



Inc. (“Eagle Rio”), and Okoto Okpo (“Okpo”) (collectively “Defendants”)<sup>1</sup>, file this Motion for Summary Judgment on All Claims (the “Motion”). In support, Defendants respectfully represent:

**I.**

**BASIS FOR RELIEF**

1. This action is time-barred as to all transfers received by Defendants from the Receivership Entities.<sup>2</sup> Defendants worked for the Receivership Entities as employees and were compensated for their work. According to the documents disclosed by the Receiver in his Rule 26(a)(1) Disclosures, the last payment to Trevino was made on May 20, 2014. The last payment made to Trevino’s company, Eagle Rio, was made on April 22, 2014. The last payment made to Okpo was made on February 8, 2016. No transfers were made after that date. On February 7, 2018, the Receiver sent demand letters to the Defendants seeking to recover, *as fraudulent transfers*, exactly the same payments the Receiver seeks to recover in this action. Thus, the Receiver plainly knew about the transfers and expressly declared them to be recoverable as fraudulent transfers no later than February 7, 2018.

2. The Receiver filed his Complaint against Defendants on February 18, 2020, four (4) years and 10 days after the last payment was made to any of the Defendants, and two (2) years and eleven (11) days after the Receiver demanded that the payments be returned on the alleged basis that they were fraudulent transfers under the Texas Uniform Fraudulent Transfer Act, Texas Business & Commerce Code Section 24.001 *et seq.* (“TUFTA”).

3. The Receiver has sued Defendants under TUFTA, and his claims are subject to all defenses available under that statute. TUFTA Section 24.010 provides a cause of action to avoid

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<sup>1</sup> Eagle Rio Energy Companies, Inc. was a Texas corporation, 100% owned by Rey Trevino. The services provided to the Receivership Entities by Eagle Rio Energy Companies, Inc., were actually performed by Rey Trevino. Okoto Okpo is an individual with no connection to Rey Trevino, except that both worked for one or more of the Receivership Entities at roughly the same time and are personally acquainted through that prior employment.

<sup>2</sup> Breitling Energy Corporation, et. al.

and recover a fraudulent transfers under Section 24.005(a)(1) is **extinguished** unless filed within four (4) years after the transfer occurred, or if later, within one (1) year after the transfer was or could reasonably have been discovered by the claimant. The Receiver missed both the four (4) year deadline based upon the dates of the transfers and the (1) year “discovery rule” deadline for filing the action after learning of the transfers. The Texas Supreme Court holds that the provisions of TUFTA Section 24.010<sup>3</sup> are a statute of repose, not limitations. *Nathan v. Whittington*, 408 S.W.3d 870, 873 (Tex. 2013). Once the statutory period expires, the legal right is extinguished. The four (4) year deadline and one (1) year “discovery rule” deadline are absolute and not subject to equitable or procedural tolling. The statutory language is plain and not subject to debate. The Receiver’s fraudulent transfers claim were extinguished as a matter of law by the passage of time before this action was filed. Defendants are entitled to summary judgment that the Receiver take nothing on his fraudulent transfer claims under TUFTA. Since the Receiver’s claims were extinguished before the case was filed, the Receiver should not have sued Defendants in this action. Defendants have been forced to incur reasonable attorneys’ fees and costs to defend claims that were plainly extinguished before the action was filed. Pursuant to TUFTA Section 24.013, it would be just and equitable to award Defendants recovery of their reasonable and necessary attorneys’ fees. Indeed, it would be unjust not to award those fees and costs.

4. The Receiver’s asserted “unjust enrichment” claim does not a state a claim under Texas law, which recognizes no such cause of action. Furthermore, TUFTA is intended to be a uniform statute, to pre-empt the field and create one uniform law in Texas for the recovery of fraudulent transfers. A challenged transfer either meets the elements for recovery under TUFTA

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<sup>3</sup> *Tex. Bus. & Com. Code § 24.010(a)(1)*.

or it does not. If the Receiver cannot recover an alleged fraudulent transfer under TUFTA, he cannot accomplish the same result by repackaging a failed fraudulent transfer claim as a claim for “unjust enrichment.”

5. The Receiver does not own the “unjust enrichment” claim he seeks to assert. The Complaint states the Defendants were unjustly enriched at the expense of the defrauded investors, not as the expense of the Receivership Entities. The Receiver does not own the claims of the defrauded investors and lacks standing to assert them. A federal equity receiver owns and can assert the claims of the receivership entities themselves, but not the claims of their creditors.

6. Nor were the Defendants unjustly enriched. The Defendants were not officers, directors, or shareholders of the Receivership Entities. Nor were they supervisors. They were ordinary employees. They went to work each workday and did their jobs. The Receivership Entities paid the Defendants the agreed-upon compensation for the work they were hired to do. There is nothing unjust about that. The Receivership Entities have no right to recover money they voluntarily paid to the Defendants for employee services that were performed.

