 12(b)(6) should be granted only if the complaint does not include "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true (even if doubtful in fact)." *Id.* at 545 (internal citations omitted).

The Receiver alleges that the Defendants engaged in conduct that was, at best, negligent and assisted Faulkner to breach fiduciary duties owed to the Breitling entities and engage in fraud. As such the Receiver is not required to comply with the pleading standard outlined in FED. R. CIV. P. 9(b).[2] But even assuming *arguendo* that the Receiver must comply with Rule 9(b), said rule is not intended "to procure punctilious pleading detail." *SEC v. Brady*, 2006 WL 1310320, at *3 (N.D. Tex. May 12, 2006); *see also SEC v. Sharp Capital, Inc.*, 1999 WL 242691 at *2 (N.D. Tex. Apr. 16, 1999) (noting with respect to Rule 9(b) that "courts have never required a plaintiff to plead detailed evidence in its complaint") (citation omitted).

As demonstrated below, dismissal of the Receiver's claims is unwarranted, as the Receiver easily meets and exceeds all applicable pleading requirements.

B. The Receiver's Negligence Claim is not Barred by Limitations

Defendants first argue that the Receiver's negligence claim is time barred because (1) Faulkner's fraudulent actions benefitted the Breitling entities by bringing in $150 million in investor proceeds and (2) therefore Faulkner's knowledge is imputed to the Breitling entities for limitations purpose.[3]

[2] FED. R. CIV. P. 8 applies to Plaintiffs' claims for negligence. *See Smith v. Texas*, 2012 WL 5868657 at *12 (S.D. Tex. 2012) (applying Rule 8 to malpractice claim); *see also Randolph v. Resolution Trust Corp.*, 995 F.2d 611, 616 n.3 (5th Cir. 1993; *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 339 (5th Cir. 2008) Rule 8 also applies to the Receiver's fraudulent transfer claims. *See GE Capital Comm., Inc. v. Wright & Wright, Inc.*, 2009 WL 5173954, at *10 (N.D. Tex. 2009)

[3] Defendants essentially ask the Court to go outside the pleadings and assume that Faulkner knew about

As a preliminary matter, dismissal based on the imputation theory is not appropriate at the pleading stage of the case because the Receiver has clearly plead that Faulkner acted *adversely* to the Breitling entities – including by looting them – and there is no allegation anywhere in the Complaint that Faulkner's actions benefitted the entities. Indeed, Defendants' primary case on this subject, *FDIC v. Ernst & Young*, 967 F. 2d 166 (5th Cir. 1992), arose in the context of a summary judgment motion, not a motion to dismiss. *See also FDIC v. Nathan*, 804 F. Supp. 888, 893-894 (S.D. Tex. 1992) (noting that the question of whether corporate fraudsters acted for the benefit of, or adversely to, their entities is a fact issue more appropriately addressed via summary judgment).[4]

More fundamentally Defendants' argument is based on a fallacy because it assumes that the Breitling entities *themselves* - as opposed to Faulkner - knew about or intended to allow Faulkner to manipulate and use them to commit fraud, violates securities laws, and steal the money invested with them by third party investors. As the Fifth Circuit held, receivership entities themselves are innocent of wrongdoing and cannot have intended to violate the law or deceive investors. *Janvey v. Democratic Sen. Campaign Comm., Inc*., 712 F.3d 185, 190-92 (5th Cir. 2013) ("*DSCC*") (Stanford entities' actions were "coerced" by Allen Stanford who used them like "robotic tools" and "evil zombies")(citing *Scholes v. Lehman*, 56 F. 3d 750 (7th Cir. 1995); *Janvey v. Alguire*, 847 F. 3d 231, 241 (5th Cir. 2017) (same); *Jones v. Wells Fargo Bank*,

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Defendants' negligence. Motion at 10 (Faulkner *"must have been aware of any such negligence*"). The Complaint does not allege that Faulkner knew about Defendants' negligent audit.

[4] Questions of imputation and the adverse interest exception generally involve fact issues that cannot be decided on a motion to dismiss. *See FDIC v. Shrader & York*, 991 F.2d 216, 222-24 (5th Cir. 1993); *Smith v. Arthur Andersen*, 175 F. Supp. 2d 1180, 1198-1200 (D. Ariz. 2001) (denial of motion to dismiss because allegations of adverse interest exception to imputation doctrine sufficient to avoid dismissal); *Askanase v. Fatjo*, 828 F. Supp. 465, 471 (S.D. Tex. 1993) (a fact issue existed as to whether the officers and directors were acting entirely in their own interest and to the detriment of the corporation).

666 F. 3d 955, 965- 967 (5th Cir. 2012) (corporation is entity separate from its individual bad actors).

In fact, Defendants' imputation and limitations argument is foreclosed by the Fifth Circuit's holding in *DSCC*, in which the Fifth Circuit squarely rejected the argument that the Stanford Receiver's claims accrued prior to his appointment. There the court refused to impute the controlling fraudsters' knowledge to his entities, holding that the entities' claims could not have accrued prior to the date the Stanford Receiver was appointed. *DSCC*,712 F.3d at 192-93.

So too here. Because the knowledge of the Breitling entities' pre-receivership officers and directors like Faulkner cannot be imputed to the receivership entities on whose behalf the Receiver now sues, the Receiver's claims could not have accrued, as a matter of law, until some date after September 25, 2017, the date on which the Receiver was appointed and empowered to specifically pursue "*all assets – in any form or of any kind whatsoever*". Complaint at ¶ 78 (citing ECF 142 in the SEC Action, as defined below).[5]

Defendants attempt to distinguish *DSCC* by arguing that Faulkner's conduct somehow *benefitted* the Breitling entities. But the Receiver clearly alleges that Faulkner acted adversely to the Breitling entities by using and causing said entities to engage in fraud and violate securities laws and then looting the entities of the ill-gotten gains. Complaint, at ¶¶ 2, 4, 7, 12, 16-32, 57, 61, 76-77, 83-97.[6] Just as the Fifth Circuit held in *Warfield v. Brown*, ***"[i]t takes cheek***" to argue that the Breitling entities "*benefitted from [Faulkner's] efforts to extend the*

