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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
THOMAS L. TAYLOR III, solely in his capacity as Court-appointed temporary receiver for Breitling Energy Corporation, et al	§	**Civil Action No. 3:20-cv-00393-D**
	§	
PLAINTIFF	§	
	§	
VS.	§	
	§	
REYMOND TREVINO, EAGLE RIO ENERGY COMPANIES, INC., DEREK TAYLOR, ALDEN ADAMS, LLC, NATHAN MADU, and OKOTO OKPO,	§	
	§	
DEFENDANTS.	§	

DEFENDANTS, REYMUNDO "REY" TREVINO, III'S, EAGLE RIO ENERGY COMPANIES, INC.'S, AND OKOTO OKPO'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON ALL CLAIMS
(PERTAINS TO DOCKET NO. 38)

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TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Defendants, Reymundo "Rey" Trevino, III ("Trevino"), Eagle Rio Energy Companies, Inc. ("Eagle Rio"), and Okoto Okpo ("Okpo") (collectively "Defendants")[1], file this Brief in Support of their Motion for Summary Judgment pursuant to FED. R. CIV. P. 56, with regard to the claims asserted against them by the Plaintiff, Thomas L. Taylor, III, solely in his capacity as Court-appointed temporary receiver for Breitling Energy Corporation *et al*., (referred to herein as **"Plaintiff"** or the **"Receiver"**) in his Complaint, dated February 18, 2020 [Docket No. 1] (the "Complaint"), and in support thereof, Defendants would respectfully show this Court the following:

I. UNCONTROVERTED FACTS

A. The Appointment of the Receiver

1. As stated in the Complaint, the Receiver was appointed as temporary receiver pursuant to Orders entered in an enforcement action filed by the Securities and Exchange Commission (the "SEC") against Christopher A. Faulkner, Breitling Energy Corporation, *et al*. in Civil Action No 3:16-cv-01735-D, filed in the United States District Court for the Northern District of Texas, Dallas Division (the "Enforcement Action"). (Complaint, Page 2, Appx. Page 3).

2. The initial Order appointing the Receiver appears on the Court's Docket in the Enforcement Action at Docket No. 108. The initial Order appointing the Receiver has been amended by further Orders entered on the Court's Docket at Docket No. 142, 320, 418, and 496 (collectively the "Receivership Orders"). Pursuant to Federal Rule of Evidence 201, Defendants request the Court to take judicial notice of the Receivership Orders. For the convenience of the Court, a copy of the most

[1] 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 their periods of employment by the Receivership Entities overlapped, and Trevino and Okpo are personally acquainted through that prior employment.

recent Receivership Order is included in the Appendix. (Appx. Pages 23-41).[2]

3. The initial Receiver Order was entered on August 10, 2017. (Complaint, Page 4, Appx. Page 5). Defendants further request the Court to take judicial notice of the date of the initial Receivership Order and the Complaint in this action [Docket No. 1]. (Fed. Rule of Evid. 201).

4. Pursuant to the Receivership Order, the Receiver acts as temporary receiver for the estates of Christopher A. Faulker, Breitling Oil & Gas Corporation ("BOG"), Breitling Energy Corporation ("BEC"), Crude Energy, LLC ("Crude Energy"), Patriot Energy, Inc. ("Patriot"), Breitling Royalties Corporation ("BRC"), Breitling Ventures Corporation ("BVC"), Breitling Holdings Corporation ("BHC"), Breitling Operating Company ("Breitling Ops), Breitling Energy Companies, Inc. ("BECOS"), Breitling Royalty Funds, LLC ("BRF"), Crude Royalties, LLC ("Crude Royalties"), Inwood Investments, Inc. ("Inwood"), and Grand Mesa Investments, Inc. ("Grand Mesa"). Those entities, excluding Faulkner personally, constitute the "Receivership Entities," as defined in the Complaint. (Complaint, Pages 2-3 (Appx. Pages 3-4). Here, the Receiver purports to assert causes of action on behalf of BOG, BRC, Crude Energy, and Patriot. (Complaint, Page 3, Appx. Page 4).

5. The Receivership Entities were in the business of selling oil and gas-related securities (the "Securities") to the investing public. The terms of BOG and BRC securities offerings were provided to public investors through written offering materials in the form of private placement memoranda, confidential placement memoranda, and other marketing brochures ("Offering Materials"). (Complaint, Page 5, Appx. Page 6).

B. Defendants' Employment by the Receivership Entities

6. Defendant Trevino was hired by the Receivership Entities as a salesman in the summer of 2011, to help market the Securities by cold-calling potential investors and asking if they

[2] In citations to the Appendix, Defendants have omitted any zeros that appear before the relevant page number, so that "Appx. Page 0070" is simply written as "Appx. Page 70."

might be interested in receiving Offering Materials. If the investor indicated potential interest, Trevino would turn over the potential investor's name and contact information to a supervisor to follow up with the contact. Trevino would have no further contact with the potential investor. (Declaration of Rey Trevino, Page 3, Appx. Page 63). Trevino had no knowledge that any of the Offering Materials were materially misleading or that the Receivership Entities was not legitimate oil and gas companies. Trevino acted in good faith at all times during his period of employment, which ended in May 2014. (Declaration of Rey Trevino, Page 3, Appx. Page 63).

7. Trevino was a regular W-2 employee, with no ownership interest in the Receivership Entities and no managerial responsibility or authority. Trevino was a full-time employee, who came to work regularly. He was compensated with a fixed salary of $800, paid bi-weekly, and potential additional compensation (5% of funds invested) if an investor he contacted ultimately invested in the Securities. Trevino was paid what the Receivership Entities had agreed to pay him for this work, and nothing more. (Declaration of Rey Trevino, Pages 2-4, Appx. Pages 62-64).