7. Even if Texas law recognized a cause of action for unjust enrichment, the statute of limitations for a such claims is two (2) years under Texas Civil Practice and Remedies Code Section 16.003. That statutory limitations period ran out long before the Complaint was filed. In fact, the statutory period for all the payments received by Trevino and Eagle Rio and most of the payments received by Okpo ran before the Receiver was even appointed. The appointment of the Receiver did not revive claims that were already time-barred.

8. The Defendants are entitled to summary judgment that the Receiver taking nothing on his claims for “unjust enrichment.”

9. In the event that the Court does not award summary judgment on all claims, pursuant to Rule 56(g), the Defendants request that the Court enter an Order stating what issues have been resolved and what issues, if any, remain in genuine dispute.

10. In accordance with Northern District of Texas Local Rules governing motion practice, Defendants will present their summary judgment evidence in a numbered Appendix and file a separate brief setting forth their factual contentions and legal arguments.

## II.

### **REQUESTED RELIEF**

WHEREFORE, PREMISES CONSIDERED, Defendants ask the Court to enter final summary judgment that: (1) the Receiver take nothing on his claims against Defendants; and (2) Defendants recover from the Receiver the reasonable attorneys' fees and costs that Defendants incurred to defend this action, with the proper amount of such fees and costs to be proven by affidavit or declaration submitted after the Court rules on this Motion. In the alternative, if the Court does not award summary judgment on all claims, pursuant to Federal Rule 56(g), Defendants request that the Court enter an Order expressing what issues have been resolved conclusively and what issues, if any, remain in genuine dispute. Finally, Defendants also request such other and further relief as may be just and proper.

November 23, 2020.

Respectfully submitted,

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**Eagle Rio Energy Companies, Inc.,**  
**and Okoto Okpo**

**CERTIFICATE OF SERVICE**

I hereby certify on this 23<sup>rd</sup> day of November 2020, that I served a true and correct copy of the forgoing Defendants’ Motion for Summary Judgment on the following counsel by email and this Court’s ECF notification system:

Thomas L. Taylor, Receiver  
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“Receiver”) for Breitling Energy Corporation et al. (the “Receivership Entities”).

**I.**

**FRAUDULENT TRANSFER CLAIMS**

The Court finds that there is no genuine issue of material fact in this case as to the specific Defendants who filed the Motion. The Court finds that Defendants, Trevino and Eagle Rio, received no transfers from Receivership Entities after May 20, 2014. The Court finds that Okpo received no transfers from the Receivership Entities after February 8, 2016. The Court further finds that, on or about February 7, 2018, the Receiver sent demand letters (the “Demand Letters”) to Trevino, Eagle Rio, and Okpo, in which the Receiver demanded return of the same transfers he seeks to recover in this action, and expressly stated that such transfers were fraudulent as creditors and recoverable pursuant to Section 24.005(a)(1) of the Texas Uniform Fraudulent Transfer Act (“TUFTA”). See TEX. BUS. & COMM. CODE § 24.001. et. seq. The Court further finds that his action was filed on February 18, 2020, more than four (4) years after the last transfer received by the Defendants and more than one (1) year after the Receiver **had discovered the transfers and knew facts that led him to believe that the transfers were fraudulent** as to creditors of the Receivership Entities. No competent evidence controverts these any of these findings.

Under Texas law, as declared by the Texas Supreme Court in *Nathan v. Whittington*, 408 S.W.3d 870, 873 (Tex. 2013), TUFTA Section 24.010(a)(1) is a statute of repose, not limitations. As a result, the deadlines for filing actions under TUFTA are a matter of substantive law, i.e. the time limits are elements of the statutory cause of action, and thus are immune to equitable or procedural tolling. *O’Chesky v. American Housing Foundation*, 543 B.R. 245, 257 (Bankr. N.D. Tex. 2015).



Under TUFTA Section 24.010(a)(1), a cause of action to recover transfers under Section 24.005(a)(1) is extinguished as a matter of law if not filed within four (4) years of the date of the transfer, or if later, within one (1) year after the plaintiff discovered or reasonably should have discovered the transfer and facts sufficient for him to believe that the transfer might be fraudulent as to creditors. Based upon its findings of fact, the Court concludes the Receiver's claims against the specific Defendants who filed the Motion were extinguished by operation of the statute before this action was filed. Accordingly, the Defendants are entitled to summary judgment that the Receiver take nothing on his claims against them under TUFTA.