[5] Moreover, any such claims were thereafter tolled by this Court's orders in *SEC v. Faulkner et al*., Case No. 3:16-CV-1735-D (the "SEC Action") tolling limitations for receivership claims. Complaint at ¶79 (citing SEC Action, ECF No. 108 at ¶22; ECF No. 142 at ¶34; ECF No. 320 at ¶34; ECF No. 418 at ¶34). This Court has previously recognized in the SEC Action that the Receiver was investigating claims against the Breitling entities' former professionals less than a year ago in October 2018. *SEC v. Faulkner*, 2018 U.S. Dist. LEXIS 182294 at *9-10 (N.D. Tex. 2018)

[6] Indeed, earlier this year the Court took judicial notice in the related SEC Action of the fact that Faulkner plead guilty to wrongfully diverting millions of dollars from the Breitling entities for his own personal benefit. *SEC v. Faulkner*, 2019 U.S. Dist. LEXIS 34367 at note 7 (N.D. Tex. 2019). See *Scholes*, 56 F. 3d at 752 (noting that the fraudster in that case was prosecuted for fraud and plead guilty).

fraud by securing new investments." *Warfield v. Brown*, 436 F. 3d 551, 560 (5th Cir. 2006)

In Texas, whether an officer's fraud is attributable to a corporation depends on whether the fraud was on behalf of the corporation or against it:

> Fraud on behalf of a corporation is not the same thing as fraud against it. Fraud against the corporation usually hurts just the corporation; the stockholders are the principal if not only victims; their equities vis-a-vis a careless or reckless [law firm] are therefore strong. But the stockholders of a corporation whose officers commit fraud for the benefit of the corporation are beneficiaries of the fraud . . . .

Ernst & Young, 967 F. 2d at 168 (quoting *Greenstein, Logan & Co. v. Burgess Mktg., Inc*., 744 S.W.2d 170, 190-91 (Tex. App. – Waco 1987, *writ denied*)).

Here, the Receiver alleges that Faulkner used the entities to commit fraud and caused them to violate securities laws – which resulted in the entities being sued and shut down by the SEC and exposed to massive liabilities to investor victim creditors. Complaint at ¶¶ 2, 4, 7, 12, 16-32, 57, 61, 76-77, 83-97. See *Scholes*, 56 F. 3d at 754 (noting that the controlling shareholder fraudster could have ratified the diversion of assets only if no creditors were harmed but finding that the investors *were* harmed and converted into tort creditors against the entities). The bottom line is that the facts alleged in this case are no different than the facts set forth in *Scholes* and *DSCC* the Receiver alleges that Faulkner used the entities to lure money from investors, and then stole those funds from the entities, sticking the entities with the liabilities to the investors. Complaint, at ¶¶ 2, 4, 7, 12, 16-32, 57, 61, 76-77, 83-97. Under these circumstances, Faulkner's knowledge is not imputed to the Breitling entities.[7]

Defendants attempt to further distinguish this case from *DSCC* and *Scholes* by arguing

[7] *See FDIC v. Lott*, 460 F.2d 82, 88 (5th Cir. 1972) (where majority shareholder fraudulently dealt with his entity in his own interest, he is deemed to have an adverse interest and the knowledge possessed by him in the transaction is not imputable to the entity); *see also Wight v. Bank America Corp.*, 219 F 3d 79, 87 (2d Cir. 2000) (debtor's management acted in their own interest and not in company's interest, barring application of the imputation doctrine); *Smith v. Arthur Anderson*, 175 F Supp. 2d 1180, 1199 (D. Ariz. 2002)(scheme to continue a company in business past its point of insolvency cannot be said to benefit the company); *FDIC v. Nathan*, 804 F. Supp. 888 (S.D. Tex. 1992) (imputation not applicable where directors milked company and pushed it into insolvency).

that the instant case does not involve an alleged Ponzi scheme, and that in a Ponzi scheme securities fraud the controlling fraudsters' conduct is adverse to the entities, while in a regular securities fraud, the controlling fraudster's fraud somehow benefits the entities. Motion at 8. Such argument is baseless; fraud is fraud, and Faulkner's conduct in manipulating the Breitling entities to commit fraud and violate securities laws so he could loot the entities to fund a lavish lifestyle is no different than Allen Stanford's conduct in manipulating the Stanford entities to commit fraud and violate securities laws so he could loot the entities to fund a lavish lifestyle. After all, a Ponzi scheme is just a species of securities fraud.[8] Indeed the primary claims the SEC brought against Stanford and the Stanford entities are identical to the claims the SEC has brought against Faulkner and the Breitling entities in the related SEC Action – all centered on securities fraud; there is no separate securities law cause of action for "Ponzi scheme".[9]

The principal case relied on by Defendants as support for their imputation arguments, *Ernst & Young*,[10] is further distinguishable on multiple grounds. *First*, it pre-dates *DSCC* and *Jones v. Wells Fargo Bank*, 666 F. 3d 955 (5th Cir. 2012) and subsequent Fifth Circuit jurisprudence on the imputation and *in pari delicto* subjects. *Second*, it was decided on summary judgment, not a motion to dismiss. And *third*, in *Ernst & Young* the FDIC's role was purposefully limited to acting as an assignee of the defunct entity's claims and consequently did not equate to the role of an SEC equity receiver seeking to recover funds for the benefit of

[8] *See, e.g., Janvey v. Alguire*, 847 F. 3d at 246-247 (Judge Higginbotham describing Stanford's Ponzi scheme as "a simply constructed vintage fraud", wherein Stanford presented an "air of legitimacy" to "lull" investors by "assuring payments from money of later investors" while "masking the source of the 'return on investment'"); *see also Magaraci v. Espinosa*, 2016 Tex. App. LEXIS 2345, at notes 15 and 17 (Tex. App. – Austin 2016, no pet.) (citing *Goldstein v. Mortenson*, 113 S.W. 3d 769, 773 (Tex. App. – Austin 2003, not pet.) and noting that a Ponzi scheme is a type of investment fraud and that some investment frauds may have many of the markings or "badges" of a Ponzi scheme without formally being declared Ponzi schemes); *O'Cheskey v. Horton*, 2011 Bankr. LEXIS 3837 at *58 (N.D. Tex. 2011) (Ponzi scheme entities engage in a fraud on investors).