8. For his own business and tax reasons, Trevino formed Eagle Rio, as a Texas corporation. Trevino was the sole owner and sole person who acted for Eagle Rio. From mid-October 2013 to mid-April 2014, Trevino performed some of his duties as employee of the Receivership Entities through Eagle Rio, which was paid for the work Trevino performed on behalf of the Receivership Entities. Eagle Rio was paid only what the Receivership Entities agreed to pay it, and nothing more. In May 2014, Trevino's period of employment ended and neither he nor Eagle Rio received any money from the Receivership Entities after May 20, 2014. (Declaration of Rey Trevino, Pages 2-4, Appx. Pages 62-64). Trevino and Eagle Rio received their compensation in good faith at all times. (Declaration of Rey Trevino, Page 3, Appx., Page 63).

9. The Receivership Entities hired Defendant Okpo as a salesman in December 2012, to help market the Securities by cold-calling potential investors and asking if they might be interested in receiving Offering Materials. If the investor indicated potential interest, Okpo would turn over the potential investor's name and contact information to a supervisor to follow up with the contact. Okpo would have no further contact with the potential investor. (Declaration of Okoto Okpo, Pages 2-3, Appx. Pages 69-70). Okpo had no knowledge that any of the Offering Materials were materially misleading or that the Receivership Entities was not legitimate oil and gas companies. Okpo acted in good faith at all times during this period of employment, which ended in February 2016. (Declaration of Okoto Okpo, Page 3, Appx. Page 70).

10. Okpo was a regular W-2 employee with no ownership interest in the Receivership Entities and no managerial responsibility or authority. Okpo was a full-time employee, who came to work regularly. He was compensated with a fixed salary of $800, paid bi-weekly, and potential additional compensation (5% of invested funds) if an investor he contacted ultimately invested in the Securities. Okpo was paid what the Receivership Entities had agreed to pay him for this work, and nothing more. (Declaration of Okoto Okpo, Pages 2-3, Appx. Pages 69-70).

11. As part of the Receiver's Rule 26(A)(1) Initial Disclosures, and in support of his calculation of damages, the Receiver provided a document marked as Exhibit "A" thereto, entitled "Bank Statement Database," which provides an accounting of the transfers (payments of compensation) made by the Receivership Entities that the Receiver seeks to recover from all defendants in this action, including Trevino, Eagle Rio, and Okpo. (Receiver's Rule 26(A)(1) Disclosures, at Page 6 and Exhibit "A," Appx. Pages 47, 49-56).[3]

[3] The Receiver's Rule 26(A) Initial Disclosures, including the Bank Statement Database, and other discovery requests and responses referenced herein are authenticated by the Declaration of Robert A. Simon, Appendix Exhibit "D," Appx. Pages 57-60. See Paragraph 20 below.

12. According to the Receiver's Bank Statement Database, Eagle Rio received its last payment from the Receivership Entities on April 22, 2014. (Receiver's Rule 26(A)(1) Disclosures, at Page 6 and Exhibit "A," Page 1 of 8, Appx. Page 49).

13. According to the Receiver's Bank Statement Database, Trevino received his last payment from the Receivership Entities on May 20, 2014. (Receiver's Rule 26(A)(1) Disclosures, at Page 6 and Exhibit "A" thereto, Pages 6-8, Appx. Pages 54-56).

14. According to the Receiver's Bank Statement Database, Okpo received his last payment from the Receivership Entities on February 8, 2016. (Receiver's Rule 26(A)(1) Disclosures, at Page 6 and Exhibit "A" thereto, Pages 3-6, Appx. Pages 51-54).

15. On or about February 7, 2018, the Receiver sent a demand letter to Defendants Trevino and Eagle Rio. A true and correct copy of the February 7, 2018 Demand Letter sent to Trevino and Eagle Rio (the "Trevino Demand Letter") is attached to the Declaration of Rey Trevino and incorporated herein by this reference. The Trevino Demand Letter appears in the Exhibit Appendix at Pages 65-67 thereto, and is authenticated by the Declaration of Rey Trevino, at Appendix Page 64. Furthermore, the Receiver admits the authenticity of the Trevino Demand Letter. (Receiver's Objections and Responses to Defendants' Requests for Admission, Response No. 14, Appx. Pages 80, 83-85, and 110).[4] In the Trevino Demand Letter, the Receiver asserts that Eagle Rio and Trevino received fraudulent transfers in the combined amount of $237,868.50 and demands that the funds be returned to the Receiver. The Receiver expressly cites TUFTA[5]

[4] This citation includes the Defendants' Requests for Admission and the Receiver's Objections and Reponses to Defendants' Request for Admission. Both discovery documents are included in the Appendix, because the Receiver did not attach Exhibits "A" and "B," i.e. the Trevino and Okpo Demand Letters, to his Objections and Responses. Defendants cite the Request for Admission, the Demand Letters, and the Receiver's admission of their authenticity.
[5] TUFTA is the common acronym for the Texas Uniform Fraudulent Transfer Act, found at Texas Business & Commerce Code § 24.001 et. seq.

Section 24.005(a)(1) as the legal basis for making his demand on Trevino and Eagle Rio for the return of those funds. (Trevino Demand Letter, Appx. Page 66).

