

**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, <i>et</i>	§	
<i>al.</i> ,	§	
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 RULE 56(d) MOTION TO DEFER DETERMINATION OF
DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT**

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.*, has separately and contemporaneously filed his response (“Response”) in opposition to the Motion for Summary Judgment (ECF No. 38) (“Motion”)¹ of Defendants Raymond Trevino (“Trevino”), Eagle Rio Energy Companies, Inc. (“Eagle Rio”), and Okoto Okpo (“Okpo”) (collectively “Movants”). Therein, the Receiver asked the Court to deny the Motion with respect to Count II of the Receiver’s Original Complaint (ECF No. 1) (“Complaint”) upon the evidence submitted by Movants, on the basis that Movants had not met

¹ Receiver cites to Movants’ Brief in Support of their Motion (ECF No. 39) (“Brief” or “Br.”) throughout this motion.

their initial burden for relief under Rule 56. Resp. at §I.C.2.a.3 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

If the Court declines to deny the Motion with respect to Count II, the Receiver respectfully files this Motion pursuant to Rule 56(d) of the Federal Rules of Civil Procedure (“Rules”) and asks the Court alternatively to defer consideration of the Motion with respect to Count II until the Receiver is able to conduct certain discovery with respect to related underlying facts.

I. ARGUMENT AND AUTHORITY

A. Determining Motions Under FED. R. CIV. P. 56(d)

Rule 56(d) “‘is an essential ingredient of the federal summary judgment scheme and provides a mechanism for dealing with the problem of premature summary judgment motions.’” *Parakkavetty v. Indus. Int’l, Inc.*, 2004 WL 354317, at *1 (N.D. Tex. Feb. 12, 2004) (Fitzwater, J.) (citing *Owens v. Estate of Erwin*, 968 F. Supp. 320, 322 (N.D. Tex. 1997) (Fitzwater, J.) (referring to former Rule 56(f)). Under Rule 56(d), the court can “(1) defer considering the [summary judgment] motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.” *Bramlett v. Med. Protective Co. of Fort Wayne*, No. 3:10-cv-2048-D, at *3 – 4 (N.D. Tex. Sep. 7, 2012) (Fitzwater, J.) (quoting Fed. R. Civ. P. 56(d)). The nonmovant must “‘show[] by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition.’” *Id.*

“Rule 56(d) functions as a ‘safe harbor’ that has been ‘built into the rules so that summary judgment is not granted prematurely.’” *Bramlett*, at *4 (quoting *Union City Barge Line, Inc. v. Union Carbide Corp.*, 823 F.2d 129, 136 (5th Cir. 1987) (referring to Rule 56(f)). “It is ‘usually invoked when a party claims that it has had insufficient time for discovery or that the relevant facts are in the exclusive control of the opposing party.’” *Id.* Rule 56(d) “offers relief where the

nonmovant has not had a full opportunity to conduct” discovery. *Id.* (citing *McCarty v. United States*, 929 F.2d 1085, 1088 (5th Cir. 1991) (per curiam) (citing *Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1285 (5th Cir. 1985))).

“[Rule 56(d)] motions are broadly favored and should be liberally granted.” *Id.* (quoting *Culwell v. City of Fort Worth*, 468 F.3d 868, 871 (5th Cir. 2006)). “Nevertheless, to warrant a continuance for purposes of obtaining discovery, ‘a party must indicate to the court by some statement . . . why [it] needs additional discovery and how the additional discovery will create a genuine issue of material fact.’” *Id.* (quoting *Stults v. Conoco, Inc.*, 76 F.3d 651, 657-58 (5th Cir. 1996) (internal quotation marks omitted) (quoting *Krim v. BancTexas Grp., Inc.*, 989 F.2d 1435, 1442 (5th Cir. 1993))).

B. The Court should defer consideration of the Motion or otherwise deny it

Movants’ Motion was filed prematurely -- 130 days prior to the close of discovery² -- and the Court should defer consideration of it with respect to Count II because the Receiver “has not had a full opportunity to conduct” discovery, *Bramlett*, at *4, with respect to the underlying factual issues to be determined.

In this regard, Movants assert that they are entitled to summary judgment with respect to Count II because commissions paid to unlicensed brokers cannot be recovered once paid, even if those same commissions could be withheld prior to payment. Br. at 23 (citing *Regional Properties, Inc. v. Financial & Real Estate Consulting Co.*, 678 F.2d 552, 564 (5th Cir. 1982)). The Receiver outlines in his Response why this holding does not apply to the Court’s determination of the Motion regarding Count II under the facts of the present case. Resp. at at §I.C.2.a.3. However,

² Declaration of Andrew M. Goforth (“Goforth Decl.”), at ¶3.

should the Court find that Movants have met their initial burden under Rule 56 in this regard, it should delay determination of the Motion as to Count II until the Receiver can obtain relevant discovery. In this regard, courts weigh determination of this issue upon “a balance of the factors in [each] 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.

Regional Properties, Inc. at 564 (citing 2 G. Palmer, *The Law of Restitution* § 8-1, at 174 (1978)).

The only undisputed facts of record are (1) the “extent of the enrichment” -- \$442,026.75 received by Movants (Compl. ¶ 40; Br. at 8), and (2) that Movants illegally sold the Breitling securities without being licensed to do so. Br. at 23.

Movants have submitted affidavit testimony asserting certain other facts, specifically regarding Movants’ employment status, amount and timing of compensation, job responsibilities, and job performance. Br. at 11 – 12, 22 – 23. However, because Movants filed their Motion prematurely, the Receiver has not yet taken Movants depositions and has not obtained written responsive discoverable information with respect to these assertions. Goforth Decl. ¶ 4.

The Receiver asks the Court to delay its determination of Motion regarding Count II until he can depose the Movants and obtain written discovery with respect to their affidavit testimony, and further with respect to facts related to “the degree of unjustness wrought by [the] retention [of these funds by Movants] weighed against the policy against enforcement,” “whether a judgment depriving the violator of the benefits received will subvert the policy underlying the rule of law that makes the transaction illegal,” and “the extent of the [Movants’] participation” in the Breitling fraudulent scheme. *Regional Properties, Inc.* at 564; Goforth Decl. ¶ 5.

The Receiver expects to obtain additional information, *inter alia*, about Movants' knowledge with respect to (1) the Breitling securities offerings, (2) the offering documents for same, (3) the securities laws with respect to registration, (4) the terms upon which Breitling engaged its sales staff, (6) Movants' conduct undertaken in furtherance of the sale of Breitling securities, and (7) Movants' history (if any) of offering and selling securities without being licensed, and whether any of those securities (if any) were fraudulently offered and sold to the public. Only with information about the foregoing could Receiver establish a dispute with respect to material facts upon which Movants seek summary judgment. Goforth Decl. ¶ 6.

Accordingly, the Receiver asks the Court to delay its determination of the Motion with respect to Count II until the Receiver can obtain such discovery. The Receiver will serve discovery seeking such information on Movants before the new year. Goforth Decl. ¶ 7.

II. CONCLUSION

The Receiver cannot present facts essential to justify his opposition to the Motion with respect to Count II of the Complaint. The Motion was filed 130 days before the close of discovery in the case and the Receiver has 105 days between the filing of this motion and the close of discovery in this case on April 2, 2021 timely to obtain this discovery. The Receiver has not yet taken Movants' depositions or otherwise received written discovery responses with respect to the facts underlying Count II. He intends to serve such discovery requests on Movants (and other defendants) before the new year. If the Court does not deny the Motion with respect to Count II outright as requested in the Receiver's Response in opposition to the Motion, it should delay determination of the Motion until the Receiver is able to conduct discovery with respect to the facts underlying Count II.

Dated: December 18, 2020

Respectfully submitted,

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COUNSEL FOR PLAINTIFF RECEIVER
THOMAS L. TAYLOR III

CERTIFICATE OF CONFERENCE

I certify that I have conferred with counsel for Movants regarding the relief sought by this motion. Movants are opposed.

/s/ Andrew M. Goforth
Andrew M. Goforth

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
Andrew M. Goforth

4. The Receiver does not have any discovery information from Movants in his possession beyond their Initial Disclosures. The Receiver cannot present facts essential to justify his opposition to the Motion with respect to Count II of the Complaint without obtaining additional discovery on matters of material fact.

5. To justify his opposition to the Motion with respect to Count II of the Complaint, the Receiver must obtain discovery with respect to “the degree of unjustness wrought by [the] retention [of these funds by Movants] weighed against the policy against enforcement,” “whether a judgment depriving the violator of the benefits received will subvert the policy underlying the rule of law that makes the transaction illegal,” and “the extent of the [Movants’] participation” in the Breitling fraudulent scheme.

6. With respect to these matters, the Receiver would seek information, *inter alia*, about Movants’ knowledge with respect to (1) the Breitling securities offerings, (2) the offering documents for same, (3) the securities laws with respect to registration, (4) the terms upon which Breitling engaged its sales staff, (6) Movants’ conduct undertaken in furtherance of the sale of Breitling securities, and (7) Movants’ history (if any) of offering and selling securities without being licensed, and whether any of those securities (if any) were fraudulently offered and sold to the public.

7. The Receiver will serve discovery seeking such information on Movants before the new year.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on December 18, 2020 in Houston, Texas.

/s/ Andrew M. Goforth