[9] Moreover, it makes little juridical sense for courts to enforce different legal standards for SEC receivers based solely on what type of label is applied to the securities fraud case they are administering (i.e., "Ponzi" versus "non-Ponzi") where the claims the receivers assert are all fundamentally premised on the same securities law violations involving fraud perpetrated on investors.

[10] *FDIC v. Ernst & Young*, 967 F. 2d 166 (5th Cir. 1992)

defrauded investor creditors such as is the situation here (and in *DSCC* and *Scholes*). Indeed, the Fifth Circuit underscored that distinguishing characteristic in its *Ernst & Young* opinion, noting that it was "critically important" to its decision [967 F. 2d at 169],[11] and made sure to narrowly limit its holding to the facts of that case. *Id.*, at 172. See also *Nathan*, 804 F. Supp. At 893-894 (noting the Fifth Circuit's emphasis on the FDIC's limited assignee status in *Ernst & Young* and holding that the controlling fraudsters' wrongdoing should not be imputed to the entities where they misappropriated funds from the entities while "fraudulently extending the life of the [entities] they continued to milk").

Finally, the imputation doctrine is designed to benefit and protect innocent third parties, and does not protect those who collude with the agent to defraud the principal.[12] For example, where a plaintiff alleges that a law firm defendant colluded with the sole shareholder to defraud a bank, the shareholder's knowledge will not be imputed to the bank. *Shrader & York*, 991 F.2d at 226. In the present case, the Receiver has explicitly stated a claim against Defendants for, *e.g.*, knowing participation in Faulkner's breaches of fiduciary duties owed to the Breitling entities. Thus the Defendants are not the "innocent third party" the imputation doctrine is designed to protect, and therefore the imputation doctrine cannot be used as shield to protect the Defendants from their own illicit acts.

The Receiver's claims against Defendants were also tolled until his appointment under the related but distinct theory of "adverse domination", which tolls a limitations period when (1)

[11] The Fifth Circuit noted that as a result of the FDIC's decision to sue the auditors only as an assignee of claims, "*the effect of the auditor's alleged negligence on third parties is legally irrelevant*". *Ernst & Young*, 967 F. 2d at 169

[12] *FDIC v. Shrader & York*, 991 F.2d 216, 226 (5th Cir. 1993) citing *Crisp v. Southwest Bancshares Leasing Co*., 586 S.W. 610, 615 (Tex. App. – Amarillo 1979)); *FDIC v. Nathan*, 804 F. Supp. 888, 893 (S.D. Tex. 1992) (the equitable imputed knowledge rule applies only to innocent third parties, not to culpable defendants acting in collusion with the wrongdoer*); United States v. Aubin*, 87 F.3d 141, 46-147 (5th Cir. 1996) ("the rule of Texas law on which this Court relied in *Ernst & Young* that an agent's knowledge is imputed to his principal--does not protect those who collude with an agent to defraud the principal)".

the wrongdoer directors constitute a majority of the company's board of directors and (2) the majority's wrongdoing was intentional. *See Askanase v.Fatjo*, 130 F.3d 657, 666 (5th Cir. 1997); *U.S. Bank Nat'l Ass'n v. Verizon Commc'ns.*, 2012 U.S. Dist. LEXIS 106576, 2012 WL 3100778, *15 (N.D. Tex. 2012). The doctrine is used "to toll limitations on a corporate action while the corporation is controlled by those culpably involved in the wrongful conduct on which the action is based," because a wrongdoing corporate director will seek to hide his wrongful conduct from the corporation. *See FDIC v. Henderson*, 61 F.3d 421, 425-26 (5th Cir. 1995) The limitations period is tolled "until a majority of the directors is disinterested and informed of the wrongdoing." *Id.* at 426.

C. <u>The Receiver States a Valid Claim for Professional Negligence</u>

Defendants next argue that the Receiver has failed to plead a necessary element of his negligence claim – causation based on reliance on the audit by the Breitling entities. As a preliminary matter, such argument is premature and improperly raised at this stage of the proceedings because under Texas law the issue of proximate causation is a question of fact for the jury to decide. *See e.g., Flock v. Scripto-Tokai Corp.*, 319 F.3d 231, 237 (5th Cir.2003) ("Under Texas law, causation generally is a question of fact for the jury."); *Texas Department of Transportation v. Olson*, 980 S.W.2d at 890, 893 (Tex. App.— Fort Worth 1998, no pet.) ("The question of proximate cause is one of fact particularly within the province of a jury, and a jury finding on proximate cause will be set aside only in the most exceptional circumstances.").

Once again Defendants' lead case supporting its reliance argument is *Ernst & Young*, 967 F. 2d 166, which (as noted above) was decided on summary judgment and not on a motion to dismiss. Other courts that have considered the audit reliance/causation issue have similarly concluded that it is not appropriate for resolution on a motion to dismiss. See *Mosier v.*

Stonefield Josephson, Inc., 2011 U.S. Dist. LEXIS 124058 (C.D. Calif. 2011) (denying motion to dismiss for failure to plead reliance on audit as premature "because questions of causation raise issues of fact"); *Mosier v. Stonefield Josephson, Inc.*, 2013 U.S. Dist. LEXIS 132598 at *14-18 (C.D. Calif. 2013) (granting summary judgment on receiver's auditor negligence claim and holding that while the receiver did not have to *plead* reliance to survive a motion to dismiss because reliance is not an element of a negligence claim, the receiver still had to *prove* reliance on the audit to survive summary judgment).

The Receiver has satisfied his pleading burden on causation, pleading how Defendants' negligence caused damages to the Breitling entities. Complaint, at ¶¶ 7, 23-25, 35, 43, 55, 61, 69-70, 72, 76-77, 83. Moreover, the Receiver *has* plead that the entities relied on the audit, and the Receiver submits that such pleading is adequate under the applicable Rule 8 standard. *Id*., at ¶ 3.

To the extent that the Court disagrees that reliance on the audit is not required to be plead with particularity as part of causation at this preliminary stage of the case, or that the Receiver has adequately plead reliance, then the Receiver requests leave to amend his Complaint to plead, *inter alia*, that the Breitling entities filed Defendants' audit with the SEC as part of its 10-K filing, which some courts have held constitutes sufficient evidence of reliance to support entry of judgment on a jury verdict. See *Thabault v. Chait*, 541 F. 3d 512, 524 (3d Cir. 2008). The Receiver incorporates a motion for leave to amend at the end of this Brief.