16. On or about February 7, 2018, the Receiver sent a substantially similar demand letter to Defendant Okpo. A true and correct copy of the February 7, 2018 Demand Letter sent to Okpo (the "Okpo Demand Letter") is attached to the Declaration of Okoto Okpo and incorporated herein by this reference. The Okpo Demand Letter appears in the Exhibit Appendix at Pages 72-74 and is authenticated by the Okpo Declaration at Appendix Page 71. Furthermore, the Receiver admits the authenticity of the Okpo Demand Letter. (Receiver's Objections and Responses to Defendants' Requests for Admission, Response No. 15, Appx. Pages 80, 86-89, and 110). In the Okpo Demand Letter, the Receiver asserts that Okpo received fraudulent transfers in the combined amount of $204,158.25 and demands that the funds be returned. The Receiver expressly cites TUFTA Section 24.005(a)(1) as the legal basis for making his demand on Okpo for return of those funds. (Okpo Demand Letter, Appx. Page 73).

17. No later than February 7, 2018, the Receiver knew of the transfers to the Defendants listed in Paragraph 40 of the Complaint (i.e. the transfers he seeks to recover in this action), and at that time the Receiver believed the transfers were recoverable as fraudulent transfers under TUFTA. (Receiver's Objections and Responses to Requests for Admission No. 19, Appx. Page 111).

18. On February 18, 2020, the Receiver filed his Complaint in this action seeking recovery of $237,886.50 from Eagle Rio and Trevino and $204,158.25 from Okpo as fraudulent transfers under TUFTA Section 24.005(a)(1). (Complaint Pages 1, 15-16, Appx. Pages 2, 16-17).

19. The Receiver also assets claims for recovery of "unjust enrichment" in the same amounts, without citing any legal authority for such claims or any explanation as to why he has standing to assert them. (Complaint, Page 17-18, Appx. 18-19).

20. Appendix Exhibit "C," the Plaintiff's Rule 26(A)(1) Initial Disclosures (Appx. Page 42-56); Appendix Exhibit "G," Defendants' First Requests for Admission to Plaintiff, dated 9-24-2020 (Appx. Pages 75-102), and Appendix Exhibit "H," Plaintiff's Objections and Response to Defendants' First Requests from Admission, dated 11-16-20 (Appx. 103-13, including each of their attached exhibits, are true and correct copies of the respective Rule 26(A) Initial Disclosures, Requests of Admission, and Objections and Responses to Requests for Admission in this action that they purport to be. (Declaration of Robert A. Simon, Exhibit "D," Pages 3-4, Appx. Pages 58-59).

II. SUMMARY JUDGMENT REQUESTED

21. The Defendants request summary judgment that the Receiver take nothing on all claims. Alternatively, pursuant to Federal Rule of Civil Procedure 56(g), if the Court does not award summary judgment on all claims, Defendants request that the Court award partial summary as to all issues of fact and law that the Court is able to determine as a matter of law, and state what issues, if any, remain in genuine dispute. Furthermore, if Defendants prevail, they request the opportunity to recover reasonable attorneys' fees and costs as may be just and equitable, pursuant to TUFTA Section 24.013, which authorizes the Court to make such an award.

III. SUMMARY JUDGMENT EVIDENCE

22. The competent summary judgment evidence includes the following:

A. The Receiver's Complaint, filed on February 18, 2020 (Appx. Pages 1-22);

B. The most recent amended Receivership Order (Appx. Pages 23-41);

C. The Receiver's Rule 26(a)(1) Disclosures, dated October 1, 2020, including Exhibit "A" thereto, listing transfers the Receiver seeks to recover (Appx. Pages 42-56);

D. Declaration of Robert A. Simon, authenticating the Receiver's Rule 26(a)(1) Disclosures and Responses to Requests for Admission (Appx. Pages 57-60);

E. Declaration of Rey Trevino III, including the February 7, 2018 demand letter from the Receiver, seeking recovery of the same transfers to Trevino and Eagle Rio set forth in the Complaint (Appx. Pages 61-67);

F. Declaration of Okoto Okpo, including the February 7, 2018 demand letter from the Receiver, seeking recovery of the same transfers to Okpo set forth in the Complaint (Appx. Pages 68-74).

G. Defendants' Requests for Admission to the Receiver (Appx. Pages 75-102); and

H. Receiver's Objections and Response to Defendants' First Requests for Admission (Appx. Pages 103-13).

IV. SUMMARY OF ARGUMENT

23. The Receiver's fraudulent transfer claims were extinguished by the passage of time pursuant to TUFTA Section 24.010(a). The Complaint was filed more than four (4) years after the last of the transfers occurred and more than one (1) year (more than two (2) years) after the Receiver learned of the transfers and knew of the facts that caused him to believe that the transfers were fraudulent as to creditors and recoverable pursuant to TUFTA Section 24.005(a). TUFTA is a Texas statute, not a federal law. The Texas Supreme Court is the final authority on the interpretation of TUFTA. The Texas Supreme Court holds that the provisions of TUFTA Section 24.010 are a statute of repose, not limitations, and the statutory deadlines for filing an action may not be equitably tolled. The Receiver's TUFTA claims were extinguished as a matter of law before the Complaint was filed. Furthermore, the Receiver may not defeat the statute of repose by repackaging his already extinguished TUFTA cause of action as a claim for "unjust enrichment."

24. Texas law recognizes no cause of action for "unjust enrichment." Rather, "unjust enrichment" is an equitable remedy for some other recognized cause of action, which the Receiver

does not have. Moreover, the Receivership Entities have no claim for "unjust enrichment" because they employed Defendants and voluntarily paid them their agreed upon compensation. Defendants were "justly" paid for coming to work and doing their jobs, like any other employee. The Receivership Entities have no right under Texas law to recover wages from employees who came to work and did their jobs. The fact that the Defendants did not have securities licenses does not change that result. Once the Receivership Entities voluntarily paid their employees for doing their jobs, the Receivership Entities had no right to recover the money. Neither does the Receiver.

