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

THOMAS L. TAYLOR III, solely in his capacity as Court-appointed temporary receiver for Breitling Energy Corporation, *et al.*,	§	
Plaintiff,	§	
v.	§	Civil Action No. 3:20-cv-393-D
REYMOND TREVINO, EAGLE RIO ENERGY COMPANIES, INC., DEREK TAYLOR, ALDEN ADAMS, LLC, NATHAN MADU, and OKOTO OKPO,	§	
Defendants.	§	

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Plaintiff Thomas L. Taylor III, solely in his capacity as Court-appointed temporary receiver in *SEC v. Faulkner et al.*, Case No. 3:16-CV-1735-D (N.D. Tex. 2016) (the "SEC Action") for Breitling Energy Corporation, *et al.*[1] ("Receiver"), respectfully files this response in opposition ("Response") to Defendants Reymond Trevino ("Trevino"), Eagle Rio Energy Companies, Inc. ("Eagle Rio"), and Okoto Okpo's ("Okpo") (collectively "Movants") Motion for Summary Judgment (ECF No. 38) ("Motion")[2] pursuant to Rule 56 of the Federal Rules of Civil Procedure (the "Rules"). For the reasons detailed below, the Court should deny the Motion in its entirety.

I. ARGUMENT AND AUTHORITY

A. Determining motions for summary judgment under Rule 56

Summary judgment is proper only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *see also Carrizales v. State Farm Lloyds*, 518 F.3d 343, 345 (5th Cir. 2008). A fact is genuinely in dispute "if a reasonable jury could return a verdict for the non-moving party." *Fordoche, Inc. v. Texaco, Inc.*, 463 F.3d 388, 392 (5th Cir. 2006).

The party moving for summary judgment bears the burden of showing all evidence demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). To defeat summary judgment, "the non-moving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.

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[1] Referred to generally as the "Receivership Entities."

[2] Receiver cites to Movants' Brief in Support of their Motion (ECF No. 39) ("Brief" or "Br.") throughout this Response.

Ed. 2d 538 (1986) (quoting FED. R. CIV. P. 56(e)). The Court must view the evidence in the light most favorable to the non-movant and draw all justifiable inferences in favor of the non-movant. *Envtl. Conservation Org. v. City of Dallas, Tex.*, 529 F.3d 519, 524 (5th Cir. 2008).

B. The Court's stay regarding Ancillary Actions applies to the Receiver's claims under TUFTA

Courts across the country have recognized the complex and time-consuming nature of receivers' investigations into the assets and liabilities constituting the estates that have been placed under their control. *See*, *e.g.*, *SEC v. Forex Asset Mgmt. LLC*, 242 F.3d 325, 327 – 28 (5th Cir. 2001); *United States v. Durham*, 86 F.3d 70, 71 – 72 (5th Cir. 1996); *SEC v. Elliott*, 953 F.2d 1560, 1564 – 66 (11th Cir. 1992) ("The district court and Receiver had a mammoth task before them, and they did a thorough job."); *SEC v. Credit Bancorp, Ltd.*, 290 F.3d 80, 83 – 86 (2d Cir. 2002). Schemes to defraud public investors through the offering and sale of securities are of particular complexity. That is the case with the fraudulent scheme implemented by Faulkner through the Breitling entities. When this Court appointed the Receiver, it recognized this maxim[3], not only tolling the accrual of causes of action of the Receivership Entities but staying all Ancillary Actions[4] in their entirety and enjoining anyone with notice of the Receivership Order "from

[3] In fact, the language of the Texas Uniform Fraudulent Transfer Act, TEX. BUS. & COM. CODE §§ 24.001 *et seq.* ("TUFTA") is in harmony with this maxim, incorporating a discovery rule for causes of action brought under TEX. BUS. & COM. CODE § 24.005(a)(1) -- transfers made with actual intent to hinder, delay, or defraud any creditor of the debtor -- but not under §§ 24.005(a)(2) or 24.006(a) -- transfers for which, *inter alia*, reasonably equivalent value was not received in exchange for the transfer. *Compare* TUFTA § 24.010(a)(1) and (2).