D. <u>The Receiver's Fraudulent Transfer Claim is not Barred by the Statute of Repose</u>

Defendants move to dismiss the Receiver's fraudulent transfer claim by arguing that it is extinguished pursuant to the repose provisions of the Texas Uniform Fraudulent Transfer Act

("TUFTA"), Tex. Bus. & Com. Code section 24.010(a). Defendants' Motion should be denied as to the TUFTA claim because Defendants misconstrue the TUFTA repose provision.

Defendants argue that pursuant to §24.010(a) the Receiver's TUFTA claim is extinguished four years after the last alleged fraudulent transfer, i.e. April 2018. But Defendants ignore the remainder of the statutory language in §24.010(a)(1), which provides that a fraudulent transfer is extinguished unless the action is brought:

> (1) under section 24.005(a)(1) of this code, 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*. (emphasis added).

Thus, by its very terms §24.005(a)(1) incorporates an alternative "one-year from discovery" repose time limit beyond the four-year limit. *See, e.g., Renate Nixdorf GmbH & Co. KG v. TRA Midland Props*., LLC, 2019 Tex. App. LEXIS 26 at *22-23 (Tex. App. – Dallas 2019) (TUFTA repose statute includes one year from discovery component for claims brought under §24.005(a)(1));[13] *Biliouris v. Patman*, 2017 U.S. Dist. LEXIS 40868 at *4-5 (N.D. Tex. 2017) (same).

Defendants argue that the Texas Supreme Court's opinion in *Nathan v. Whittington*, 408 S.W. 3d 870 (Tex. 2013), holding that §24.010(a) is a statute of repose, forecloses any "discovery rule" exception because it would be entirely inconsistent with the nature of a statute of repose. Defendants' Motion at 14. While §24.010(a) is undoubtedly a statute of repose, it specifically provides a "discovery" period for claims brought under section 24.005(a)(1). The one-year discovery provision simply was not at issue in *Nathan*, as the parties there had agreed

[13] In §24.010(a)(1) of TUFTA, the legislature specifically incorporated a discovery rule for causes of action based on §24.005(a)(1) - transfers made with actual intent to hinder, delay, or defraud any creditor of the debtor - and distinguished such causes of action from those based on transfers for which reasonably equivalent value was not received in exchange for the transfer. For the latter type of transfer the legislature provided no discovery rule. *Johnston v. Cook*, 93 S.W. 3d 263, 269 (Tex. App.-Houston [14th Dist.] 2002, pet. denied)

that the plaintiff's claims were barred if not saved by §16.064(a) of the Tex. Civ. Prac. & Rem Code. *Nathan*, 408 S.W. 3d at 874.

The Receiver's fraudulent transfer claim is clearly brought pursuant to §24.005(a)(1) and therefore subject to the one year discovery provision because in ¶92 of the Complaint the Receiver specifically pleads that the transfers at issue were made with "actual intent to hinder, delay, or defraud" creditors of BOG and BECC. Moreover, in ¶¶ 78-80 of the Complaint, the Receiver pleads that he did not discover, and could not with the exercise of reasonable diligence have discovered until more recently, Defendants' connection to the Breitling fraudulent scheme and the true nature of the injury suffered. The Receiver further pleads that the Defendants' wrongful acts were inherently undiscoverable.

Under Texas law, the limitations period for a §24.005(a)(1) claim does not begin to run upon the discovery of the transfer alone; instead the claim accrues only when the claimant discovers or reasonably could have discovered the ***fraudulent nature of the conveyance***. *DSCC,*712 F. 3d at 195 (5th Cir. 2013). "When a plaintiff knew or should have known of an injury is . . . a question of fact" that cannot be determined at the dismissal stage. *Janvey v. Dem. Sen. Campaign Comm.*, 793 F. Supp. 2d 825, 837 (N.D. Tex. 2011), *affirmed, DSCC* 712 F.3d 185 (5th Cir. 2013), *Brandau v. Howmedica Osteonics Corp*., 439 Fed. Appx. 317, 322 (5th Cir. 2011), *USPPS, Ltd. v. Avery Dennison Corp*., 326 Fed. Appx. 842, 850-51 (5th Cir. 2009). Indeed, this Court has also noted that 'application of the TUFTA "discovery rule" is a factual question inappropriate for resolution on a motion to dismiss.' *Basic Capital Mgmt., Inc. v. Dynex Capital, Inc.*, 2018 WL 2100041 at note 7 (N.D. Tex. May 7, 2018) (Fitzwater, J.). As a result, Defendants' Motion to Dismiss should be denied.

E. The Receiver's Fraudulent Transfer Claim is otherwise Properly Plead

The Texas Uniform Fraudulent Transfer Act sets forth two grounds for recovery: actual fraud and constructive fraud. TEX. BUS. & COMM. CODE ANN. §§ 24.001–.010 (Vernon 2009). Actual fraud – which is what the Receiver has plead in this case - occurs when the debtor/transferor makes a transfer "with actual intent to hinder, delay, or defraud any creditor." *Id.* at § 24.005(a)(1). Constructive fraud occurs when the debtor/transferor makes a transfer without receiving "reasonably equivalent value" and when either: (i) the debtor was undercapitalized or was made so as a result of the transfer; or (ii) the debtor intended or should have known that it was incurring debts it would be unable to pay. *Id.* at § 24.005(a)(2). The transferee's intent is not an element of the plaintiff's case under either ground. *See* TEX. BUS. & COMM. CODE ANN. § 24.005. Indeed, "'the transferees' knowing participation is irrelevant under [UFTA]' for purposes of establishing . . . [even the actual fraud] premise . . . ." *SEC v. Res. Dev. Int'l, LLC*, 487 F.3d 295, 301 (5th Cir. 2007) (quoting *Warfield v. Byron*, 436 F.3d 551, 559 (5th Cir. 2006)).