25. As the purported basis for his unjust enrichment claim, the Receiver alleges that it would be unjust for the Defendants to keep their compensation at the expense of defrauded investors. The Receiver owns claims that the Receivership Entities themselves can pursue. He does not own the claims, if any, of the defrauded investors. To the extent such claims exist, they belong to the defrauded investors, not to the Receiver.

26. Furthermore, if the Receivership Entities had such a right, it would have been subject to a two (2) year statute of limitations under Texas law. By August 17, 2017, when the Receiver was appointed, the two (2) year limitations period had already expired as to all payments made to Eagle Rio and Trevino and most payments made to Okpo. The Receivership Entities knew of those payments and the consideration for them. The Receivership Entities had no basis for any equitable tolling of the statute. The Receiver stands in the shoes of the Receivership Entities with respect to such claims and has no greater right than they had. The appointment of the Receiver does not revive a statute of limitations that had already expired.

V. ARGUMENT

A. Summary Judgment Standard

27. The standard for summary judgment is familiar. A movant is entitled to summary judgment if there is no genuine issue of material fact and movant is entitled to judgment as a matter of law. Fed. Rule Civ. Proc. 56(a). The party asking for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). The movant can meet this burden by presenting evidence showing there is no genuine dispute of material fact, or by showing that the nonmoving party has failed to present evidence in support of some element of its case on which it bears the ultimate burden of proof. *Celotex*, 477 U.S. at 322-23. The fact that litigants may disagree about the legal effect of admissible evidence in the summary judgment record does not mean there is a fact dispute. The Court determines the legal effect of the uncontroverted facts. Here, the facts are clear and uncontroverted. The applicable law permits only one result. Summary judgment is appropriate.

B. The Statute of Repose Under TUFTA

28. Under TUFTA § 24.010(a), a fraudulent transfer cause of action under TUFTA § 24.005(a)(1) is extinguished unless an action is brought within four (4) years after the transfer is made, or, if later, within one (1) year after the transfer was or reasonably could have been discovered. Based upon Exhibit "A" to the Receivers Rule 26(a)(1) Disclosures, there is no dispute that Eagle Rio, Trevino, and Okpo received all their compensation, i.e. the transfers that the Receiver seeks to recover, more than four (4) years before the Complaint was filed on February 18, 2020. (Appx. Page 42-56). Eagle Rio and Trevino received their last transfer from the Receivership Entities on April 22, 2014 and May 20, 2014 respectively. (Appx. Pages 47, 49 and 56). Okpo received his

last transfer from the Receivership Entities on February 8, 2016. (Appx. Pages 47 and 54).

29. Based upon the Trevino Demand Letter and the Okpo Demand Letter, both dated February 7, 2018, there is no dispute that the Receiver "discovered" the transfers and expressly declared them to be fraudulent pursuant to TUFTA Section 24.005(a)(1) more than a year (more than two years) before the Complaint was filed on February 18, 2020. (Appx. Pages 64-67 and 71-74). The Demand Letters speak for themselves. Furthermore, the Receiver has admitted in his Responses to Defendants' Requests for Admission that: (a) on February 7, 2018, the Receiver already knew of the transfers to Defendants that he seeks to recover in this action; and (b) the Receiver already believed those transfers to be recoverable as fraudulent transfers under TUFTA. (Response to Request No. 19; Appx. Page 111). Thus, there is no "discovery rule" to save the lapsed claim. The Receiver's fraudulent transfer claims under TUFTA were extinguished by operation of law before the Complaint was filed. Those claims no longer exist, as a matter of law.

30. Based upon a frank discussion with the Receiver's counsel, and the Receiver's Responses to Interrogatories, the Defendants know that the Receiver will argue that paragraph 34 of Receivership Order, as amended, tolls applicable statutes of limitations and prevented the TUFTA time clock from running out. That paragraph provides as follow:

> All Ancillary Proceedings are stayed in their entirety, and all courts having any jurisdiction thereof are enjoined from taking or permitting any action until further order of this court. Further, as to a cause of action accrued or accruing in favor of one or more of the Receivership Entities against a third person or party, any applicable statute of limitation is tolled during the period in which this injunction against commencement of legal proceedings is in effect as to that cause of action.

(Appx. Page 34). With respect to common law torts or contract claims, there might be substance to that argument, but not for TUFTA claims. As a matter of law, no tolling applies.

31. The Receiver sues Defendants under TUFTA, which is a Texas statute. Accordingly, this Court must apply Texas substantive law regarding what TUFTA says and means.

The Fifth Circuit recognizes that the Texas Supreme Court is the final authority on the interpretation of TUFTA. *Janvey v. Golf Channel, Inc.*, 834 F.3d 570, 573 (5th Cir. 2016). The language of TUFTA Section 24.010(a)(1) indicates that the provision is a statute of repose, not limitations. The Texas Supreme Court unequivocally confirms that interpretation. *See generally Nathan v. Whittington*, 408 S.W.3d 870, 873 (Tex. 2013). Because this principle is fundamental as to why the Receiver has no cause of action under TUFTA, the Texas Supreme Court's discussion of the issues bears quotation at length:

> *Tex. Bus. & Com. Code § 24.010(a)(1)*. The parties and the court of appeals all agreed that this provision is a statute of repose, rather than a statute of limitations. "[W]hile statutes of limitations operate procedurally to bar the enforcement of a right, a statute of repose takes away the right altogether, creating a substantive right to be free of liability after a specified time." *Methodist Healthcare Sys. of San Antonio, Ltd., v. Rankin, 307 S.W.3d 283, 287 (Tex. 2010)* (quoting *Galbraith Eng'g Consultants, Inc. v. Pochucha, 290 S.W.3d 863, 866 (Tex. 2009))*. Statutes of repose are of an "absolute nature," and their "key purpose . . . is to eliminate uncertainties under the related statute of limitations and to create a final deadline for filing suit that is not subject to any exceptions, except perhaps those clear exceptions in the statute itself." *Id. at 286-87*. Unlike statutes of limitations, which are intended primarily to encourage diligence on the part of plaintiffs, statutes of repose may serve other purposes and may run from some event other than when the cause of action accrued. *See Nelson v. Krusen, 678 S.W.2d 918, 926 (Tex. 1984)* (Robertson, J., concurring).
>
> Although we have not previously addressed this issue, other Texas courts have, and like the parties and the court of appeals in this case, they have agreed that the provision is a statute of ***repose***. *See Janvey v. Democratic Senatorial Campaign Comm., 793 F. Supp.2d 825, 830-31 n.5 (N.D. Tex. 2011)* (citing cases and stating "the few Texas intermediate appellate courts to expressly consider the matter view the time-bar provision as a ***statute*** of ***repose***"); *see also Zenner v. Lone Star Striping & Paving, L.L.C., 371 S.W.3d 311,315 n.1 (Tex. App.—Houston [1st Dist.] 2012, pet.denied)* ("Entitled 'Extinguishment of Cause of Action,' *section 24.0010* [sic] is a ***statute*** of ***repose***, rather than a ***statute*** of limitations."). But ***TUFTA*** is a uniform act, so its provisions must "be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it." *Tex. Bus. & Com. Code § 24.012*.
>
> We will therefore independently review the issue, to ensure that our construction of *section 24.010* is as consistent as possible with the constructions of other states that have enacted a Uniform Fraudulent Transfer Act containing a similar

> provision. 408 S.W.3d 870, *872; 2013 Tex. LEXIS 693, **1 Page 5 of 7. We have found that some courts, including the high courts of several states, have referred to this UFTA provision as a "statute of limitations," while others have referred to it as a "statute of repose." *See K-B Bldg. Co. v. Sheesley Constr., Inc., 2003 PA Super 372, 833 A.2d 1132, 1133 n.1 (Pa. Super. Ct. 2003)* **[*874]** (noting that its "review of decisions of other jurisdictions reveals that [the provision] is referred to as both a statute of limitations and a statute of repose"). But in most of the opinions in which the court referred to the provision as a statute of limitations, including all of those of the states' high courts, the courts did not actually consider or address the issue. Instead, they simply referred to the provision as a statute of limitations without actually concluding that it was a statute of limitations as opposed to a statute of repose. In the absence of any uniformity among the other states, we have also considered the comments of the National Conference of Commissioners on Uniform State Laws, which promulgated the model UFTA. We note first that their Prefatory Notes to the model UFTA also refer to the provision as a "statute of limitations." UNIF. FRAUDULENT TRANSFER ACT, 7A part II U.L.A. 7 (2006). (Prefatory Note) ("The new Act also includes a statute of limitations that bars the right rather than the remedy on expiration of the statutory periods prescribed."). Because of this, a Pennsylvania intermediate appellate court decided to label the provision as a ***statute*** of limitations, even though it recognized that "[t]he language of the provision, which involves the extinguishment of a cause of action rather than a limitation on the action, would appear to be labeled properly as a ***statute*** of ***repose***." *K-B Bldg. Co., 833 A.2d at 1133 n.1*.
>
> Considering the actual language of ***TUFTA*** *section 24.010* and the Commissioners' comments to UFTA section 9 on which it is modeled, we agree with the parties and the court of appeals in this case that it is a ***statute*** of ***repose***, rather than a ***statute*** of limitations. By its own terms, the provision does not just procedurally bar an untimely claim, it substantively "extinguishes" the cause of action. As the Commissioners' Prefatory Note explains (despite its reference to a "***statute*** of limitations"), the provision "bars the right rather than the remedy on expiration of the statutory periods prescribed."" UNIF. FRAUDULENT TRANSFER ACT, 7A part II U.L.A. 7 (2006) (Prefatory Note). And the Commissioners' comments to section 9 explain that "[i]ts purpose is to make clear that lapse of the statutory periods prescribed by the section bars the right and not merely the remedy." *Id*. at 195, § 9 cmt. 1. This language is nearly identical to our definition of a statute of ***repose***. *See Rankin, 307 S.W.3d at 287* ("[W]hile statutes of limitations operate procedurally to bar the enforcement of a right, a statute of ***repose*** takes away the right altogether, creating a substantive right to be free of liability after a specified time." (quoting *Galbraith, 290 S.W.3d at 866*)). Unlike a ***statute*** of limitations, the provision "extinguishes" the underlying cause of action.

Nathan, 408 S.W. 3d at 873-74 9 (emphasis in the original, footnotes omitted). Under Texas substantive law, as declared by the Texas Supreme Court, TUFTA Section 24.010(a) is a statute

of repose, not a statute of limitations. Federal courts in the Northern District of Texas have recognized that rule of law. *Taylor v. Rothstein Kass & Co.*, PLLC, 2020 U.S. Dist. LEXIS 17435 *24 (N.D. Tex. February 4, 2020) (*citing Nathan*, 408 S.W.3d at 874); *O'Chesky v. American Housing Foundation*, 543 B.R. 245, 257 (Bankr. N.D. Tex. 2015 ("TUFTA's § 24.010 is a statute of repose and is immune to procedural tolling").