## II.

### UNJUST ENRICHMENT CLAIMS

As to the Receiver's claims for "unjust enrichment," the Court concludes that "unjust enrichment" are merely the Receiver's fraudulent transfer claims by a different name. The Texas Legislature enacted TUFTA to create a uniform law governing the recovery of fraudulent transfers and defenses to such claims. See TUFTA Section 24.012. *Cadle Co. v. Wilson*, 136 S.W.3d 345, 353 (Tex.App.-Austin 2004, no pet.). All rights and remedies are contained within the statute. There is no penumbra of common rights peaks around the fringes of the statute. *Reagan National Advertising of Austin, Inc., v. Lakeway 620 Partners, L.P.*, 2001 Tex. App. LEXIS 4375, \*25-27 (Tex.App.-Austin 2001, pet. denied). The statute is intended to pre-empt the field of fraudulent transfer liability under Texas law. Such uniform laws advance the legislative policy goals of clarity and predictability. The Receiver's TUFTA claims are barred by the statute of repose in Section 24.010(a)(1). The Receiver's fraudulent transfers causes of action against the Defendants cannot satisfy the elements of TUFTA. The Receiver cannot

escape of the legal effect of TUFTA Section 24.010(a)(1) merely by giving his claims another name.

Texas does not recognize an independent cause of action for unjust enrichment. *Davis v. OneWest Bank, N.A.*, 2015 Tex. App. LEXIS 3470, \*2-3 (Tex.App.-Fort Worth 2015) (“Most of the Texas courts of appeals and federal courts that have considered the question under Texas law have rejected the existence of an independent cause of action for unjust enrichment.”) (Internal citations omitted); *Barnett v. Coppell North Texas Court, Ltd.*, 123 S.W.3d 804, 816-17 (Tex.App.-Dallas 2003, pet. denied) (“[U]njust enrichment is not an independent cause of action.”). *See also Oxford Finance Cos. v. Velez*, 807 S.W.2d 460, 465 (Tex.App.-Austin 1991, writ denied); *Mission Trading Co. v. Lewis*, 2017 U.S. Dist. LEXIS 181094 \*15 (S.D. Tex. 2017).

The Court further finds that Defendants were not unjustly enriched. Based upon the competent summary judgment evidence presented, the Court finds Defendants were non-managerial employees of the Receivership Entities who performed the services they were asked to perform and received their agreed compensation. Defendants were justly compensated by the Receivership Entities for their time and labor. The fact that they were not licensed to sell securities makes no difference. The Receivership Entities received value for their services as employees. *Regional Properties, Inc. v. Financial & Real Estate Consulting Co.*, 678 F.2d 552, 564 (5th Cir. 1982). There is no legal or equitable basis for the Receivership Entities to recover salaries that it contracted for and voluntarily paid to its employees.

The Court further concludes that the Receiver does not own the claims of the defrauded investors of the Receivership Entities and cannot prosecute claims for unjust enrichment on behalf of such defrauded investors. *Janvey v. Democratic Senatorial Campaign Committee, Inc.*,

712 F.3d 185, 190 (5<sup>th</sup> Cir. 2013). Based on these findings and conclusions, the Court concludes that Defendants are entitled to summary judgment that the Receiver taking nothing on his claims against Defendants for unjust enrichment.

### **III.**

#### **COSTS AND ATTORNEYS' FEES**

Pursuant to TUFTA Section 24.013, in any proceeding under TUFTA, the Court may award costs and reasonable attorneys' fees as are "equitable and just." The Court finds that the Receiver's TUFTA cause of action against the Defendants was extinguished by operation of law before this action was filed, and that accordingly, the Receiver should not have sued Defendants in this action. The Court concludes that the Receiver's unjust enrichment claims is merely the TUFTA claim by another name. The Court further concludes that Texas recognize no independent cause of action for "unjust enrichment" and any such claims would belong to the defrauded investors, not the Receiver. The Court finds that Defendants have been forced to incur costs and attorneys' fees to defend their interests. The Court further finds it would be just and equitable to award Defendants the costs and reasonable attorneys' fees that they incurred to defend their interests in this action. Defendants should be given the opportunity to prove their costs and reasonable attorneys' fees by separate Affidavit.

### **IV.**

#### **DECREE**

Based upon the findings of fact and conclusions of law stated herein, is therefore ORDERED, ADJUDGED, AND DECREED that:

1. The Motion is granted as filed;
2. The Receiver shall take nothing from Defendants on his claims to avoid fraudulent

transfers pursuant to TUFTA Section 24.005(a)(1);

3. The Receiver shall take nothing from Defendants on his claims for unjust enrichment;
4. Pursuant to TUFTA Section 24.013, Defendants are entitled to recovery their costs and reasonable attorneys' fees incurred to defend their interests in this action, in an amount to be determined;
5. Defendants are hereby given a period of 28 days from date of the entry of this Order to submit an Affidavit or Declaration to prove the amount of their costs and reasonable attorneys' fees in this action;
6. The Receiver shall have 21 days from the filing of such Affidavit or Declaration to file a counter-Affidavit or Declaration and/or any objections to the Defendants' Affidavit or Declaration; and
7. If the Receiver and the Defendants can agree on the amount of costs and attorneys' fees, they may settle the claim for costs and reasonable attorneys' fees privately and file a notice with the Court that the settlement has occurred. Otherwise, the Court shall consider the evidence presented by the parties and determine the appropriate award of costs and reasonable attorneys' fees pursuant to TUFTA Section 24.013.

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SIDNEY A. FITZWATER  
U.S. DISTRICT COURT JUDGE