Defendants argue that the Receiver has not sufficiently alleged facts that enable the court to draw reasonable inference that Faulkner or the Breitling Entities acted *with constructive or actual fraudulent intent* when the payments were made to Rothstein Kass to conduct the audit. But the Complaint alleges a fraudulent transfer claim under §24.005(a)(1) and sufficiently pleads facts supporting its claim of fraudulent transfer under that section. Unlike the complaint in *Basic Capital Mgmt., Inc. v. Dynex Capital, Inc.*, N0. 3:17-CV-1147-D, 2018 WL 2100041 (N.D. Tex. May 7, 2018), the Receiver's Complaint specifically alleges that Faulkner caused BOG and BECC to make transfers totaling at least $215,000 between December 1, 2103 and April 1, 2014 with actual intent to hinder, delay or defraud creditors of BOG and BECC.

Complaint at ¶¶ 91-95.[14] The Complaint goes into great detail detailing Faulkner's actual fraud on creditors using the Breitling entities. Complaint at ¶¶ 2, 12-32.

Actual intent to defraud creditors ordinarily is a fact question. Facts and circumstances that may be considered in determining intent include the non-exclusive list of badges of fraud prescribed by the legislature in section 24.005(b). *Ho. v. MacArthur, LLC*, 395 S. W. 3d 325, 328-29 (Tex. App-Dallas 2013, no pet.) A transferor's intent to hinder, delay, or defraud is not an appropriate issue for summary judgment (let alone a 12(b)(6) motion) except in limited circumstances because intent, like knowledge, is a question of fact generally reserved for the jury. *Wohlstein v. Aliezer*, 321 S. W. 3d 765, 777(Tex. App.-Houston [14th Dist.] 2010, no pet.).

The Receiver's detailed pleading of the Breitling fraud scheme during which the transfers to Defendants were made satisfy the Rule 8 requirements, and Defendants' Motion on this claim should be denied. To the extent that the Court disagrees that the Receiver has adequately plead his TUFTA claim, then the Receiver requests leave to amend his Complaint to so plead. The Receiver incorporates a motion for leave to amend at the end of this Brief.

F. <u>The Receiver's Remaining Claims do not Violate Texas' Anti-Fracturing Rules</u>

Defendants next argue that the Receiver has improperly "fractured" the professional negligence claim into several causes of action, including participation in breach of fiduciary duty, and aiding and abetting/participation in a fraudulent scheme.

But the Defendants misconstrue Texas law on fracturing of malpractice claims. Texas law is clear that "when cases say that clients cannot divide or fracture their negligence claims

[14] Again, fraudulent transfer claims are subject to Rule 8's requirement of "a short and plain statement of the claim showing that the pleader is entitled to relief", not Rule 9(b)'s pleading requirements. *See U.S. Bank. Nat. Ass'n v. Verizon Comm's Inc*., 2012 WL 3100778, at *11 (N.D. Tex. Jul. 31, 2012); *Janvey v. Alguire*, 846 F.Supp.2d 662, 676 (N.D. Tex. 2011) (there is "no principled reason for applying Rule 9's pleading requirements to [the Plaintiffs'] fraudulent transfer claims."); *GE Capital Comm., Inc. v. Wright & Wright, Inc*., 2009 WL 5173954, at * 10 (N.D. Tex. Dec. 31, 2009).

against their attorneys [accountants] into other claims, this does *not* mean that clients can sue their attorneys [accountants] *only* for negligence." *Beck v. Law Offices of Edwin J. Terr*y, 284 S.W. 3d 416, 427 (Tex. App. – Austin 2009)) citing *Deutsch v. Hoover, Bax & Slovacek, LLP*, 97 S.W. 3d 179, 190 (Tex. App. – Hous. [14th Dis.] 2003) (emphasis added). Nor does the anti-fracturing rule necessarily bar a client from *simultaneously* asserting professional negligence and non-negligence claims against an attorney or accountant that are predicated on some common or overlapping facts. *Id.; see also Floyd v. Hefner*, 556 F. Supp. 2d 617, 659 (S.D. Tex. 2008)(holding that Texas law permits a party to bring ***both*** a malpractice action against its attorney and a separate claim for the lawyer's assistance with the breach of ***another's*** fiduciary duties); *In re TOCFHBI, Inc.*, 413 B.R. 523, 534 (N.D. Tex. 2009) (same).

Defendants mistakenly argue that the Receiver's allegations for participation in breach of fiduciary duty and fraud are merely restatements of the Receiver's negligence claim. To the extent the Receiver relies on some of the same facts for both the negligence and participation/aiding and abetting claims, Courts have held that the jury should be charged on both claims:

> Though [plaintiff] alleged the same facts in his petition for both his negligence and breach-of-fiduciary-duty claims, this pleading practice is not determinative. The procedural rules allow a claimant to plead in the alternative. When, as in this case, the evidence raises a genuine issue of material fact regarding alleged wrongful conduct that sounds in negligence as well as alleged wrongful conduct that sounds in breach of fiduciary duty, the trial court should charge the jury on both claims, regardless of any alternative pleading.

Deutsch, 97 S.W.3d at 190-191 (internal citations omitted).

In the Stanford litigation, Judge Godbey followed the logic outlined in the above line of authority in declining to dismiss, based on the anti-fracturing argument, the Stanford Receiver's claims against Proskauer Rose – which were virtually identical to the participation and aiding

and abetting tort claims asserted by the Receiver in this case. *Janvey v. Proskauer Rose*, 2015 U.S. Dist. LEXIS 187809 at *11-14 (N.D. Tex. 2015) (declining to dismiss the receiver's claims for aiding and abetting breaches of fiduciary duties, aiding and abetting/participation in a fraudulent scheme, aiding and abetting fraudulent transfers, aiding and abetting conversion, civil conspiracy, and negligent retention/supervision).

Here the Receiver has plead that Defendants knew of a plethora of financial and accounting wrongdoing by Faulkner, including outright fraud on investors, yet Defendants proceeded to issue a clean audit for the Breitling entities anyway. Complaint at ¶¶ 36-77 (citing Defendants' knowledge of over two dozen instances of wrongful conduct by Faulkner that would constitute a breach of fiduciary duty and fraud). A jury could reasonably infer that Defendants' conduct constitutes negligence, gross negligence, participation in breach of fiduciary duty or a fraudulent scheme, or aiding and abetting fraud, *or all of the above*. Texas law on fracturing permits a jury to be charged as to *all* of the causes of action that are supported by the evidence. *Deutsch*, 97 S.W.3d at 190-191. The Court should deny Defendants' motion to dismiss the Receiver's non-negligence claims based on the anti-fracturing theory.