[4] "All civil legal proceedings of any nature, including, but not limited to, bankruptcy proceedings, arbitration proceedings, foreclosure actions, default proceedings, or other actions of any nature involving: (a) the Receiver, in his capacity as Receiver; (b) any Receivership Assets, wherever located; (c) the Receivership Entities, including subsidiaries and partnerships; or, (d) any of the Receivership Entities' past or present officers, directors, managers, agents, or general or limited partners sued for, or in connection with, any action taken by them while acting in such capacity of any nature, whether as plaintiff, defendant, third-party plaintiff, third-party defendant, or otherwise." *See*, *e.g.*, SEC Action, ECF No. 496 at ¶ 32.

commencing or continuing any such legal proceeding, or from taking any action, in connection with any such proceeding, including, but not limited to, the issuance or employment of process." SEC Action, ECF No. 496 at ¶¶ 32 – 34.

The Movants' argument with respect to statutes of limitation and of repose, Br. at 14 – 20 -- that the Receiver's TUFTA claim (Count I to the Receiver's Original Complaint, ECF No. 1 ("Complaint"), at ¶¶45 – 51) has been extinguished -- constitutes a distinction without a difference. Movants ignore wholesale this Court's "broad powers and wide discretion to determine the appropriate relief in an equity receivership." *SEC v. Safety Fin. Serv., Inc.*, 674 F.2d 368, 372 – 73 (5th Cir. 1982) (quoting *SEC v. Lincoln Thrift Ass'n*, 577 F.2d 600, 606 (9th Cir. 1978)); *see also Elliott*, 953 F.2d at 1566 (citing *Safety Fin. Serv., Inc.*). Such "authority derives from the inherent power of a court of equity to fashion effective relief." *Id*. at 372 (quoting *SEC v. Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980)).

This Court exercised its "inherent power of a court of equity" to enjoin and stay Ancillary Actions, including with respect to the Receiver's TUFTA cause of action, and toll the accrual of such causes of action in favor of the Receivership Entities so long as that injunction was in effect. It was within the Court's "broad powers and wide discretion to determine the appropriate relief in an equity receivership" to do so. *Safety Fin. Serv., Inc.*, *supra*. The Receiver's TUFTA causes of action did not accrue, or become extinguished, as ordered by this Court. Accordingly, the Court should deny summary judgment with respect to the Receiver's Count I.

C. Movants are not entitled to summary judgment on Count II of the Receiver's Complaint seeking disgorgement of funds which unjustly enriched Movants

Movants are not entitled to summary judgment on Count II of the Complaint (Compl. ¶¶ 52 – 56) because (1) either (a) unjust enrichment is an independent cause of action in Texas, or (b)

the Receiver has asserted a cause of action (money had and received) in his Complaint for which the disgorgement of funds which unjustly enriched Movants is an adequate remedy; and (2) the material facts underlying the elements of such a cause of action are underdeveloped or in dispute, and summary judgment is not appropriate (whether at this time or at all).

1. **The Receiver has asserted a cause of action against Movants for which the remedy is the disgorgement of funds that unjustly enriched them under "applicable law"**

Whether or not "unjust enrichment" is an independent cause of action in Texas is not dispositive to the Court's determination of summary judgment for Count II of the Receiver's Complaint. In this regard, if the Court holds that "unjust enrichment" is not an independent cause of action in Texas, the Receiver has asserted in his Complaint a cause of action for "money had and received" under Texas law, for which the disgorgement of funds due to unjust enrichment is a remedy.

As an initial matter, Texas law is not settled as to whether "unjust enrichment" is an independent cause of action. *Biliouris v. Sundance Res., Inc.*, 559 F.Supp. 2d 733, 739 (N.D. Tex. 2008) (Godbey, J.) (noting that "it is unclear under Texas law whether unjust enrichment is an independent cause of action") (citations omitted); *but see*, *e.g.*, *Fortune Production Co. v. Conoco, Inc.*, 52 S.W.3d 671, 682–86 (Tex. 2000) (upholding summary judgment on some of plaintiff's unjust enrichment claims); *McAfee, Inc. v. Agilysys, Inc.*, 316 S.W.3d 820, 828 (Tex.App.—Dallas 2010, pet. den.) (upholding trial court's grant of summary judgment on claims for both unjust enrichment and money had and received); *Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 367, 380 – 81 (Tex.App.—Dallas 2009, pet. denied) (discussing plaintiff's "unjust enrichment claim" and "elements" comprising such a claim); *but see Hancock v. Chicago Title Insurance Company*, 635 F. Supp. 2d 539, 561 (N.D. Tex. 2009)

(Fitzwater, J.) (holding that unjust enrichment and money had and received "are not separate and independent claims" and dismissing unjust enrichment cause of action as duplicative of claim for money had and received) (citing *Mowbray v. Avery*, 76 S.W.3d 663, 680 n. 25 (Tex.App.—Corpus Christi 2002, pet. denied)).