32. In *Taylo*r, this Court acknowledged that TUFTA Section 24.010(a) extinguishes the substantive right to recovery under TUFTA but declined to dismiss the action under Rule 12(b)(6) because there was a potential fact issue regarding whether the Receiver had filed the action within a year after the Receiver knew or should have known of the fraudulent nature of the transfer. *Taylor*, 2020 Dist. LEXIS *26-27. Thus, *in that case*, the possible application of the one (1) year "discovery rule" was a potential fact issue that precluded dismissal under Rule 12(b)(6).

33. The "discovery rule" is not an issue in this case, as the Receiver sent the Trevino Demand Letter and the Okpo Demand Letter on February 7, 2018, more than two (2) years before the Complaint was filed on February 20, 2020. The amounts listed in the two Demand Letters exactly match the amounts that the Receiver identifies in Paragraph 40 of the Complaint and seeks to recover from Defendants in this action. (Appx. Pages 15-16, 66, 73). Furthermore, the Receiver expressly stated in the two Demand Letters that he sought to recover those specific amounts pursuant to TUFTA Section 24.005(a)(1) **as fraudulent transfers**. (Appx. Pages 66, 73). **Thus, there is no dispute that the Receiver "discovered" the transfers to Defendants and knew the facts necessary for the Receiver to declare them "fraudulent" under TUFTA Section 24.005(a)(1) more than two (2) year before the Complaint was filed.** The Receiver's one (1) year, "discovery rule" clock began running no later than February 7, 2018 and expired by February

7, 2019. The Complaint was filed more than a year too late. *See* TUFTA Section 24.010(a)(1).[6]

34. On less compelling facts, this Court has determined that the "discovery rule" did not apply. *See Basic Capital Mgmt., Inc. v. Dynex Capital, Inc.*, No. 3:17-CV-01147-X, 2019 WL 5578510, 2019 U.S. Dist. LEXIS 186739, *12-13 (N.D. Tex. Oct. 28, 2019) (notice of the relevant transfers in SEC 10-K filings barred application the discovery rule).[7] S*ee also Yamin v. Carroll Wayen Conn., L.P.*,574 S.W.3d 50, 64-65 (Tex.App.-Houston [14th Dist.] 2018, pet. denied) (affirming dismissal of TUFTA claim under Section 24.010 where plaintiff had notice of the sale transaction more than a year before the lawsuit was filed). Here, the Receiver not only had access to information sufficient to negate the discovery rule, he affirmatively declared in the Trevino Demand Letter and the Okpo Demand Letter that the transfers were fraudulent and recoverable under TUFTA Section 24.005(a)(1). The Court will never see more conclusive evidence.

35. The Receiver filed his Complaint in this action more than four (4) years after the last transfer to any of Defendants occurred[8] and more than a year (more than two (2) years) after he learned of the transfers and declared them to be fraudulent under TUFTA. *See* Receiver's Rule 26(a)(1) Initial Disclosure regarding the dates of transfers (Appx. Pages 49-56); the Trevino Demand Letter, dated February 7, 2018 (Appx. Pages 65-67); the Okpo Demand Letter, dated February 7, 2028 (Appx. Pages 72-74); and the Complaint, filed on February 18, 2020 (Appx. Page 1; Judicial Notice Fed. R. Evid. 201).

36. The Receiver waited too long to file this action. Accordingly, Receiver's TUFTA

[6] Tex. Bus. & Com. Code § 24.010(a)(1).

[7] *Basic Capital Management* was a "should have known" case. Based upon publicly filed SEC documents, Dynex *should have known* of the transfers it sought to recover. On that evidence, the discovery rule did not apply. Here, based upon two Demand Letters, and the Objections and Response to Requests for Admission, the Receiver had *actual knowledge* of the transfers and *already believed them* to be fraudulent under TUFTA by February 7, 2018.

[8] The last transfer to any of the Defendants was received by Okpo on February 8, 2016, four (4) years and ten (10) days before the Complaint was filed.

causes of action against Trevino, Eagle Rio, and Okpo for recovery of their compensation were extinguished by operation of law before the Complaint was filed. Tex. Bus. & Comm Code § 24.010(a)(1); *Nathan*, 408 S.W.3d at 873-74. The extinguishment of the TUFTA causes of action is a matter of substantive Texas law, not procedure, and cannot be "tolled." *O'Chesky*, 543 B.R. at 257. While paragraph 34 of the last Receivership Order may have tolled any pure statute of limitations that had not yet expired as of August 17, 2017, it did not change Texas substantive law. Accordingly, the Receivership Orders did not preserve the Receiver's TUFTA causes of action against Defendants. *O'Chesky*, 543 B.R. at 257. Trevino, Eagle Rio, and Okpo are entitled to judgment as a matter of law that the Receiver take nothing on his TUFTA claims.

C. The Receiver Has No Claims against the Defendants for Unjust Enrichment.

The Receiver Seeks to Undermine the Statutory Purpose of TUFTA

37. The Receiver's "unjust enrichment" claims are simply TUFTA fraudulent transfer claims called by another name. The Receiver alleges no new or different facts to support the alleged claim, merely the legal conclusion that the Defendants were "unjustly enriched" by receiving the transfers and that it would be "unconscionable" for them to retain those funds, when defrauded investors had lost money. The argument suffers from many deficiencies, beginning with the statutory purpose for TUFTA itself. TUFTA Section 24.012 provides: "This chapter shall be applied and construed to make uniform the law with respect to the subject of this chapter among the states enacting it." According to its express provisions, TUFTA is intended to be a uniform law. The Texas Legislature enacted TUFTA to create a single legal standard in Texas for the recovery of alleged fraudulent transfers and for defenses to such claims. *Cadle Co. v. Wilson*, 136 S.W.3d 345, 353 (Tex.App.-Austin 2004, no pet.). Such uniform laws advance the legislative policy goals of clarity and predictability.

38. To the extent Texas ever had a common law cause of action for recovery of fraudulent transfers, TUFTA replaced and pre-empted that cause of action for any transfers that occurred after September 1, 1987.[9] *Id.* Thus, all rights, remedies, and defenses regarding the recovery of the fraudulent transfers under Texas law reside within the text 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). No alternative common law theory survives the enactment of TUFTA. No penumbra of common law rights peaks around the fringes of the statute and modifies its provisions. The Receiver either has a TUFTA Section 24.005(a)(1) claim that he can prove, or he does not.

39. Here, the Receiver's fraudulent transfer claim was extinguished by operation of law before the Complaint was filed. He cannot resurrect that lapsed statutory cause of action by calling it another name. To allow that result would undermine the Texas Legislature's statutory purpose for enacting TUFTA, which was to create a uniform law for the recovery of fraudulent transfers, and defenses thereto, upon which Texans can safely rely. Tex. Bus. & Comm. Code § 24.012; *Cadle*, 136 S.W.3d at 353; *Reagan*, 2001 Tex. App. LEXIS 4375 *25-27.

Texas Recognizes No Cause of Action for Unjust Enrichment

40. Texas law does not recognize a "stand alone" cause of action for unjust enrichment. Though authorities are not unanimous, the great weight of Texas case law authority holds that unjust enrichment is not an independent cause of action. *Davis v. OneWest Bank, N.A.*, 2015 Tex. App. LEXIS 3470, *2-3 (Tex.App.-Fort Worth 2015, no pet.) ("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); *Mission*

[9] All transfers received by Defendants were made between October 2011 and February 2016. (Appx. Pages 49-56).

Trading Co. v. Lewis, 2017 U.S. LEXIS 181094 *15 (S.D. Tex. 2017) (no independent cause of action for "unjust enrichment" exists in Texas); *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 Oxford Finance Cos. v. Velez*, 807 S.W.2d 460, 465 (Tex.App.-Austin 1991, writ denied). Rather, it is an element of a cause of action for restitution. An action for restitution, "based upon unjust enrichment will lie to recover money received on consideration that has failed in whole or in part." *Barnett*, 123 S.W.3d at 817. "Quantum meruit is an equitable theory founded in the principle of unjust enrichment based upon an implied agreement to pay for benefits received." *Barnett*, 123 S.W.3d. at 817 *(citing Vortt Exploration Co. v. Chevron U.S.A., Inc.*, 787 S.W.2d 942, 944 (Tex. 1990)).

41. The elements of quantum meruit are: "(a) valuable services and/or materials were furnished; (b) the party sought to be charged, (c) they were accepted by the party sought to be charged, and (d) under such circumstances as reasonably notified the recipient that the plaintiff, in performing, expected to be paid by the recipient." *Barnett*, 123 S.W.3d at 871 (citing *Heldenfels Bros. Inc., v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992)). The Receiver has not pleaded any facts that would support a claim for restitution or quantum meruit. Defendants worked for the Receivership Entities as W-2 regular employees and were paid a regular salary of $800 every two weeks and a 5% of funds invested by potential investors they contacted. Defendants went to work when required, did the work they were told to do by their supervisors, and were compensated in the agreed amount. (Appx. Pages 62-64, 69-70). None of those facts would support a right of restitution or quantum meruit on behalf of the Receivership Entities, who received from Defendants exactly the employee labor for which they contracted and agreed to pay.

42. The fact that Trevino, Eagle Rio and Okpo did not hold securities licenses is irrelevant to the question of whether the provided value *to the Receivership Entities*. Case law establishes that an unlicensed salesperson who sells securities has provided value to his principal. "The person who paid his fee **has received actual services**." *Regional Properties, Inc. v. Financial & Real Estate Consulting Co.*, 678 F.2d 552, 564 (5th Cir. 1982) (emphasis added).[10] As in *Regional Properties*, the Receivership Entities agreed to pay Defendants extra money (5% of invested funds) in addition to their fixed salary to the extent the potential investors they contacted actually invested. (Appx. Pages 63, 70). The Receivership Investors voluntarily paid those commission-based amounts. (Appx. Page 64, 70). The Receivership Entities received the services that they paid for; *i.e.*, the efforts of the salesmen on the telephone contacting potential investors. Those services were "value" to the Receivership Entities even if Defendants could not have recovered *unpaid* commissions from the Receivership Entities. *See also Anglo-Dutch Petroleum Int'l, Inc. v. Haskell*, 193 S.W.3d 87, 102-103 & n.13 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (securities violations only made the transactions voidable, not void). Defendants were not "unjustly enriched" by receiving the agreed compensation that the Receivership Entities voluntarily paid to them as employees to keep them on the job, calling potential investors. Defendants did the work they were hired to do as employees and were compensated as agreed. The Receivership Entities received "value" in the form of employee labor. Defendants were not "unjustly enriched" by doing their jobs and getting paid for it.

[10] Analogously, if an unlicensed real estate broker arranges a sale, he cannot enforce his brokerage contract, but *he has provided value to the seller by arranging the sale*. Thus, he has a right to *retain* the brokerage fee already paid for services rendered because of such value provided, even though he could not have enforced the brokerage contract if his client had refused to pay. The same rule applies here. The Receivership Entities have no right to recover compensation they voluntarily paid to Defendants merely because Defendants did not have securities licenses or because the Receivership Entities themselves defrauded their investors.

The Receiver Does Not Own the Claims of Defrauded Investors.

43. The Receiver's real complaint is not the Receivership Entities received no value from Defendants' work contacting potential investors, but rather that the Receivership Entities' investors were defrauded. The Receiver alleges that it would be "unjust" for Defendants to retain their compensation "at the expense of defrauded investors in and creditors of the Breitling fraudulent scheme." (*See* Complaint, Page 18, Appx. Page 19). That contention has no basis in law. The Receiver does not own the claims of the defrauded investors and cannot assert them. "A federal equity receiver has standing to assert **only** the claims of the entities in receivership, and not the claims of the entities' investor-creditors[.]" *Janvey v. Democratic Senatorial Campaign Committee, Inc*., 712 F.3d 185, 190 (5th Cir. 2013) (emphasis added.). If the "unjust enrichment" claims alleged by the Receiver existed,[11] they would belong to the defrauded investors themselves. *Id.* The Receiver does not own their claims and cannot assert them. Standing is a constitutional prerequisite to maintaining a cause of action under well-established Texas law. *Texas Association of Business v. Texas Air Control Board*, 852 S.W.2d 440, 444 (Tex.1993). Unless acting in a representative capacity, a litigant may not prosecute claims that it does not own. The Receiver represents the Receivership Entities, not the defrauded investors. The Receiver cannot assert their claims. Defendants are entitled to summary judgment on the "unjust "enrichment claim."

The Statute of Limitations for Unjust Enrichment is Two (2) Years in Texas

44. To the extent that a cause of action for "unjust enrichment" exists (it does not), and to the extent the Receiver can assert it (he cannot), the cause of action would be governed by the two (2) year statute of limitations set forth in Texas Civil Practice and Remedies Code Section 16.003. *Elledge v. Freiburg-Cooper Water Supply Corp*., 240 S.W.3d 869, 871 (Tex. 2007). The

[11] Under Texas law, the Receiver's "unjust enrichment" claims against Defendants do not exist.

Receiver stands in the shoes of the Receivership Entities. *Janvey*, 712 F.3d at 190. He is subject to any defenses that would be applicable to their claims. Eagle Rio and Trevino received their last payments from the Receivership Entities in April and May 2014 respectively. (Appx. Pages 49 and 56). The Receivership Entities knew of those payments and had no basis to assert any theory of equitable tolling. As to Eagle Rio and Trevino, the two (2) year statute of limitations expired in April and May 2016, long before the Receiver's appointment in August 2017. The appointment of a federal receiver does not revive an already expired state law claim. *RTC v. Phelps*, 860 F.Supp. 389, 390 (S.D. Tex. 1994); *FDIC v. Daniel*, 1992 U.S. Dist. LEXIS 22460 * 2 (E.D. Tex. 1992). Any claims for "unjust enrichment" might have existed against Eagle Rio and Trevino were already time-barred when the Receiver was appointed.

45. Okpo worked for the Receivership Entities until February 2016, but most of his employment pre-dated August 17, 2015. (Appx. Pages 51-4). The Receivership Entities knew of the payments and had no basis to assert any theory of equitable tolling. All transfers that Okpo received before August 17, 2015 lie beyond the two (2) year statute of limitations under Texas law and would be not recoverable under such a theory. Okpo received $32,615 from the Receivership Entities after August 17, 2015. (Appx. 53-54). That would be the outer limit of Okpo's potential liability, even if the Receiver could prove a claim for "unjust enrichment," which he cannot.

VI. CONCLUSION

46. There is no genuine issue of material fact. The Receiver's causes action for recovery of alleged fraudulent transfers and unjust enrichment fail as a matter of law for the reasons stated herein. Pursuant to Federal Rule of Civil Procedure 56(a), Trevino, Eagle Rio, and Okpo are entitled to summary judgment that Receiver take nothing on those claims. Furthermore, the deficiencies in the Receiver's claims were readily apparent when the Complaint was filed. The

Receiver should not have sued these Defendants. They have been forced to defend this action, engage counsel, and incur reasonable attorneys' fees and expenses. Pursuant to TUFTA Section 24.013, Defendants are entitled to recover their reasonable and necessary attorneys' fees and costs as may be "just and equitable."[12] The "just and equitable" amount should include all the legal fees and expenses incurred. That amount will not be known until the summary judgment proceedings conclude. At that time, Defendants should be authorized to submit an Affidavit or Declaration setting forth their reasonable and necessary attorneys' fees and costs for the Court's consideration.

VII. REQEUSTED RELIEF

WHEREFORE, premises considered, Defendants request that the Court grant summary judgment that the Receiver take nothing on all claims. Pleading in the alternative, pursuant to Federal Rule of Civil Procedure 56(g), if the Court does not grant summary judgment as to all issues, Defendants request partial summary judgment on all issues resolved and a statement of what issues remain. Defendants further request summary judgment as to their entitlement to reasonable attorneys' fees under TUFTA Section 24.013 and permission to submit an affidavit or declaration as to the amount that would be just and equitable.

Dated: November 23, 2020

Respectfully submitted,

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[12] This is not unfair. The Receiver makes the same claim for attorneys' fees in his Complaint.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the Brief in Support of Summary Judgment was served, pursuant to the Federal Rules of Civil Procedure, on all counsel of record appearing herein via ECF on this 23rd day of November, 2020, and specifically on the Plaintiffs' attorneys and the attorneys for other defendants via ECF and by email or by certified mail, return receipt requested to Andrew M. Goforth, Goforth Law, PLLC, 7614 Fairdale Lane, Houston, Texas 77063.

/s/ Robert A. Simon
Robert A. Simon