G. The Receiver has Adequately Plead the Aiding and Abetting/Participation Claims

Defendants argue that the Receiver's participation in breach of fiduciary duty and aiding and abetting/participation in fraud claims must be dismissed because he fails to plead Defendants' "substantial assistance".

As a preliminary matter, the Receiver's claim for knowing participation in breach of fiduciary duty does not include or require pleading of "substantial assistance" as an element. Under Texas law, a claim for participation in breach of fiduciary duty has only three elements: (1) the existence of a fiduciary relationship; (2) that the third party knew of the fiduciary

relationship; and (3) that the third party was aware that it was participating in the breach of that fiduciary relationship. *Meadows v. Hartford Life Ins. Co.*, 492 F.3d 634, 639 (5th Cir. 2007). Importantly, these are ***not*** the same elements as a claim for common law aiding and abetting because they do not include "substantial assistance" as an element. *Floyd v. Hefner*, 556 F.Supp.2d 617 at n. 35 (S.D. Tex. 2008).[15]

As for the Receiver's aiding and abetting fraud claim, the Receiver submits that Defendants' issuance of an unqualified "clean" audit opinion for the Breitling entities, despite knowledge of over two dozen instances of wrongful conduct and outright fraud on investors by Faulkner [Complaint at ¶¶ 36-77], constitutes "substantial assistance" in and of itself. *See Mishkin v. Peat, Marwick, Mitchell & Co*., 658 F.Supp. 271, 274 (S.D.N.Y. 1987) (accountant's certification of materially false financial statements substantially assisted the fraud). *See also Nathel v. Siegal*, 592 F. Supp. 2d 452, 470 (S.D.N.Y. 2008) (where primary wrong involves false documentation, "substantial assistance usually involves assistance in the preparation or dissemination of the documents."). This is because "[c]lean audit opinions are public statements that are intended to provide assurance to the public of the financial health of a company". *See Krys v. Sugrue (In re Refco Inc. Sec. Litig.),* 2011 U.S. Dist. LEXIS 154449 at *68-70 (S.D.N.Y. 2011) ("giving a public imprimatur to materially misleading financial statements constitutes a "substantial contribution to the perpetration" of the Refco Fraud because it allowed Refco to

[15] To prevail on its claim that Defendants participated in a breach of fiduciary duty, the Receiver is ***not*** required to prove that Defendants were aware of the fraud, but only that they were aware that Faulkner and/or other directors and officers of the Breitling entities were breaching duties they owed to the entities. *Milligan v. Salamone*, No. 1:18-CV-327-RP, 2019 WL 1208999 *7 (W.D. Tex. 2019) (denying motion to dismiss knowing participation claim because plaintiff plausibly alleged defendant's knowledge of officer's and director's violation of fiduciary duties); *Darocy v. Abildtrup*, 345 S.W.3d 129, 137-138 (Tex. App.—Dallas 2011, no pet.) (affirming trial court judgment against participant in managing partner's breach of fiduciary duty based on his overall "role and involvement" and "knowledge of problems"); *Nelson v. Vernco Constr. Inc.*, 566 S.W.3d 716, 760-761 (Tex. App.—El Paso 2018) (affirming judgment against participant in breach of fiduciary duty.) A jury can infer actual knowledge from circumstantial evidence. *United States v. Kuhrt*, 788 F.3d 403, 416 (5th Cir. 2016); *CBIF Ltd. P'ship v. TGI Friday's Inc.,* No. 05-15-00157-CV, 2017 WL 1455407, *42-64 (Tex. App.—Dallas Apr. 21, 2017, pet. denied).

continue to do business and deceive the public until the insiders could cash out"). *See also Ponce v. SEC*, 345 F. 3d 722, 737-738 (9th Cir. 2003) (auditor's role in issuing audit certification constituted substantial assistance because of the integral role the audit played in SEC reporting requirements).

Furthermore, the issue of substantial assistance is closely linked to issues of proximate cause, which typically involve fact questions. *See Kirschner v. Bennett*, 759 F. Supp. 2d 301, 340 (S.D.N.Y. 2010) (noting that whether the issuance of a clean audit in and of itself constitutes substantial assistance raised fact questions on causation); *JP Morgan Chase Bank v. Winnick*, 406 F. Supp. 2d 247, 256 (S.D.N.Y. 2005) (the substantial assistance element has been construed as a causation concept, requiring that the plaintiff allege that the acts of the aider and abettor proximately caused the harm upon which the primary liability is predicated).

In his Complaint, the Receiver has plead how Defendants' wrongful conduct caused damages to the Breitling entities [*Id.*, at ¶¶ 7, 23-25, 35, 43, 55, 61, 69-70, 72, 76-77, 83] including "paving the way" for Faulkner to fraudulently raise an additional $68.5 million in investor funds and misappropriate an additional $18 million in Breitling assets. *Id.*, at ¶¶ 7, 25. *See also Id.*, at ¶ 43 (Defendants' conduct increased the scale of the overall fraud); ¶ 69 (Defendants gave Faulkner cover to keep and use fraudulently obtained revenues); ¶ 72 (Defendants' inclusion of liquidity footnote in the audit opinion and issuance of unqualified audit opinion without a going concern disclosure ***materially aided*** Faulkner's fraudulent scheme).

The Defendants' Motion should be denied because the Receiver has plead substantial assistance sufficient to support his aiding and abetting/participation in fraud claim. To the extent that the Court disagrees that the Receiver has plead substantial assistance, then the Receiver requests leave to amend his Complaint to so plead. The Receiver incorporates a motion for leave to amend at the end of this Brief.