The Receiver contends that "unjust enrichment" is an independent cause of action in Texas. However, even if this Court holds, consistent with *Hancock*, *supra*, that unjust enrichment is not an independent cause of action in Texas, Movants are not entitled to summary judgment on this basis. The Complaint alleges that "[t]he Receiver is entitled to disgorgement of the transfers made from the Breitling entities … to or for the benefit of Defendants pursuant to the doctrine of unjust enrichment under applicable law." Compl. ¶ 52. Accordingly, the language in the Receiver's Complaint is adequate to uphold Count II as a cause of action under "applicable law" -- for money had and received, pursuant to which the disgorgement of funds that unjustly enriched Movants is an appropriate remedy. *See generally Janvey v. Alguire*, 846 F. Supp. 2d 662, 673 – 75 (N.D. Tex. 2011).

In *Alguire*, as here, a receiver sought to disgorge payments to persons who sold securities underlying a massive fraudulent scheme. *Id*. at 666 – 67. In his complaint, the receiver sought recovery of these payments, *inter alia*, by "plead[ing] unjust enrichment as an equitable doctrine that entitles him to disgorgement pursuant to unspecified 'applicable law.'" *Id*. at 673. Like Movants, the defendants sought to defeat that cause of action on the basis that "unjust enrichment" was not an independent cause of action in Texas. *Id*. at 673 – 74.

However, the Court rejected the defendants' argument because "[r]egardless of whether Texas law allows an 'unjust enrichment' claim or requires pleading a claim for money had and received, the Receiver states claims under either 'applicable law.'" *Id*. at 674; *see also id*. ("the

two claims are substantively identical").[5] Here, as in *Alguire*, the Receiver has stated a claim "under either 'applicable law.'" Compl. ¶ 52 ("The Receiver is entitled to disgorgement of the transfers made from the Breitling entities … to or for the benefit of Defendants pursuant to the doctrine of unjust enrichment under applicable law."). The Receiver alleged in the Complaint that:

- "The fraudulent scheme perpetrated by Faulkner and his confederates was undertaken primarily through the fraudulent offer and sale of oil and gas-related securities by BOG, BRC, BECC, Crude Energy, Crude Royalties, and Patriot (collectively, "Breitling") from 2010 to 2016." *Id.* ¶11;

- "Breitling solicited and received funds from investors regularly from approximately January 2011 through at least February 2016, totaling almost $150 million in gross proceeds." *Id.*;

- "The terms of BOG and BRC securities offerings were provided to public investors through offering materials in the form of private placement memoranda, confidential placement memoranda and other marketing brochures ("Offering Memoranda"). The Breitling Offering Memoranda were replete with material misrepresentations and omissions of material facts." *Id.* ¶13;

- "Because BOG (and later Crude Energy and Patriot) was entitled to retain the investor proceeds it raised in excess of the actual costs of drilling and completing any wells, Faulkner's gross inflation of the AFEs ensured that Breitling would pocket millions of dollars in inflated "profits" from unwitting investors, from which Faulkner could fund his lavish lifestyle." *Id.* ¶15;

- "BOG and BRC (and later BECC, Crude and Patriot) extensively comingled the assets they received from investors. Although investor funds were generally received by Breitling in offering-specific accounts, they were almost always transferred thereafter into general "operating accounts" prior to the completion of drilling and other completion costs associated with the offering's respective well(s), and comingled with the proceeds of investors in other, distinct offerings. Funds transferred to these "operating accounts" included the excess of funds illicitly received by Breitling as a result of the grossly inflated AFEs, which defrauded investors believed would be used

[5] Additionally, the *Alguire* court did not require the receiver to replead his cause of action. *Alguire*, at 675 n.11 ("The facts pled here do not require the Court to make an inferential leap of any magnitude. The 'elements' of both causes of action are present, well-pled, and give the [movants] adequate notice to prepare their defense.") (citing *Boyles v. Kerr*, 855 S.W.2d 593, 601 (Tex. 1993); *Roark v. Allen*, 633 S.W.2d 804, 809 – 10 (Tex. 1982)).