H. The Receiver States Valid Participation/Aiding and Abetting Claims

In an argument reminiscent of its anti-fracturing argument, Defendants contend that the Receiver's claims for participation in breach of fiduciary duty and aiding and abetting/participation in fraud do not apply to professional negligence claims and/or only exist as "concert of action" for "anti-social" behavior. This argument is mertiless. The Texas Supreme Court long ago recognized the cause of action for participation in breach of fiduciary duty as being the "***settled law***" of Texas and has never reversed or withdrawn that decision. *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 514 (1942) ("It is settled law of this State that where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes a joint tort-feasor with the fiduciary and is liable as such."). Over the ensuing years, numerous Texas intermediate appellate courts have consistently recognized participation in breach of fiduciary duty as a valid cause of action under Texas law.[16]

The Fifth Circuit has also recognized this cause of action under Texas law. *Meadows v. Hartford Life Ins. Co.*, 492 F.3d 634, 639 (5th Cir. 2007) ("Under Texas law, 'where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes a joint tortfeasor with the fiduciary and is liable as such'").

Defendants cite to the Texas Supreme Court's decision in *First United Pentecostal Church v. Parker*, 514 S.W.3d 214 (Tex. 2017) as support for their argument. But in that case the Texas Supreme Court assumed, without deciding, that a claim for "aiding and abetting" breach of fiduciary duty existed under Texas law, but went on to hold that there was no evidence

[16] *See, e.g., Hunter Bldgs. & Mfg., L.P. v. MBI Global L.L.C.*, 436 S.W.3d 9, 15 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) ("Under Texas common law, if a third party knowingly participates in a defendant's breach of a fiduciary duty owed to a plaintiff, the third party is jointly liable with the defendant for damages to the plaintiff proximately caused by this breach of fiduciary duty. . . ."); *CBIF Ltd. P'ship v. TGI Friday's Inc.,* No. 05-15-00157-CV, 2017 Tex. App. LEXIS 3605, *42-45 (Tex. App.—Dallas Apr. 21, 2017, pet. denied) ("When a defendant knowingly participates in the breach of fiduciary duty, he becomes a joint tortfeasor and is liable as such"); *James J. Flanagan Shipping Corp. v. Del Monte Fresh Produce, N.A. Inc.*, 403 S.W.3d 360, 368 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *Graham Mortg. Corp. v. Hall*, 307 S.W.3d 472, 479 (Tex. App.—Dallas 2010, no pet.).

that the lawyer accused of aiding and abetting the theft of church funds was aware of the plan to steal the money and that there was no evidence that the church was harmed by the lawyer's post-theft covering up what happened to the church's funds. *Id.* at 225.

Of course, the Texas Supreme Court does not reverse, overrule, or withdraw one of its prior opinions without explicitly saying so,[17] and therefore the *Parker* opinion – which does not reverse, overrule, withdraw, or even mention *Kinzbach Tool*– cannot be read as eliminating the long standing "settled law" of Texas recognizing participation in breach of fiduciary duty as a valid cause of action.

Moreover, even after the Texas Supreme Court issued its decision in *Parker*, several Texas intermediate appellate courts have continued to recognize the tort of participation in breach of fiduciary duty—including the Dallas Court of Appeals, which affirmed a jury verdict for participation in breach of fiduciary duty in an opinion issued the month after *Parker*. *SeeCBIF Ltd. P'ship v. TGI Friday's, Inc.,* No. 05-15-00157-CV, 2017 Tex. App. LEXIS 3605, *42-45 (Tex. App.—Dallas Apr. 21, 2017, pet. denied); *see also Nelson v. Vernco Constr., Inc.*, No. 08-10-00022-CV, 2018 Tex. App. LEXIS 3938 (Tex. App.—El Paso May 31, 2018, pet. filed) (affirming jury verdict for participation in breach of fiduciary duty in an opinion issued 14 months after *Parker*). See also, *Milligan v. Salamone*, No. 1:18-CV-327-RP, 2019 WL 1208999 *7 (W.D. Tex. 2019) (denying law firm's motion to dismiss knowing participation claim because plaintiff plausibly alleged lawyers' knowledge of officer's and director's violation of fiduciary duties).

Defendants also cite *Juhl v. Airington*, 936 S.W. 2d. 640 (Tex. 1996) as supporting their position. But *Juhl* involved a cause of action for "concert of action" under § 876 of the

[17] *See, e.g., St. John Missionary Baptist Church v. Flakes*, 547 S.W.3d 311, 317 (Tex. App.—Dallas 2018, pet. filed) ("It is the prerogative of the supreme court, not us, to overrule the supreme court's decisions if it determines the reasons have been rejected by another line of decisions").

Restatement of Torts, not *Kinsbach* joint tortfeasor liability for participation in breach of fiduciary duty, or common law aiding and abetting fraud. *Id.*, *Juhl* at 643-645. Moreover the underlying conduct alleged in *Juhl* was negligence, not an intentional tort like breach of fiduciary duty or fraud. *Id.*, at 644.

While not cited by Defendants, the Receiver will nevertheless address the Fifth Circuit's opinion in *Christopher v. DePuy Orthopaedics Inc*. (*In re DePuy Orthopaedics Inc. Hip Implant Products Liability Litig*.), 888 F.3d 753 (5th Cir. 2018) ("*DePuy*"). *DePuy* involved a massive hip implant products liability verdict against the hip implant manufacturer DePuy and its parent company Johnson & Johnson ("J&J"). The case had nothing to do with any participation in breaches of fiduciary duties; instead the Plaintiffs in *DePuy* asserted three theories of liability against J&J: ***aiding and abetting strict liability***; nonmanufacturer seller and negligent undertaking. *DePuy*, 888 F.3d at 763.

In addressing the "aiding and abetting strict liability" claim against J&J, the Fifth Circuit concluded that no such claim existed under Texas law. *Id*. at 781-82. In doing so, the Fifth Circuit stated that the Texas Supreme Court's *Kinzbach Tool* decision was not relevant to the inquiry because that case involved "a joint tortfeasor matter". *Id.* at 782. The Fifth Circuit did not determine or hold – nor could it[18] – that *Kinzbach Tool* was wrong or should be reversed or overturned. Nor did the Fifth Circuit reverse or overrule – or even reference – its prior decision in *Meadows* recognizing participation in breach of fiduciary duty as a valid cause of action under Texas law. *Meadows v. Hartford Life Ins. Co.*, 492 F.3d 634, 639 (5th Cir. 2007) ("Under Texas law, 'where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes a joint tortfeasor with the fiduciary and is liable as such'").