to fund the working interest prospects underlying the BOG (and later Crude Energy and Patriot) offerings." *Id.* ¶18;

- "Faulkner directed Breitling personnel to pay business expenses from these comingled "operating accounts", sometimes with respect to oil and gas offerings, meaning that one investor's money was necessarily being spent on expenses for a different offering. Moreover, it was from these "operating accounts" that Faulkner directed the payment of credit card bills representing millions of dollars in charges for personal expenses, and from which Faulkner was reimbursed for personal expenses which he claimed, without support, were made on behalf of Breitling." *Id.* ¶19;

- "Faulkner's improper and illegal use of transaction-based compensation was undertaken to incentivize sales of Breitling securities and grow the fraudulent scheme, from which Faulkner misappropriated millions of dollars of investor proceeds." *Id.* ¶47; and

- "The Receiver … is entitled to disgorgement of all transferred funds [Movants] received … [because those funds] unjustly enriched them … [and] are property of the Receivership Estate held pursuant to a constructive trust for the benefit of the Receivership Estate." *Id.* ¶55.

As in *Alguire*, the Receiver has "allege[d] that the [Movants] obtained a benefit from the [Breitling] Defendants' scheme that equity dictates they cannot retain justly." *Alguire*, at 675. Accordingly, the Receiver has asserted a cause of action for money had and received, and summary judgment should be denied on the basis that the Receiver has not asserted an independent cause of action under Texas law.

2. **The material facts underlying Count II are underdeveloped or in dispute, and summary judgment is not appropriate**

Because the Receiver asserts a valid, independent cause of action in Count II, Movants are only entitled to summary judgment if the undisputed material facts negate an element of that cause of action as a matter of law. That is not the case, and summary judgment should be denied, or otherwise delayed pursuant to Rule 56(d).

a. *Movants are not entitled to summary judgment on Count II to the Receiver's Complaint upon the evidence submitted by Movants*

"'Unjust enrichment is an equitable principle holding that one who receives benefits unjustly should make restitution for those benefits,' regardless of whether the defendant engaged in wrongdoing." *Alguire*, at 673 (quoting *Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 367 (Tex.App.—Dallas 2009, pet. den.) (citations omitted)). "Unjust enrichment occurs when the person sought to be charged has wrongfully secured a benefit or has passively received one which it would be unconscionable to retain." *Id*. "A party may recover under the unjust enrichment theory when one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage." *Id*. (quoting *Heldenfels Bros. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992) (citations omitted)).

Money had and received is an equitable doctrine applied to prevent unjust enrichment. *Villarreal v. First Presidio Bank*, 283 F. Supp. 3d 548, 553 n.5 (W.D. Tex. 2017) (citing *London v. London*, 192 S.W.3d 6, 12 – 14 (Tex.App.—Houston [14th Dist.] 2005, pet. denied)) ("Claims for money had and received and unjust enrichment are materially and substantively identical."). The elements for a cause of action for money had and received are (1) the defendant holds money, and (2) the money belongs to the plaintiff in equity and good conscience. *Staats v. Miller*, 243 S.W.2d 686, 687 – 88 (Tex. 1951) (quoting 58 C.J.S., Money Received, § 4a, p. 913).[6]

Movants do not deny that they received the funds at issue in this case. Br. at 7 – 8. Therefore, the only analysis the Court must undertake is whether the undisputed facts establish

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[6] Movants' briefing with respect to quantum meruit, Br. at 22 – 23, is a red herring. The Receiver does not seek compensation for "valuable services and/or materials … furnished" by Receivership entities to Movants. Br. at 22 (quoting *Barnett v. Coppell North Texas Court, Ltd.*, 123 S.W.3d 804, 816 – 17 (Tex.App.—Dallas 2003, pet. denied). Rather, as discussed herein, the Receiver seeks the disgorgement of funds received and held by Movants which in equity and good conscience belongs to the Receivership Entities.

that the money transferred to the Movants does not belong to the Receivership Estate in equity and good conscience. Upon Movants' evidentiary record, it cannot make this determination, and summary judgment should be denied.

1) *The Receiver's Count II is a cause of action owned by the Receivership Estate*

As an initial matter, Movants' conclusory position that the Receiver has asserted claims not owned by the Receivership Estate, but by defrauded investors, Br. at 24, is belied by the Receiver's pleadings, and Movants have not submitted any evidence in support of their position. Although the Receiver has pleaded that he seeks the disgorgement of funds received by Movants "for ultimate distribution to defrauded investors and creditors with claims against the Receivership Estate," Compl. ¶ 52, this language merely reflects the ultimate use of funds recovered by any receiver. The Receiver also alleges that these funds "in equity and good conscience belong to the Receivership Estate." *Id*. The existence of legal and equitable claims against the Receivership Entities by defrauded investors does not eliminate any claims held by the Receivership Estate for its funds held by Movants.

The Receiver's allegations that Movants hold funds "at the expense of defrauded investors in and creditors of the Breitling fraudulent scheme," Compl. ¶ 53, further reflects the reality of all receiverships which seek ultimately to distribute assets to claimants/creditors. Although defrauded investors in and creditors of the Breitling fraudulent scheme hold claims against the Receivership Entities for their investments fraudulently obtained, the Receiver is seeking the return of specific funds from Movants which were improperly paid by the fraudfeasors using Receivership Entities' funds for their fraudulent ends.

The Receiver seeks the disgorgement of funds paid by the Receivership Entities to Movants for Movants' illegal offering and sale of Breitling securities. *See* Compl. ¶¶ 7 – 8, 31 – 32.[7] The Receiver's claims against the Movants for the disgorgement of these payments are separate and distinct from claims that defrauded investors may have against the Breitling entities for the return of their invested amounts generally. These funds belong to the entities in the Receivership. Summary judgment should be denied because the Receiver's Count II belongs to, and is asserted on behalf of, the Receivership Entities.

2) <u>*Movants are not entitled to summary judgment upon a limitations defense*</u>

As detailed above, Count II of the Receiver's Complaint asserts a cause of action for money had and received. Courts disagree as to whether a two-year or four-year statute of limitations applies to claims for money had and received. *Compare Amoco Production Co. v. Smith*, 946 S.W.2d 162, 165 (Tex.App.—El Paso 1997, no writ) ("[M]oney had and received is an action for debt, governed by the four-year statute of limitations."), *with Tanglewood Terrace v. Texarkana*, 996 S.W.2d 330, 342 (Tex.App.—Texarkana 1999, no pet.) ("An action for money had and received, being in the nature of an action for conversion, is subject to a two-year statute of limitations."). However, the Court's determination in this regard is not dispositive because the discovery rule applies to the Receiver's Count II. *Tanglewood Terrace*, at 337.

"In general, the discovery rule applies in those cases where the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable." *Id.* (citing *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 456 (Tex. 1994)). "An injury is

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[7] Movants admit that they acted illegally by offering the Breitling securities to public investors without being licensed to do so. Br. at 13, 23.

inherently undiscoverable if it is the type of injury that is not generally discoverable by the exercise of reasonable diligence." *Id.* (citing *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 886 (Tex. 1998)). "[I]f the discovery rule has been pled or otherwise raised, and the defendant has not conclusively shown that the nature of the injury is not inherently undiscoverable, or that the evidence of injury is not objectively verifiable, then the discovery rule does apply and accrual of the cause of action occurs when the plaintiff knew or should have known of the wrongfully caused injury." *Id.* (citing *KPMG Peat Marwick v. Harrison County Housing Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999)).

Here the Receiver has "pled" the discovery rule with respect to his claims against Movants and raises it again in this Response. Compl. ¶ 49 ("The Receiver was only able to discover the [facts underlying his causes of action] after Faulkner was removed from control of the Breitling entities and after a time-consuming and extensive review of thousands of pages of paper and electronic records and documents relating to the Breitling entities.").[8]

Additionally, "the nature of the injury incurred is inherently undiscoverable." In this regard, the Receiver could not possibly have learned the existence and nature of the facts underlying Count II prior to his appointment. Moreover, 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

[8] That this allegation is contained in the Receiver's Count I is of no moment. The Receiver's discovery of the transfer of funds at issue in Count II and the inequitable nature of Movants' possession of these funds under a claim of money had and received arose from the same investigation upon which he discovered "the fraudulent nature of the transfers from BOG, BRC, Crude Energy, and Patriot to, and for the benefit of, Defendants." *Id.* ¶ 49. "The [discovery rule-related] facts pled here do not require the Court to make an inferential leap of any magnitude" and "are present, well-pled, and give the [Movants] adequate notice to prepare their defense." *Alguire*, at 675 n.11.

F.3d 231, 241 (5th Cir. 2017) (same); *Jones v. Wells Fargo Bank*, 666 F.3d 955, 965 – 967 (5th Cir. 2012) (corporation is entity separate from its individual bad actors)).

The Breitling entities themselves -- as opposed to Faulkner -- could not have known about or intended to allow Faulkner to manipulate and use them to commit fraud, violate securities laws, and steal the money invested with them by third party investors, or transfer funds to unlicensed brokers. The Fifth Circuit squarely rejected the argument that the Stanford receiver's claims accrued prior to his appointment in *DSCC*. There the court refused to impute the controlling fraudster's (Allen Stanford's) 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. 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 ¶ 1 (citing SEC Action, ECF No. 496 at 1).

Additionally, upon the Receiver's appointment, the accrual of such causes of action were further tolled to enable the Receiver to investigate and discover the nature and extent of the Breitling fraudulent scheme and any claims that the Receivership Estate held against others. SEC Action ECF No. 108 at ¶22; ECF No. 142 at ¶34; ECF No. 320 at ¶34; ECF No. 418 at ¶34; *see also supra*, at § I.B. Accordingly, the discovery rule applies to the Receiver's Count II cause of action, and any limitations with respect to that cause of action was tolled prior to the Receiver's initiation of this lawsuit. The Receiver's Count II is timely, and summary judgment should be denied on limitations grounds.

3) *Movants have not met their initial burden to establish undisputed facts which support judgment as a matter of law*

Movants assert that although they illegally sold securities without being licensed to do so, they are entitled to keep the fruits of that illegal activity. Br. at 13, 23 (citing *Regional Properties, Inc. v. Financial & Real Estate Consulting Co.*, 678 F.2d 552, 564 (5th Cir. 1982)). The Court should reject their position because they have not presented undisputed material facts sufficient to meet their initial burden under Rule 56. *Celotex Corp. v. Catrett*, 477 U.S. at 323.

As an initial matter, Movants' reliance on *Regional Properties, Inc.* is misplaced, as that case is distinguishable in several respects. First, that case involves claims for rescission under section 29(b) of the Securities Exchange Act of 1934 ("Act"), which "renders certain contracts void", *id*. at 556, 561, and which the Receiver does not seek here. Additionally, *Regional Properties, Inc.* does not involve claims that defendants had illegally sold securities offered on behalf of a fraudulent scheme, but rather that defendants had defrauded (and breached fiduciary duties to) the plaintiffs themselves. *Id*. at 556 – 57. The Receiver has not alleged in this case that Movants defrauded or breached fiduciary duties to the Receivership Entities.

Moreover, the court in *Regional Properties, Inc.* made its determination upon "a balance of the factors in [that] specific case," namely:

> the extent of the enrichment and the degree of unjustness wrought by its retention weighed against the policy against enforcement, the extent of the non-violator's participation, and whether a judgment depriving the violator of the benefits received will subvert the policy underlying the rule of law that makes the transaction illegal.

Id. at 564 (citing 2 G. Palmer, The Law of Restitution § 8-1, at 174 (1978)). That fact-based analysis is not possible upon the evidentiary record submitted to the Court by Movants, who have failed to meet their initial burden. Here, the only undisputed facts relevant to this analysis are with respect to (1) the "extent of the enrichment" -- $442,026.75 received by Movants (Br. at 8), and

(2) that Movants illegally sold the Breitling securities without being licensed to do so. Br. at 23. The record is bereft of evidence with respect to "the degree of unjustness wrought by [the] retention [of these funds] weighed against the policy against enforcement," and "whether a judgment depriving the violator of the benefits received will subvert the policy underlying the rule of law that makes the transaction illegal." Summary judgment should be denied upon this basis.

Alternatively, the Court should delay its determination with respect to the above factors and with respect to "the extent of the [Movants'] participation" in the Breitling fraudulent scheme, where the record is incomplete and the Receiver "cannot present facts essential to justify [his] opposition" to the Motion with respect to Count II of the Complaint. FED. R. CIV. P. 56(d). Movants' affidavit testimony regarding their roles and actions/omissions as sales staff at the Receivership Entities has not been subjected to examination by the Receiver -- Movants filed their Motion 130 days before the close of discovery in the case. The Court should delay determination of the Movants' Motion with respect to Count II until the Receiver is able to obtain certain discovery, as requested in the Receiver's concurrently filed Rule 56(d) Motion.

b. *The Receiver's equitable claims against Movants are not preempted by TUFTA*

TUFTA does not preempt the Receiver's separate, equitable cause of action for the disgorgement of funds held by Movants, and their contention otherwise, Br. at 20 – 21, should be rejected. Plaintiffs are permitted to assert alternative causes of action based upon the same factual bases.

The cases cited by Movants are inapplicable here. In *Cadle Co. v. Wilson*, 136 S.W.3d 345, 353 (Tex.App.—Austin 2004, no pet.), the plaintiff specifically asserted "a common-law claim for fraudulent transfer," which the court held had been extinguished. *Id.* at 353. This is distinguishable from the Receiver's case, in which he has not asserted a "common-law claim for fraudulent

transfer," but rather has alleged facts establishing the elements of an unjust enrichment/money had and received claim, which are valid claims under Texas law. That this separate cause of action also seeks the disgorgement of funds which were transferred in violation of TUFTA does not negate the Receiver's ability to bring an alternative cause of action.

Movants' second case does not address alternative causes of action at all. In *Reagan National Advertising of Austin, Inc., v. Lakeway 620 Partners, L.P.*, 2001 Tex. App. LEXIS 4375 (Tex.App.—Austin 2001, pet. denied), the appellate court reversed the lower court's summary judgment against appellant's TUFTA claims, finding material facts in dispute with respect to those claims. *Id.*, at *37 – 38. The Court upheld the lower court's granting of summary judgment with respect to a claim under the Home Solicitation Act, TEX. BUS. & COM. CODE §§ 39.001-.009, but not because it was preempted by TUFTA -- it did so on the basis that the appellant was not a "consumer" under that act, a prerequisite for a cause of action thereunder. *Id.*, at *41 – 42.

TUFTA does not preempt the Receiver's cause of action for unjust enrichment/money had and received, and Movants are not entitled to summary judgment thereon.

D. Movants are Not Entitled to Attorney's Fees

If the Court grants summary judgment to Movants, in whole or in part, Movants are not entitled to attorney's fees and costs because awarding such relief would neither be equitable, nor just. Movants have not asserted any bad faith on the part of the Receiver. Moreover, any fee award would necessarily reduce the Receivership Assets available ultimately to be distributed to the investor claimants defrauded by Faulkner through the Breitling fraudulent scheme -- including those recruited by Movants into the fraudulent scheme. Additionally, Movants cannot support their assertions that there were "deficiencies in the Receiver's claims" nor that any facts were "readily apparent when the Complaint was filed" which the Receiver ignored. Br. at 25 – 26. The Receiver

brought claims which on their face were appropriate and within proscribed time limits as modified by the Order Appointing Receiver. Movants admit that they received compensation for knowingly offering and selling securities to public investors without being licensed to do so. Br. at 23. It would neither be equitable nor just to award attorney's fees and costs to them for no other reason than that they are a prevailing party in this action.[9]

There is no basis to award attorney's fees and costs, and the Court should deny the Movants this requested relief should they prevail on their Motion, in whole or in part.

II. CONCLUSION

Movants are not entitled to summary judgment with respect to the Receiver's Counts I and II. The Motion should be denied in its entirety. Alternatively, the Court should permit the Receiver to conduct discovery with respect to the facts underlying Count II before it determines the Motion on that Count. Should Movants prevail on their Motion, in whole or in part, it would be neither equitable nor just to award attorney's fees and costs to them, and the Court should deny such relief.

[9] As unlicensed brokers who knowingly sold fraudulent securities to public investors for undisclosed compensation, it is a bridge too far for Movants to assert that it "is not unfair" to award them attorney's fees because "[t]he Receiver makes the same claim for attorneys' fees in his Complaint." Br. at 26 n.12.

Dated: December 18, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 18, 2020, I filed the foregoing document through the Court's CM/ECF filing system, which satisfies service requirements under FED. R. CIV. P. 5(b)(2)(E).

/s/ Andrew M. Goforth
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