[18] *E.g.*, *Erie R. Co. v. Tompkins*, 304 U.S. 64, 79-80 (1938).

Unlike *DePuy*, but like *Kinzbach* and *Meadows*, this case is readily distinguishable because it involves claims of joint tortfeasor liability for breach of fiduciary duty and fraud, not an aiding and abetting claim where "the predicate offense sounds in strict liability." *DePuy*, 888 F.3d at 781. Stated otherwise, *DePuy* stands only for the proposition that there is no common law claim for aiding and abetting a strict liability claim. It is silent as to aiding and abetting an intentional tort such as fraud.[19]

I. The Receiver has Adequately Plead his Claim for Participation in a Fraudulent Scheme

As Count III of the Complaint, the Receiver has plead a cause of action for "aiding and abetting or participation in a fraudulent scheme". Said claim is not a direct claim for fraud by Defendants. Rather it is a joint tortfeasor claim, with the primary fraud committed by Faulkner and the other Breitling directors and officers named in the Complaint who manipulated the Breitling entities and caused them to engage in a fraudulent scheme. As discussed above, the Complaint is replete with specific allegations describing Faulkner's use of the Breitling entities to engage in fraudulent schemes. And it has long been the law in Texas that "each party to a fraudulent scheme is responsible for the acts of the other participants done in furtherance of the scheme and ***liable for fraud***".[20]

III. MOTION FOR LEAVE TO AMEND COMPLAINT

In the alternative, if the Court is inclined to grant Defendants' Motion in whole or in part,

[19] Notably, the *DePuy* Plaintiffs failed to identify any authority, either from Texas or any other jurisdiction, supporting the existence of a claim for aiding and abetting strict liability. This is not surprising because aiding and abetting claims arise in intentional tort cases, not in cases involving claims for strict liability like in *DePuy*, or for negligence, like in *Juhl*.

[20] *In re Arthur Andersen LLP*, 121 S.W. 3d 471, 481 (Tex. App. – Hous. [14th Dis.] 2003, orig. proceeding [mand. Denied]); *Skrepnek v. Shearson Lehman Bros. Inc*., 889 S.W. 2d 578, 580 (Tex. App. – Hous. [14th Dis. 1994, no writ); *Corpus Christi Teachers Credit Union v. Hernandez*, 814 S.W.2d 195, 202 (Tex. App.—San Antonio 1991, no writ); *Crisp v. Southwest Bancshares Leasing Co*., 586 S.W. 2d 610, 615 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e) (citing *Jernigan v. Wainer*, 12 Tex. 189, 194 (1854)*; King v. Shawver*, 30 S.W.2d 930, 932 (Tex. Civ. App. – 1930, no writ) (upholding a jury question on aiding and abetting the fraudulent sale of bonds).

the Receiver respectfully requests leave to amend the Complaint under Rule 15(a) of the Federal Rules of Civil Procedure, so that the Receiver can correct any pleading defects, including any issues specifically identified in the Motion or this Response. When a trial court is considering a motion to dismiss a complaint for failure to state a claim, granting leave to amend is especially appropriate. See *Great Plains Trust Co., et al v. Morgan Stanley Dean Witter & Co*., 313 F.3d 305, 329 (5th Cir. 2002) ("[O]ur cases support the premise that 'granting leave to amend is especially appropriate . . . when the trial court has dismissed the complaint for failure to state a claim.") (citing *Griggs v. Hinds Junior College*, 563 F.2d 179, 180 (5th Cir. 1977) (per curiam) (addressing Rule 12(b)(6) dismissal)). Rule 15(a) applies where plaintiffs expressly request to amend even though the request is "not contained in a properly captioned motion paper." *Willard v. Humana Health Plan of Texas, Inc.*, 336 F.3d 375, 387 (5th Cir. 2003) (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 701 (5th Cir. 1988). A formal motion is not required as long as the requesting party has set forth with particularity the grounds for the amendment and the relief sought. *Id.*.

While the Receiver believes that he has adequately pled facts sufficient to survive dismissal, he nevertheless requests leave to amend the Complaint if necessary, and to the extent relevant to the Court's determination of this Motion, to address the allegedly deficient allegations that are the subject of Defendant's asserted grounds for dismissal, including issues related to reliance and substantial assistance. The Court should not dismiss the Complaint with prejudice, which is a "drastic remed[y] [that] should be used only in extreme situations . . . ." See *Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977) (citing *Brown v. Thompson*, 430 F.2d 1214, 1216 (5th Cir. 1970).

IV. PRAYER

For the foregoing reasons, the Receiver respectfully requests that the Court enter an order denying Defendants' Motion to Dismiss in its entirety, and grant the Receiver such other and further relief the Court deems just and proper.

Respectfully submitted,

CASTILLO SNYDER, P.C.
700 N. St. Mary's, Suite 1560
San Antonio, Texas 78205
Telephone: 210-630-4200
Facsimile: 210-630-4210

/s/ Edward C. Snyder
Edward C. Snyder
Texas State Bar No. 791699
esnyder@casnlaw.com
Jesse R. Castillo
Texas State Bar No. 03986600
jcastillo@casnlaw.com

ATTORNEYS FOR THOMAS L. TAYLOR, III

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served on this 20th day of September, 2019 on all counsel of record via CM/ECF, and/or email, pursuant to the Federal Rules of Procedure 5(b)(2).

/s/ Edward C. Snyder
Edward C. Snyder

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THOMAS L. TAYLOR, III In his capacity as Court-Appointed temporary receiver for Breitling Energy Corporation,	§	
Plaintiff,	§	**CIV. ACTION NO. 3:19-cv-01594-D**
vs.	§	
ROTHSTEIN KASS & COMPANY and BRIAN MATLOCK,	§	
Defendants.	§	

ORDER DENYING DEFENDANTS' ROTHSTEIN KASS & COMPANY AND BRIAN MATLOCK'S MOTION TO DISMISS RECEIVER'S ORIGINAL COMPLAINT

Before this Court is Defendant's Rothstein Kass & Company and Brian Matlock's Motion to Dismiss Receiver's Original Complaint. Upon consideration of the Motion and the Receiver's Response and Brief in Opposition, the Court has determined that the Motion to Dismiss should be and is hereby DENIED.

SO ORDERED this ___ day of September, 2019

SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE