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

THOMAS L. TAYLOR, III, in his capacity as Court-appointed temporary receiver for Breitling Energy Corp. et al., Plaintiff v. ROTHSTEIN KASS P.A. d/b/a ROTHSTEIN KASS & CO. P.C.; ROTHSTEIN KASS & COMPANY, PLLC and BRIAN MATLOCK, Defendants.	§ § § § § § § § § § § § § §	NO. 3:19-cv-01594-D

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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Defendants Rothstein Kass P.A. (d/b/a/ Rothstein Kass & Co. P.C.) ("Rothstein Kass PA"), Rothstein Kass & Company, PLLC (together and collectively with Rothstein Kass PA, "Rothstein Kass") and Brian Matlock ("Matlock" and collectively with Rothstein Kass, "Defendants"), pursuant to Fed. R. Civ. P. 56, respectfully submit this Memorandum in support of their Motion for Summary Judgment as to all causes of action filed by Thomas L. Taylor III ("Taylor"), as a court-appointed temporary receiver (the "Receiver" or "Plaintiff"), in Plaintiff's First Amended Complaint. For the reasons set forth below, the Motion should be granted.

I. SUMMARY OF ARGUMENT

In June 2016, after years of investigation, the U.S. Securities & Exchange Commission ("SEC") filed a federal lawsuit alleging that Breitling Energy Corporation ("BECC") engaged in securities fraud. Two years later, the U.S. Department of Justice ("DOJ") arrested Chris Faulkner, BECC's Chief Executive Officer, and later indicted him on similar charges. But in 2014, when it performed the audits at issue in this litigation, Rothstein Kass PA did not have the luxury of years to conduct an investigation, let alone the Federal Government's vast investigatory powers. Rather, over a six-month period, Rothstein Kass PA conducted audits of the financial statements of two private companies and a company that, as of the end of the last audit period, was only three weeks removed from a reverse merger. Rothstein Kass PA identified several accounting issues and informed members of Breitling Oil and Gas Corporation ("BOG")'s and Breitling Royalties Corporation ("BRC")'s[1] management and BECC's Board of Directors of those issues. Rothstein Kass PA completed its audits after resolving all audit issues that impacted the financial statements, and issued audit opinions on February 14, 2014 and March 31, 2014 (the "Audit Opinions"). During the course of the audits, Rothstein Kass PA did not conclude that the Breitling Entities

[1] These entities, together with BECC, are referred to as the "Breitling Entities."

were engaged in fraud. Notably, none of the critical actors at the time—officers of the Breitling Entities, BECC's independent directors, BECC's outside counsel, and BECC's subsequent auditors—believed that Mr. Faulkner was engaged in fraud even after Rothstein Kass PA informed them, or they otherwise learned of, the conduct later characterized by the SEC as fraudulent. Plaintiff's efforts to pin the purported misconduct of Mr. Faulkner and others on Rothstein Kass PA are unsupported by the record. Despite clear, undisputed evidence to the contrary, Plaintiff contends that Defendants violated their professional duties and seeks millions of dollars in damages (mostly for entities that Rothstein Kass PA did not audit).

Plaintiff also scrambles together the distinct claims of BOG, BRC, BECC, Crude Energy LLC ("Crude Energy"), Crude Royalties LLC ("Crude Royalties"), and Patriot Energy Inc. ("Patriot")[2] in an ill-fated attempt to overcome one of the core infirmities plaguing his case: the only entities that Defendants audited (BOG, BRC, BECC) raised no money after the audits, while the entities that did raise money after the audits (Crude Energy, Crude Royalties, Patriot) were neither Rothstein Kass PA's clients nor audited by Rothstein Kass PA. This mix-and-match pleading theory cannot survive summary judgment. The unique aspects of each entity's potential claims—and their impact on the applicable statute of limitations and elements necessary to Plaintiff's claims (such as privity, proximate causation, damages, and fiduciary duties)—are too important to ignore. For example, each of these entities became a part of the Receivership at different times, and therefore gained the benefit of the Court's Orders tolling actions for members of the Receivership at different times. As another example, only BOG, BRC, and BECC have contractual privity with Rothstein Kass PA. Even as to Mr. Faulkner, the record shows that his

[2] For ease of reference, all of the entities on whose behalf Plaintiff purports to bring claims (BOG, BRC, BECC, Crude Energy, Crude Royalties, and Patriot) are referred to collectively as the "Receiver Entities."

duties and obligations to these entities varied as to each entity, with no fiduciary duties owed to Crude Energy, Crude Royalties, or Patriot.

In addition to these pervasive issues in Plaintiff's theory of his case, multiple, independent grounds support a grant of summary judgment in favor of Defendants:

- ***First***, Plaintiff's claims are barred by the statute of limitations because they were brought after the relevant statutes of limitation expired, and the Court's tolling orders in *SEC v. Faulkner* could not toll state-law causes of action against third parties. Even if the tolling orders did toll such claims, the undisputed facts show that Plaintiff's professional negligence claim is still time-barred.
- ***Second***, Plaintiff cannot, as a matter of law, pursue a professional negligence claim (i) against Rothstein Kass PLLC or Mr. Matlock, or (ii) on behalf of Crude Energy, Crude Royalties, or Patriot because such a claim lacks privity.
- ***Third***, Plaintiff's professional negligence claim fails because there is no evidence to show that Defendants either (i) breached a duty of care owed to any of the entities comprising the Receiver Entities or (ii) were the proximate cause of any harm suffered by the entities comprising the Receiver Entities.
- ***Fourth***, Plaintiff cannot pursue a participation in breach of fiduciary duty claim on behalf of Crude Energy, Crude Royalties, or Patriot because there is no evidence that Mr. Faulkner owed fiduciary duties to these entities.
- ***Fifth***, Plaintiff's participation in breach of fiduciary duty claim fails because there is no evidence to show (i) Defendants' contemporaneous knowledge of Mr. Faulkner's breach or (ii) Defendants' knowing aid to Mr. Faulkner's breach.

- ***Sixth***, Plaintiff is precluded, as a matter of law, from pursuing his "Increased Liabilities Damages" because such damages are thinly disguised investor losses for which Plaintiff lacks standing to recover.

II. PROCEDURAL HISTORY

On June 24, 2016, the SEC filed its action against Mr. Faulkner, BECC, BOG, and other individuals and entities alleging violations of the federal securities laws.[3] More than a year later, on August 14, 2017, the Court appointed Plaintiff as the Receiver in the SEC's action.[4] Initially, Taylor was appointed the Receiver only over the oil-and gas related assets of Mr. Faulkner, BOG and BECC. The Court expanded the scope of the Receivership on September 4, 2017 by defining "Receivership Assets" to include *all* assets of the "Receivership Defendants," which, at the time, included only Mr. Faulkner, BOG, and BECC.[5]

One year later, on September 12, 2018, the Court expanded the reach of the Receivership when it added several entities (including BRC and Patriot) into the "Receivership Entities."[6] On March 26, 2019, the Court again expanded the scope of "Receivership Entities" to include Crude Energy and Crude Royalties for the first time.[7] Although the tolling language included in the Court's orders is effectively identical, the tolling provisions only apply, if at all, to an entity *after that entity is included within the Receivership Entities*.[8]

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[3] *SEC v. Faulkner, et al.*, No. 3:16-cv-01735-D, Dkt. No. 1.

[4] *Id.*, Dkt. No. 108 at 1.

[5] *Id.*, Dkt. No. 142 at 1.

[6] *Id.*, Dkt. No. 320 at 1.

[7] *Id.*, Dkt. No. 418 at 1; *see also* App. at 1662, Ex. DB at 38:15-41:14.

[8] *See, e.g.*, *SEC v. Faulkner, et al.*, No.3:16-cv-01735-D, Dkt. No. 108, ¶ 22 ("Further, as to a cause of action accrued or accruing in favor of one or more *of the Receivership Defendants* against a third person or party, any applicable statute of limitation is tolled during the period in which this

On July 1, 2019, Plaintiff filed his Original Complaint against Rothstein Kass & Company, PLLC and Mr. Matlock on behalf of the Receiver Entities. (Dkt. No. 1.) The Original Complaint alleged causes of action for (i) professional negligence, (ii) aiding, abetting, or participation in breaches of fiduciary duties, (iii) aiding, abetting, or participation in a fraudulent scheme, and (iv) avoidance of fraudulent transfers. (*Id.*) Defendants moved to dismiss all of Plaintiff's causes of action. (Dkt. No. 19.)

On February 4, 2020, this Court issued a Memorandum Opinion and Order dismissing (i) aiding and abetting claims, (ii) the alleged participation in a fraudulent activity, and (iii) the avoidance of fraudulent conveyances. (*See* Dkt. No. 34 (*Taylor v. Rothstein Kass & Co., PLLC*, No. 3:19-CV-1594-D, 2020 WL 554583, at *1 (N.D. Tex. Feb. 4, 2020)).) Plaintiff subsequently filed the First Amended Complaint, naming Rothstein Kass PA as a new defendant because Plaintiff "discovered that Rothstein PA is the real party in interest and the party responsible for the audits in dispute." (Dkt. No. 45, ¶ 82.) Count I asserts a claim against all Defendants for professional negligence. (*Id.*, ¶ 85.) Count II asserts a claim against all Defendants for knowingly participating in Mr. Faulkner's alleged breaches of fiduciary duties. (*Id.*, ¶¶ 87-88.) Plaintiff asserted both claims on behalf of the Receiver Entities, including Crude Energy, Crude Royalties, and Patriot as subsidiaries and alter egos of BECC. (*Id.*, ¶¶ 85-88.)

III. THE RECEIVER ENTITIES

Each entity for which Plaintiff purports to bring claims has a different relationship with Defendants—indeed, Crude Energy, Crude Royalties, and Patriot have *no relationship with Defendants*—and a unique position in the fraudulent scheme alleged in *SEC v. Faulkner*. In

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injunction against commencement of legal proceedings is in effect as to that cause of action.") (emphasis added).

addition, each entity purports to have incurred different damages through the funds that each entity raised through separate offerings and sales of oil-and-gas interests. These distinctions are summarized in the Appendix at 1711-14, Ex. DF.

BOG and BRC are private companies that generated revenue through private offerings of fractional interests in oil-and-gas prospects between approximately 2009 and December 9, 2013.[9] BOG sold fractional interests in working interests of specific oil-and-gas wells,[10] while BRC sold fractional interests in mineral rights for oil-and-gas prospects, referred to as royalty interests.[11] Mr. Faulkner, Parker Hallam, and Michael Miller each owned one-third of BOG and BRC.[12] Messrs. Faulkner, Hallam, and Miller also served as officers for BOG and BRC,[13] later joined by Mr. Wagers in late 2012, when he became their General Counsel and Chief Compliance Officer.[14] As such, Mr. Wagers was recognized as the officer responsible for corporate governance at the Breitling Entities.[15]

On December 9, 2013, BOG and BRC, on the one hand, and a public company known as Bering Exploration Inc. ("Bering"), on the other hand, entered into a reverse merger (the "Reverse Merger").[16] Bering acquired the assets of BOG and BRC, while BOG and BRC acquired

[9] App. at 1349-50, 1352, Ex. CC at 18:18-19:10, 35:5-11.

[10] App. at 1478, Ex. CN at 20:7-19.

[11] *Id.*

[12] App. at 1503-04, Ex. CQ at 53:15-54:6.

[13] App. at 1347-48, 1351, Ex. CC at 15:18-16:13, 34:9-21.

[14] App. at 1478, Ex. CN at 20:7-22; App. at 1353, Ex. CC. at 226:13-18; App. at 1458-59, Ex. CL at 77:24-78:10.

[15] *See* App. at 1567-68, Ex. CU at 33:24-34:3; App. at 1403, 1405, Ex. CH at 94:21-95:2, 338:7-13.

[16] App. at 46-59, Ex. C.

approximately 92.5% of Bering's shares in the Reverse Merger.[17] Bering did not acquire any of BOG and BRC's legal liabilities related to conduct occurring prior to the closing of the Reverse Merger.[18] Bering soon changed its name to BECC.[19] At BECC, Mr. Wagers served as General Counsel, Chief Operations Officer, Director, and Secretary, while Rick Hoover served as Chief Financial Officer.[20]

Also on December 9, 2013, Mr. Hallam and Mr. Miller launched Crude Energy and Crude Royalties to sell working interests and royalties interests.[21] Mr. Hallam and Mr. Miller ran Crude Energy and Crude Royalties; no other individual or entity was a manager or member of these entities.[22] Nor did any other individual or entity own any interest in these entities.[23] Crude Energy and Crude Royalties did not have any operations in 2013.[24] They started offering oil-and-gas interests in 2014, but ceased operations in approximately March 2015 when Mr. Hallam exited the companies.[25]

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[17] *Id.* at 54. Mr. Faulkner never owned a majority interest of BECC shares. App. at 1533, 1540-41, Ex. CS at 29:9-21, 145:12-146:4.

[18] *See* App. at 69-71, Ex. D (defining excluded liabilities).

[19] *See* App. at 1057, Ex. AY.

[20] App. at 1584, Ex. CV at 379:19 – 380:13; App. at 1646, Ex. DA at 14:6-8.

[21] App. at 51, Ex. C.

[22] App. at 1505, Ex. CQ at 58:17-59:14; App. at 1519, Ex. CR at 71:8-72:15; App. at 1560, Ex. CT at 116:23-117:8; App. at 1577-80, Ex. CV at 345:16-346:10, 346:22-355:17; App. at 1594, Ex. CW at 95:20-96:16; App. at 1613, Ex. CX at 155:4-14; App. at 1647, Ex. DA at 19:18-24; App. at 1063, 1071-74, 1079, 1101-02, Ex. AZ; App. at 1106, 1110, 1112, 1132-33, Ex. BA.

[23] App. at 1505, Ex. CQ at 58:17-59:14; App. at 1518-19, Ex. CR at 62:11-21; 71:8-72:15; App. at 1074, 1102, Ex. AZ; App. at 1133, Ex. BA.

[24] App. at 1592-93, Ex. CW at 85:14-87:3; App. at 1135-36, Ex. BB; App. at 1623, Ex. CY at 71:21-73:14; App. at 1150, Ex. BD; App. at 1146, Ex. BC.

[25] App. at 1708, Ex. DE at 75:14-76:16.

After Mr. Hallam's exit, Crude Energy and Crude Royalties wound down while Mr. Miller established Patriot Energy to sell working interests.[26] Mr. Miller was the president and sole director of Patriot.[27] Patriot operated between approximately March 2015 and April 2016.[28]

IV. FACTUAL BACKGROUND

A. Rothstein Kass PA Audited BOG and BRC's Consolidated Financial Statements for 2011 and 2012, and BECC's Financial Statements for 2013.

On April 24, 2013, two privately held companies—BOG and BRC— engaged ***Rothstein Kass PA*** to conduct an audit of their "[c]onsolidated balance sheet as of December 31, 2012 and 2011 . . . and the related consolidated statements of operations, changes in stockholders' equity, and cash flows for the years then ended . . ." (the "2011-2012 Audit").[29] Following the Reverse Merger, on December 17, 2013, BECC engaged ***Rothstein Kass PA*** to conduct a separate audit of BECC's financial statements for the two-year period ended December 31, 2013 and the balance sheet for March 31, 2014 (the "2013 Audit").[30] Each engagement letter specified that Rothstein Kass PA was engaged to "plan and perform the audit of the financial statements to obtain reasonable assurance about whether the financial statements are free of material misstatement."[31] The engagement letters further stated, "[b]ecause our audit is designed to provide reasonable, ***but not absolute***, assurance and because we will not perform a detailed examination of all transactions, there is a risk that material misstatements or material weaknesses in internal control may exist and not be detected by us" and that "our ***financial statement audit is not designed to detect immaterial***

[26] *See* App. at 1156-62, Ex. BE.

[27] App. at 1156-62, Ex. BE; App. at 1218-19, Ex. BR.

[28] App. at 1156-62, Ex. BE; App. at 1707, Ex. DE at 33:10-17; App. at 660, Ex. AJ ¶ 26.

[29] App. at 32, Ex. A.

[30] App. at 40, Ex. B.

[31] App. at 30, Ex. A; App. at 38, Ex. B.

misstatements or violations of laws or governmental regulations that do not have a direct and material effect on the financial statements."[32]

Mr. Matlock, then a principal at Rothstein Kass PA, led the audit team for each audit.[33] Michael Nymeyer, a manager, and Bertrand Maimo, a senior associate, supported Mr. Matlock on these audits (together the "Engagement Team").[34] Despite signing the engagement letter in April 2013, Rothstein Kass PA did not begin audit procedures for the 2011-2012 Audit until October 2013 due to BOG and BRC's lack of sufficient financial records.[35] Together, the 2011-2012 and 2013 Audits took approximately six months to complete. Rothstein Kass PA completed the 2011-2012 Audit on February 14, 2014,[36] and the 2013 Audit on March 31, 2014.[37]

Although the entities being audited were different for the 2011-2012 Audit and the 2013 Audit, the Engagement Team encountered similar key issues in both audits ("Key Audit Issues"), including:

- The "**Oversold Interest Issue**": For certain offerings, BOG and BRC sold more than 100% of the working interests BOG owned in a particular well, or royalty interests BRC owned in a particular prospect.

[32] App. at 31, Ex. A (emphasis added); App. at 39, Ex. B (emphasis added).

[33] App. at 32, Ex. A; App. at 40, Ex. B; App. at 1361-63, Ex. CD at 10:10-24, 17:16-18:04.

[34] App. at 1364, Ex. CD at 26:9-20.

[35] App. at 1470, Ex. CM at 149:17-19. Prior to beginning its audit procedures, Rothstein Kass PA recommended to BOG and BRC that they hire PriceKubecka, PLLC, to "help clean up" the books and records so that they could be used to produce financial statements for the planned audit. App. at 1417, Ex. CI at 603:14-604:6.

[36] App. at 333, Ex. N.

[37] App. at 304, Ex. M.

- The "**Inflated AFE Issue**": For certain offerings, BOG included in its offering documents (called "Confidential Information Memoranda" ("CIMs")) [38] an Authorization for Expenditures ("AFEs")[39] that purportedly exceeded BOG's actual costs to develop the well in which that CIM offered a fractional working interest. The mismatch between costs estimated in the AFE and actual costs affected the price at which working interests were sold, which was determined by the amount of the AFE.
- The "**Cash Segregation Issue**": BOG transferred funds received in certain offerings from well-specific or prospect-specific accounts to other accounts maintained by BOG.
- The "**Personal Expenses Issue**": BOG, BRC, and BECC reimbursed Mr. Faulkner for various allegedly personal expenses.

To evaluate these Key Audit Issues, the Engagement Team in both audits: (1) performed preliminary audit planning and scoping,[40] (2) identified potential audit risks,[41] (3) performed risk assessments,[42] (4) documented risks,[43] (5) conducted significant substantive audit testing,[44] and (6) performed additional audit testing on various issues raised.[45] Rothstein Kass PA also documented the Key Audit Issues in key workpapers, including in its Summary Review

[38] CIMs are the offering documents used for BOG's private offerings, PPMs are the offering documents used for BRC's private offerings. *See* App. at 1402, Ex. CH at 72:6-12; App. at 1507, Ex. CQ at 114:4-22 (same).

[39] AFEs are schedules containing estimates for the costs required to drill a well. App. at 1559, Ex. CT at 93:3-6; App. at 1506, Ex. CQ at 66:2-16.

[40] *See, e.g.*, App. at 495-502, Ex. W.

[41] *See, e.g.*, App. at 484-93, Ex. V; App. at 495-502, Ex. W; App. at 747-775, Ex. AK.

[42] *See, e.g.*, App. at 748-75, Ex. AK.

[43] *See, e.g.*, App. at 484-93, Ex. V; App. at 495-502, Ex. W; App. at 748-75, Ex. AK.

[44] *See* App. at 811, 820, 831, Ex. AL.

[45] *See* App. at 810-17, 820-24, 825-28, 830-33, Ex. AL.

Memorandum (which described the Key Audit Issues that had a direct impact on the financial statements under audit or Rothstein Kass PA's suggested journal entry adjustments) and its CIM Review Memorandum (which described the Key Audit Issues that did not have a direct impact on the financial statements or suggested journal entry adjustments).[46] Rothstein Kass PA also relied on formal representations from management at BOG, BRC, and BECC that, among other things, they were not aware of any fraud or illegal acts, as part of its audit procedures in these audits.[47]

B. Rothstein Kass PA Identified the Key Audit Issues to Management (Including Those in Charge of Corporate Governance) and BECC's Board of Directors (Including the Chairman of the Audit Committee).

Most importantly for the purposes of the pending Motion for Summary Judgment, Rothstein Kass PA communicated the Key Audit Issues and related findings to (1) BOG and BRC's management, including those charged with corporate governance, for the 2011-2012 Audit; and (2) members of BECC's management, Board of Directors and the chairman of BECC's Audit Committee (Mr. Williford) for the 2013 Audit.[48] Rothstein Kass PA's written communication with BECC's Audit Committee disclosed both the Overselling Issue and the Personal Expenses

[46] *See* App. at 143-47 (2011-2012 CIM Review Memorandum), Ex. E; App. at 149-50 (2013 CIM Review Memorandum), Ex. F; App. at 1164-67 (2011-2012 Summary Review Memorandum), Ex. BF; App. at 1169-72 (2013 Summary Review Memorandum), Ex. BG; App. at 1406-07, Ex. CH at 349:20-351:14.

[47] *See, e.g.*, App. at 504-06, Ex. X; App. at 512-16, Ex. Y. Mr. Hoover confirmed that he believed these representations were true and accurate at the time they were made. App. at 1648-49, Ex. DA at 42:24-47:16.

[48] *See, e.g* App. at 206-08, Ex. J; App. at 161-94, Ex. H; App. at 371, Ex. Q; App. at 365-69, Ex. P; App. at 196-204, Ex. I; App. at 211, Ex. K; App. at 1413, Ex. CI at 576:23-577:10; App. at 1446, Ex. CK at 51:3-22; App. at 1650, 1656-57, Ex. DA at 54:5-55:23, 184:13-185:17, and 187:5-189:25; App. at 1534-37, 1542-45, 1548, Ex. CS at 55:11-58:15, 64:14-65:25, 68:3-18, 152:22-154:13, 165:5-168:15, 225:6-14; App. at 1582-83, Ex. CV at 363:2-14, 365:19-367:6; App. at 1614-16, Ex. CX at 181:16-182:18, 204:7-205:5; App. at 1557-58, Ex. CT at 79:24-80:04, 87:22-88:4; App. at 1671, Ex. DB at 131:22-133:8; App. at 1494-5, Ex. CP at 184:09-187:25.

Issue.[49] Mr. Nymeyer also testified about a telephone conference between Rothstein Kass PA and Mr. Williford (Chairman of the Audit Committee) regarding the Inflated AFE and Cash Segregation Issues:

> Q What about the members of the board of directors of Breitling Energy Companies, were any of them – did Rothstein Kass inform any of those members about the AFE issues noted in Exhibit 100[50]?
>
> A Chris Williford was – communicated that verbally via phone call at the end of the 2013 audit.
>
> Q Can you tell me about that?
>
> A It was a phone call with Chris, myself and Brian. And we went through communication letter with Chris Williford and discussed the different bullet points that were described in here, in addition to AFEs and other areas such as cash misappropriation.
>
> Q So you and Mr. Matlock specifically discussed the AFE issues noted in [the CIM Review Memorandum] with Mr. Williford on this phone call you're talking about?
>
> A Yes, we did.[51]
>
> ***
>
> Q Okay. You mentioned the -- one of the other issues that was brought to his attention during that phone call was cash misappropriation?
>
> A The potential cash being spent on other development projects, essentially the Ponzi.[52]
>
> ***

[49] App. at 228-29, Ex. L.

[50] The 2011-2012 CIM Review Memorandum (App. at 143-47, Ex. E) was introduced as Exhibit 100 in the SEC's investigative testimony. *See* App. at 1377, Ex. CE at 54:18-22.

[51] App. at 1379-80, Ex. CE at 77:14-78:04.

[52] App. at 1380, Ex. CE at 78:11-19.

> Q You said that Mr. Williford told you and Mr. Matlock he was going to look into both the cash segregation and AFE issues that are referenced in [the CIM Review Memorandum] after you brought them to his attention on the phone call that occurred?
>
> A Correct.[53]

Mr. Nymeyer's testimony regarding this conversation—*taken only a few months after it occurred*—establishes that Rothstein Kass PA disclosed *all* of the Key Audit Issues to Mr. Williford, whether verbally or through a written communication. Mr. Williford does not dispute this testimony; he testified that the conversation occurred but he does not recall what was discussed.[54]

1. Rothstein Kass PA Identified the Overselling Issue and Informed BOG, BRC, and BECC's Management, BECC's Board of Directors, and the Chairman of BECC's Audit Committee.

The Parties do not dispute that Rothstein Kass PA identified the Overselling Issue during the audits.[55] The undisputed evidence also demonstrates that over the course of the audit, Rothstein Kass communicated the Overselling Issue to, at a minimum, Mr. Wagers, Mr. Hoover and Mr. Williford, as well as in the audit letters to BOG and BRC management (2011-2012 Audit) and BECC's Board of Directors (2013 Audit).[56] Both Mr. Wagers and Mr. Hoover informed Rothstein Kass PA that overselling was legally permissible under the relevant offering documents

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[53] App. at 1384-85, Ex. CE at 82:25-83:4.

[54] *See* App. at 1608-10, Ex. CX at 57:3-58:4, 138:16-139:21; *see also* App. at 1666, Ex. DB at 90:12-25.

[55] *See* App. at 921-22, Ex. AN (Request for Admission No. 19).

[56] *See, e.g.*, App. at 211, Ex. K; App. at 228, Ex. L; App. at 1494-5, Ex. CP at 184:09-187:25; App. at 161-94, Ex. H; App. at 196-204, Ex. I; App. at 206-08, Ex. J; App. at 211, Ex. K; App. at 1430-35, Ex. CJ at 60:23-65:24; App. at 1479, Ex. CN at 151:1-24; App. at 1534-35, 1539, 1542-43, 1548, Ex. CS at 55:11-58:15, 119:18-120:9, 152:22-154:13, 225:6-14; App. at 1582-83, Ex. CV at 365:19-367:6; App. at 1650, Ex. DA at 54:5-55:23; App. at 1557-58, Ex. CT at 79:24-80:4, 87:22-88:4; *see also* App. at 934, Ex. AP (Request for Admission Nos. 56, 57); App. at 1671, Ex. DB at 131:22-133:8.

and that purchasers who bought into oversold wells or prospects could be transferred to a well or prospect that was not oversold.[57] The Audit Committee considered the Overselling Issue and ultimately determined that it was not material to BECC's financial statements, in part because BECC did not acquire any of BOG's or BRC's liabilities.[58]

2. Rothstein Kass PA Recommended Adjustments to the Financial Statements to Address the Overselling Issue.

After completing its audit procedures and inquiries regarding the Overselling Issue, Rothstein Kass PA proposed an audit adjustment to move any improperly recorded amounts from revenue to deferred revenue (a liability on the financial statements).[59] Rothstein Kass PA's proposed adjustments resulted in reductions of recorded revenues (and corresponding increases in liabilities) of $4.6 million for BECC's 2013 financial statement,[60] and of $6.6 million and $1.8 million for BOG and BRC's financial statements for 2012 and 2011, respectively.[61] The Breitling Entities' audited financial statements ultimately showed an economically distressed company.[62] This was a source of consternation among BECC's management, as reflected in Mr. Faulkner's

[57] App. at 1547, Ex. CS at 203:21-205:21. BOG, BRC, and BECC's former outside counsel supported this interpretation of the offering documents. *See* App. at 1509-10, Ex. CQ at 203:9-204:14, 207:20-208:23; App. at 1520-24, Ex. CR at 100:22-102:18, 117:09-119:03, 121:24-123:22; App. at 1542-43, 1546-48, Ex. CS at 152:22-154:13, 187:22-188:3, 203:21-204:7; App. at 1671, Ex. DB at 131:22-133:8.

[58] App. at 1430-39, Ex. CJ at 60:23-62:20, 63:3-65:24, 70:20-71:8, 71:22-72:7, 156:07-156:14.

[59] App. at 215, 217, 220-21, 223-24, Ex. K and App. at 520, 524, Ex. Y (including proposed journal adjustments for deferred revenue). Mr. Wagers provided these adjustments to BECC's Audit Committee before it approved the 2013 financial statements. App. at 973-84, Ex. AS.

[60] App. at 305, Ex. M.

[61] App. at 334, Ex. N. BOG and BRC's management understood the significance of the deferred revenue adjustment. *See* App. at 359-63, Ex. O.

[62] As examples, the 2011-2012 financial statements showed that total liabilities for the period ended December 31, 2012 were $9,254,651, cash flows from operating activities for the year ended December 31, 2012 showed a net loss of $5,684,897, and total stockholder equity was ***negative*** $4,630,341. App. at 334-37, Ex. N.

emails stating that the financial statements had "[b]ig net losses . . . [n]ot good," that the financial statements "look[] like shit," and that "general run of the mill investors will look at [the financial statements] and say WTF."[63] Mr. Wagers also stated that BECC needed to "come up with a good explanation to explain these numbers" and "file it in writing."[64]

3. Rothstein Kass PA Identified the Inflated AFE Issue and Informed BOG, BRC, and BECC's Management, BECC's Board of Directors, and the Chairman of BECC's Audit Committee.

The Parties do not dispute that Rothstein Kass PA identified the Inflated AFE Issue for BOG offerings (BRC's royalty offerings did not involve this issue because the offering memoranda for those offerings did not include AFEs).[65] Once again Rothstein Kass PA conveyed the Inflated AFE issue to, at a minimum, Mr. Wagers, Mr. Hoover, and Mr. Williford.[66]

When it identified the Inflated AFE issue, Rothstein Kass PA determined that an AFE is merely the cost estimate BOG used and "does not have an impact on the financial statements, but it causes the potential for working interest purchasers to sue the Company for overstating the facts of their drilling programs."[67] Such lawsuits could result in a contingency that needed to be recorded or disclosed in the financial statements. To address this potential contingency, Rothstein Kass PA sent multiple letters to BECC's outside counsel (as identified by management or observed

[63] App. at 360-61, Ex. O.

[64] App. at 361, Ex. O.

[65] *See* App. at 965, Ex. AR (Request For Admission No. 11); App. at 954, Ex. AQ (Request for Admission No. 130); App. at 1673, Ex. DB at 157:5-7.

[66] App. at 227-29, Ex. L; App. at 1446, Ex. CK at 51:3-22; App. at 1379-80, 1384-85, Ex. CE at 77:14-78:19, 82:25-83:4; App. at 365-69, Ex. P. App. at 1480, Ex. CN at 165:16-22; App. at 1498, Ex. CP at 278:7-24; App. at 1536-37, 1544-45, Ex. CS at 64:14-65:25, 68:3-18, 165:5-168:15; App. at 1651-54, Ex. DA at 81:16-82:25, 92:24-94:10; App. at 1369, Ex. CM at 130:14-131:06; App. at 1582, Ex. CV at 363:2-14. Even Plaintiff concedes this point. App. at 965-66, Ex. AR (Requests for Admission Nos. 12, 13).

[67] App. at 147, Ex. E; App. at 149, Ex. F.

from the general ledger) to determine whether any such contingent liability existed.[68] Based on the responses from these attorneys, BOG and BRC recorded a contingent liability in their financial statements for the years ended December 31, 2011 and December 31, 2012.[69]

4. Rothstein Kass PA Identified the Cash Segregation Issue and Informed BOG, BRC, and BECC's Management, BECC's Board of Directors, and the Chairman of BECC's Audit Committee.

The Parties do not dispute that Rothstein Kass PA identified the Cash Segregation Issue.[70] The undisputed evidence also shows that Rothstein Kass PA communicated the Cash Segregation Issue to Mr. Hoover and Mr. Williford; Mr. Wagers was separately informed of the cash segregation issue by Vinson & Elkins LLP (BOG's and BRC's outside counsel in the SEC investigation).[71] Rothstein Kass PA relied on management to explain how to interpret ambiguous language in BOG's offering documents.[72] In particular, BOG's subscription agreements for BOG's offerings stated "if this Subscription Agreement is accepted, the funds tendered herewith shall be considered corporate assets of the Company."[73] The CIMs, however, are potentially inconsistent, stating "[p]roceeds received from the offer and sale of all Units will be deposited into a segregated bank account . . . [and] payments for Drilling and Testing Costs and Completion and Equipping Costs shall be paid from the segregated account."[74] Mr. Hoover and Mr. Wagers

[68] *See* App. at 373-75, Ex. R; App. at 377-80, Ex. S.

[69] App. at 221, Ex. K; App. at 347, Ex. N. BECC also referenced to this contingency in its notes to the 2013 Financial Statements. App. at 318, Ex. M.

[70] *See* Dkt. No. 45, ¶ 45.

[71] App. at 211-12, Ex. K; App. at 1380-82, Ex. CE at 78:24-79:9, 79:20-80:17; App. at 228-29, Ex. L; App. at 1446, Ex. CK at 51:3-22; App. at 1379-80, 1384-85, Ex. CE at 77:14-78:19, 82:25-83:4; App. at 1538, Ex. CS at 79:5-20.

[72] The Cash Segregation Issue did not impact BRC's offerings. *See* App. at 143-47, Ex. E; App. at 1634, Ex. CZ at 204:11-205:14.

[73] *See, e.g.*, App. at 423, Ex. T; App. at 474, Ex. U.

[74] *See, e.g.*, App. at 389, Ex. T; App. at 440, Ex. U.

explained that this language allowed BOG to move funds from segregated accounts.[75] Rothstein Kass PA documented its understanding of the segregation of cash in the CIM Review Memorandum [76] and determined that the lack of cash segregation did not have an impact on the financial statements of the Breitling Entities.[77]

5. Rothstein Kass PA Identified the Personal Expense Issue and Informed BOG, BRC, and BECC's Management, BECC's Board of Directors, and the Chairman of BECC's Audit Committee

The Parties do not dispute that Rothstein Kass PA identified the Personal Expense issue.[78] The undisputed evidence also shows that Rothstein Kass PA again conveyed the Personal Expense Issue and related findings, at a minimum, to Mr. Wagers, Mr. Hoover, and Mr. Williford.[79] Based on its own investigation and representations from BOG, BRC, and BECC's management, Rothstein Kass PA concluded that an overwhelming amount of Mr. Faulkner's expenses were company-related (such as advertising expenses and Breitling Entities-related travel expenses).[80] Among these representations were Mr. Faulkner's and Mr. Hoover's confirmation that all of his

[75] App. at 1383-84, Ex. CE at 81:25-82:13; App. at 1404, Ex. CH at 281:12-282:22; App. at 1486, Ex. CO at 160:1-8.

[76] App. at 147, Ex. E; App. at 150, Ex. F.

[77] App. at 147, Ex. E; App. at 150, Ex. F; App. at 1397, Ex. CG at 351:18-25.

[78] Dkt. No. 45, ¶ 58.

[79] App. at 211-12, Ex. K; App. at 1386, Ex. CE at 108:04-14; App. at 1672-73, Ex. DB at 136:3-11, 155:3-15; App. at 1534-35, 1539, Ex. CS at 55:11-58:15, 121:7-18, 119:18-120:9; App. at 228-29, Ex. L; App. at 1446, Ex. CK at 51:3-22; App. at 1460-63, Ex. CL at 110:8-111:11, 121:16-122:20; App. at 1413-14, Ex. CI at 576:23-579:14 (discussed 2011-2012 Audit letter with Mr. Williford); App. at 1616, Ex. CX at 204:7-205:5; App. at 1494-5, Ex. CP at 184:09-187:25.

[80] *See* App. at 526-30, Ex. Z; App. at 532-47, Ex. AA; App. at 1415-16, Ex. CI at 593:18-595:10. It is not the auditor's responsibility to question how a company uses its capital. *See* App. at 1471, Ex. CM at 215:14-216:8. To the extent there were personal expenses also charged to the Breitling Entities' credit cards, these amounts were not material and would not have impacted Breitling Entities' financial statements (except possibly to re-characterize those expenses as compensation). *See* App. at 1496-97, Ex. CP at 225:6-227:2.

reimbursements were legitimate business expenses.[81] Further, Rothstein Kass PA made sure that BECC's publicly filed financial statements included disclosures concerning material failures in the companies' internal control environments.[82] The Board of Directors and Audit Committee considered the expenses paid to Mr. Faulkner when discussing BECC's quarterly SEC filings.[83]

V. LEGAL STANDARD

This Court is no doubt familiar with the standards and evidentiary burdens applicable at summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-52 (1986). Suffice it to say that Rule 56 of the Federal Rules of Civil Procedure "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against parties who fail to make a showing sufficient to establish the existence of an element essential to their case, and on which they will bear the burden of proof at trial." *Tutton v. Garland Indep. Sch. Dist.*, 733 F. Supp. 1113, 1115 (N.D. Tex. 1990) (Fitzwater, J.) (citation omitted).

VI. ARGUMENT

Plaintiff, purportedly on behalf of six different entities (BOG, BRC, BECC, Crude Energy, Crude Royalties, and Patriot), alleges two closely related claims against Defendants: (1) Defendants committed gross negligence (*i.e.*, professional negligence) with respect to Rothstein Kass PA's audits of the Breitling Entities, (Dkt. No. 45, ¶ 85); and (2) Defendants

[81] *See* App. at 549-50, Ex. AB; App. at 552-53 Ex. AC. These confirmations were derived from a standard template and the language intended for the signatory to verify the expenses as legitimate business expenses. App. at 1420-21, Ex. CI at 691:12-693:5; App. at 1392, Ex. CF at 340:02-12; App. at 1326, Ex. BY; *see further SEC v. Faulkner, et al.*, No. 3:16-cv-01735-D, Dkt. No. 22, ¶¶ 122-23 ("Faulkner signed a letter prepared by the auditor, representing that the millions of dollars he received from [Breitling Oil and Gas] were expense reimbursements for the benefit of [Breitling]. As detailed above, Faulkner knew this representation was false . . . .").

[82] App. at 296-98, Ex. M.

[83] App. at 1460-63, Ex. CL at 110:8-111:11,121:16-122:20.

knowingly participated in Mr. Faulkner's breach of fiduciary duties owed to the Breitling Entities. (*Id.*, ¶ 88.) Plaintiff improperly conflates the distinct claims of BOG, BRC, BECC, Crude Energy, Crude Royalties and Patriot. The reason is obvious: the entities audited by Rothstein Kass PA never raised raising money after the audits, and the entities that did raise money thereafter neither had their financial statements audited by, nor privity with, Rothstein Kass PA. Each of BOG, BRC, BECC, Crude Energy, Crude Royalties, and Patriot's claims must be judged on their own merit. For the reasons provided below, summary judgment should be granted in favor of Defendants on both claims, no matter the specific entity that is bringing the claim.

A. Defendants Should Be Granted Summary Judgment With Respect to Plaintiff's Claim for Professional Negligence (Count I).

"To establish liability for professional negligence, the plaintiff must show the existence of a duty, a breach of that duty, and damages arising from the breach, as well as privity of contract." *Taylor*, 2020 WL 554583, at *4 (quotation marks and citation omitted). Moreover, "[u]nder Texas law, a cause of action based upon negligence requires proof of . . . proximate[ ] cause[]." *FDIC v. Ernst & Young*, 967 F.2d 166, 170 (5th Cir. 1992).[84]

1. Plaintiff's Claim for Professional Negligence (Count I) Is Barred by the Two-Year Statute of Limitations.

A claim for professional negligence is subject to a two-year statute of limitation. Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a); *see also Won Pak v. Harris*, 313 S.W.3d 454, 459 (Tex. App.—Dallas 2010, pet. denied). "The statute of limitations begins to run when the cause of action accrues." *Burke v. Ins. Auto Auctions Corp.*, 169 S.W.3d 771, 776 (Tex. App.--Dallas 2005, pet.

[84] *FSLIC v. Tex. Real Estate Counselors, Inc.*, 955 F.2d 261, 265 (5th Cir.1992) ("In Texas . . . [t]he duty owed by a professional to his client derives from their contractual relationship and requires that the professional 'use the skill and care in the performance of his duties commensurate with the requirements of his profession' ") (citation omitted).

denied). The determination of when a cause of action accrues is a question of law. *Waxler v. Household Credit Servs., Inc.*, 106 S.W.3d 277, 279 (Tex. App.—Dallas 2003, no pet.). A cause of action for negligence accrues when the duty of ordinary care is breached by some act or omission, even though the injury is not immediately apparent, and the plaintiff may be unaware of the cause of action. *See Johnson v. Abbey*, 737 S.W.2d 68, 69 (Tex. App.—Houston [14th Dist.] 1987, no writ) (cause of action in tort accrues when tort is complete); *Zidell v. Bird*, 692 S.W.2d 550, 554 (Tex. App.—Austin 1985, no writ) (in negligence cases generally, cause of action accrues when duty of ordinary care is breached, even if plaintiff is not aware of his right of action).[85]

Statutes of limitations are "vital to the welfare of society." *Gabelli v. SEC*, 568 U.S. 442, 449 (2013) (citations omitted). The purpose of a statute of limitations is to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Id.* at 448 (citations omitted). Plaintiff's professional negligence claim accrued when Rothstein Kass PA issued its audit opinions, which occurred more than five years prior to Plaintiff's filing this lawsuit. Rothstein Kass PA completed and issued its audit opinion for BOG and BRC's 2011 and 2012 financial statements on February 14, 2014.[86] By March 31, 2014, Rothstein Kass PA completed and issued its audit opinion for BECC's 2013 financial statements.[87] Rothstein Kass PA even resigned from its engagement with the Breitling Entities on or about June 30, 2014.[88] Accordingly, Plaintiff filed this action after expiration of the statute of limitations.

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[85] "This rule is supported by the public policy expressed in [Texas] statutes of limitations that favors repose and discourages assertion of stale demands." *Johnson*, 737 S.W.2d at 69.

[86] App. at 333, Ex. N.

[87] App. at 304, Ex. M.

[88] App. at 1181, Ex. BJ.

a. **The Court Lacked Authority to Toll the Statute of Limitations for the Texas State Law Claims.**

The August 14, 2017 Order appointing Plaintiff purports to toll "any applicable statute of limitations" for BOG and BECC. The statute continued to run for entities not included in the Order—*i.e.*, BRC, Crude Energy, Crude Royalties, and Patriot—until September 12, 2018 (BRC and Patriot) and March 26, 2019 (Crude Energy and Crude Royalties). Indeed, all of these entities were added to the Receivership more than two years after the SEC filed its enforcement action against Mr. Faulkner and others, which is the last possible date they could have been put on notice of any negligence claims against Defendants.[89]

The Court's tolling orders in *SEC v. Faulkner* do not operate to toll state-law statutes of limitations against third parties like Defendants. As a threshold matter, there is no statutory authority or equitable doctrine that permits tolling Plaintiff's claims. *FDIC v. Dawson*, 4 F.3d 1303, 1308-09 (5th Cir. 1993) (whether the state's statute of limitations is equitably tolled is a question of state law).

Unlike other types of federal proceedings,[90] SEC enforcement proceedings lack express statutory authority to toll statutes of limitations for a receiver's claims. Importantly, Congress has specifically provided through *legislation* tolling of state law claims in favor of FDIC and bankruptcy receivership estates, but not for SEC receivership estates. *C.f. Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979) (The normal rule of statutory construction

[89] *See SEC v. Faulkner, et al.*, No. 3:16-cv-01735-D, Dkt. No. 1.

[90] For example, with respect to bankruptcy proceedings, there is express legislative authority providing that—where the applicable statute of limitations has not expired prior to the bankruptcy filing—the trustee can commence an action within the latter of "(1) the end of such period, including any suspension . . . or . . . (2) two years after the order for relief." 11 U.S.C. § 108(a). Similarly, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") provides a federal statute of limitations for claims brought by the FDIC as receiver. 12 U.S.C. § 1821(d)(14).

is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.). As such, there is neither express statutory authority nor any reason to imply such authority.[91]

Without statutory authority to toll the statute of limitations, the statute of limitations continued to run until Plaintiff filed his Original Complaint on July 1, 2019. *See Nelson v. Reddy*, 898 F. Supp. 409, 413 (N.D. Tex. 1995). Accordingly, both of Plaintiff's claims must be dismissed because their limitations periods expired before Plaintiff filed this case. *See Bonner v. Henderson*, No. 05-99-01582-CV, 2001 WL 301581, at *6 (Tex. App.—Dallas Mar. 29, 2001, pet. denied) (knowing participation in breach of fiduciary duties has a four-year statute of limitations).

b. **Application of the Discovery Rule Does Not Salvage Plaintiff's Professional Negligence Claim.**

Even if the Court had the authority to toll the statutes of limitations for Plaintiff's claims, Plaintiff still brought these claims after expiration of the applicable statutes of limitation and, therefore, these claims should be dismissed. Plaintiff contends that the Receiver Entities "did not discover, and could not with the exercise of reasonable diligence have discovered until more recently, Defendants' connection to the Breitling fraudulent scheme and the true nature of the injury suffered . . ."[92] "Texas has carved out 'a very limited exception' to the legal injury rule called the 'discovery rule.'" *Smith v. Travelers Cas. Ins. Co. of Am.*, 932 F.3d 302, 311 (5th Cir.

[91] While Defendants do not dispute that federal courts have the authority to stay actions against the assets of the entity under investigation because such assets are part of the receivership estate, *SEC v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010), the purpose of such stay is "to prevent dissipation of property or assets subject to multiple claims in various locales." *SEC v. Faulkner*, No. 3:16-CV-1735-D, 2018 WL 5279321, at *2 (N.D Tex. Oct. 24, 2018).

[92] *See* Dkt. No. 45, ¶ 81.

2019) (quoting *Wagner & Brown, Ltd. v. Horwood*, 58 S.W.3d 732, 734 (Tex. 2001)).[93] "The discovery rule exception operates to defer accrual of a cause of action until the plaintiff knows or, by exercising reasonable diligence, should know of the facts giving rise to the claim." *Wagner & Brown*, 58 S.W.3d at 734. Plaintiff ultimately has the burden on summary judgment to provide evidence to support the discovery rule. *See RTC v. Bright*, 872 F. Supp. 1551, 1569 (N.D. Tex. 1995) (Fitzwater, J.); *see also FDIC v. Shrader & York*, 991 F.2d 216, 220 (5th Cir. 1993).

Plaintiff cannot meet the burden of proof required at summary judgment for application of the discovery rule. The undisputed facts show that each of the Receiver Entities knew or, at a minimum, "should have discovered through the exercise of reasonable care and diligence the facts establishing the elements of his cause of action" well in advance of August 14, 2015.[94] *Janvey ex rel. Sharp Capital, Inc. v. Thompson & Knight LLP*, No. 3:03-CV-158-M, 2003 WL 21640573, at *2 (N.D. Tex. July 8, 2003) (Lynn, J.) (quoting *Shrader & York*, 991 F.2d at 221).

First, the evidentiary record includes numerous events that provided the Receiver Entities with sufficient notice of a potential claim against Defendants:

- **January 30, 2013:** The SEC issued a Formal Order for its investigation of BOG.[95] The Formal Order stated that the SEC "has information that tends to show from at least 2011" that

[93] The Texas Supreme Court has "restricted the discovery rule to exceptional cases to avoid defeating the purposes behind the limitations statutes." *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 313 (Tex. 2006) (per curiam) (citation omitted).

[94] Tellingly, the SEC argued that Mr. Faulkner's state of mind *should* be imputed to the entities he controlled in the briefing that led to the creation of the Receivership. (*SEC v. Faulkner*, Brief in Support of Plaintiff's Motion for Preliminary Injunction, *Ex Parte* Temporary Restraining Order, Asset Freeze, Appointment of Receiver, and Other Ancillary Relief, Dkt. No. 103 at 17, 19 ("Faulkner's scienter is imputed to BOG . . . [and] is also imputed to BECC.").) The Court may take judicial notice of the existence (but not the truth) of the occurrences and positions taken in the SEC action. *Reneker*, 2012 WL 2158733, at *14 (Fitzwater, C.J.).

[95] App. at 570-73, Ex. AE.

BOG, BRC, and their "officers, directors, employees, partners, subsidiaries, and/or affiliates" had committed "possible violations of Sections 5(a), 5(c) and 17(a) of the Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder . . . ."[96]

- **September 2013**: Counsel at Vinson & Elkins LLP informed Mr. Wagers of the Cash Segregation Issue.[97]
- **November 20-21, 2013**: Rothstein Kass PA's Engagement Team informed Mr. Hoover and Mr. Wagers (who, in turn, informed Mr. Faulkner) about the Overselling Issue and the Personal Expenses Issue.[98]
- **December 5, 2013**: Mr. Nymeyer provided Mr. Hoover with a schedule of oversold assets.[99]
- **December 18 and 19, 2013**: Rothstein Kass PA's Engagement Team informed Mr. Hoover and Mr. Wagers about the Inflated AFE Issue.[100]
- **January 2014**: Rothstein Kass PA's Engagement Team continued to communicate with Mr. Hoover and Mr. Wagers regarding the Overselling Issue.[101]
- **February 2014**: The Breitling Entities' management and other executives confirmed their frustration with the Overselling Issue's impact on BOG and BRC's 2011-2012 financial statements.[102]

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[96] App. at 570-73, Ex. AE.

[97] App. at 1538, Ex. CS at 79:5-20.

[98] App. at 152-59, Ex. G.

[99] App. at 161-94, Ex. H.

[100] App. at App. at 365-69, Ex. P; App. at 371, Ex. Q.

[101] *See, e.g.*, App. at 196-204, Ex. I; App. at 1237-38, Ex. BU.

[102] App. at 359-61, Ex. O.

- **February 14, 2014**: Rothstein Kass PA issued its audit letter to BOG and BRC's management regarding the 2011-2012 Audit.[103]
- **February 19, 2014**: Mr. Nymeyer, Mr. Matlock, and Mr. Williford discussed the Key Audit Issues.[104]
- **April 14, 2014**: Rothstein Kass PA issued its audit letter to BECC's Audit Committee regarding the 2013 Audit.[105]
- **December 22, 2014**: The SEC's division of Corporate Finance sent a letter to BECC identifying several portions of BECC's financial statements that may not comply with certain SEC regulations or accounting standards, including, specifically, BECC's treatment of revenue raised and costs associated with sales of working interests and royalty interests.[106]
- **January 27, 2015**: The SEC staff informed BECC's outside counsel (Vinson & Elkins) of the claims they were prepared to recommend to the Commission against BOG, BECC, and certain officers and employees of the Breitling Entities.[107] The factual bases for these claims

[103] App. at 210-25, Ex. K.

[104] App. at 1379-80, Ex. CE at 77:14-78:4. Mr. Nymeyer also specified that he and Mr. Matlock discussed "[t]he potential cash being spent on other development projects" with Mr. Williford. App. at 1380, Ex. CE at 78:11-19; *see also* App. at 1413, Ex. CI at 576:23-577:10.

[105] App. at 227-29, Ex. L.

[106] App. at 1332-33, Ex. BZ. Mr. Wagers, Mr. Hoover, BECC's auditor (Jay Norris of MaloneBailey LLP), BECC's outside counsel (Haynes and Boone, LLP), and the Chairman of BECC's Audit Committee at the time (Trenton Thornock) knew about Corporate Finance's letter and BECC's response to that letter no later than May 4, 2015. *See* App. at 1336, Ex. CA; App. at 1339, Ex. CB.

[107] At that presentation, the Staff of the SEC informed counsel that it intended to recommend that the SEC file an enforcement action alleging: (i) BOG and Mr. Faulkner violated the anti-fraud provisions of the federal securities laws; (ii) Certain BOG employees aided and abetted BOG's and Mr. Faulkner's fraud; (iii) Certain BOG and BRC employees violated broker-dealer registration provisions; and (iv) BECC and Mr. Faulkner violated the antifraud and reporting provisions of the Securities Exchange Act of 1934. App. at 588, Ex. AG.

coincided with many of the issues that Rothstein Kass PA identified during its audits, including: (i) the Inflated AFE Issue; (ii) the Cash Segregation Issue; and (iii) the Personal Expenses Issue.[108] The Staff also stated that BECC had made "materially false statements" in its prior financial statements.[109] Vinson & Elkins discussed the SEC's presentation with Messrs. Faulkner, Wagers, Hallam and Miller.[110]

- **March through May 2015**: Accounting consultants hired by BECC identified potential fraud at BECC.[111] The accounting consultants also discussed with BECC's management BECC's potential need to re-state prior financial statements.[112] During this time, BECC considered bringing legal action against Rothstein Kass PA.[113]
- **May 11, 2015**: BECC's then current auditor (MaloneBailey LLP) raised whether BECC's prior financial statements needed to be restated.[114]
- **May 29, 2015**: Mr. Wagers, Mr. Kovacs (BECC's then CFO), Mr. Cox (another BECC executive), and BECC's outside accounting consultants discussed the financial statement issues that ultimately formed the basis for BECC's September 4, 2015 8-K disclaiming reliance on BECC's prior financial statements.[115]

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[108] *Id.* at 597-612, 613-14, 633-34.

[109] *Id.* at 610.

[110] App. at 579, Ex. AF.

[111] App. at 1185, Ex. BK; App. at 1023-24, Ex. AU; App. at 1204-05, Ex. BN.

[112] App. at 1192, 93, Ex. BL; App. at 1196, 1199, and 1201, Ex. BM; App. at 1204-05, Ex. BN.

[113] App. at 1185, Ex. BK ("Jeremy [Wagers] talks of suing people involved in the audit.").

[114] App. at 1686, Ex. DC at 106:14-108:23; *see also* App. at 1595, 1598-99, Ex. CW at 115:5-20, 116:18-117:4, 129:6-130:4.

[115] App. at 1027, Ex. AV; App. at 1687, Ex. DC at 131:14-132:2; App. at 1595-601, Ex. CW at 115:5-20, 116:18-117:4, 119:23-121:25, 123:17-124:16, 126:3-127:15, 129:6-130:4, 150:18-154:4.

- **September 4, 2015**: BECC filed a Form 8-K disclaiming reliance on prior financial statements that Rothstein Kass PA audited.[116]
- **December 1, 2015**: MaloneBailey LLP resigned as BECC's auditor.[117]
- **December 18, 2015**: The independent directors on BECC's Board resigned after conducting an investigation into BECC's financial irregularities.[118]
- **June 24, 2016**: The SEC brought an action against Mr. Faulkner, BOG, BECC, Crude Energy, Patriot, and other individuals affiliated with these companies alleging numerous violations of the Federal securities laws.[119]

Each of these events provided notice to the Receiver Entities, and their officers and directors, that the financial statements that Rothstein Kass PA audited were potentially inaccurate and/or that these entities had engaged in fraud. Alone, many of the events discussed above provided sufficient notice to the Breitling Entities to satisfy the *Janvey* standard; cumulatively, they extinguish any doubt on this matter.

Plaintiff cannot escape the imputation of the knowledge of the Receiver Entities' officers and directors to the Receiver Entities themselves. Too many officers, directors, outside counsel, and other consultants at the Receiver Entities were aware of facts giving rise to a potential claim against Defendants for Plaintiff to stave off the imputation of their knowledge to the Receiver Entities. Texas law imputes the knowledge of the Breitling Entities' officers and directors to the

[116] App. at 641-43, Ex. AH.

[117] App. at 1208, Ex. BO. At the time it resigned, MaloneBailey was not aware of any fraudulent or illegal acts committed at BECC. App. at 1215, Ex. BQ.

[118] App. at 1212, Ex. BP; *see also* App. at 1701, Ex. DD at 68:14-21, App. at 1690, Ex. DC at 181:13-19.

[119] *See SEC v. Faulkner, et al.*, No. 3:16-cv-01735-D, Dkt. No. 1.

Receiver Entities, and the Receiver Entities should have discovered facts establishing the professional negligence cause of action well before the limitations period lapsed. *See Shrader & York*, 991 F.2d at 222; *Ernst & Young*, 967 F.2d at 170 (imputing a bank officer's knowledge to the bank). Indeed, the standard set forth in *Ernst & Young* requires even Mr. Faulkner's knowledge to be imputed to BOG, BRC, and BECC.

c. Adverse Domination Doctrine Does Not Toll the Statute of Limitations.

Plaintiff contends that the statute of limitations is tolled based on the adverse domination doctrine because "the Breitling Entities were not able to bring the causes of action asserted herein until they were 'freed of [Faulkner's] coercion by the court's appointment of [the] Receiver.'" (Dkt. No. 45, ¶ 81 (citing *Janvey v. Democratic Senatorial Campaign Committee, Inc.*, 712 F.3d 185, 190).) This Receiver does not and cannot offer evidence supporting the tolling of the statute of limitations based on the adverse domination doctrine.

First, the adverse domination doctrine tolls the statute of limitations for claims *against wrongdoing officers and directors* of a corporation until they relinquish control of the institution. *See FDIC v. Howse*, 736 F. Supp. 1437, 1442 (S.D. Tex. 1990). The doctrine's primary policy rationale is that a wrongdoing corporate officer or director will seek to hide his or her wrongful conduct from the corporation. *Id.*; *see also Shrader & York*, 991 F.2d at 227. However, this "very narrow doctrine" is ***not*** to be applied to third parties, including professional advisors. *Shrader & York*, 991 F.2d at 227 (affirming district court's refusal to extend adverse domination doctrine to toll malpractice claims against outside attorneys); *Askanase v. Fatjo*, 828 F. Supp. 465, 472 (S.D. Tex. 1993) (recognizing that "adverse domination principle cannot be applied in this case to toll the running of the statute of limitations against" auditor); *Sundbeck v. Sundbeck*, No. 1:10CV23-A-D, 2011 WL 5006430, at *4 (N.D. Miss. Oct. 20, 2011) (citing Texas law and refusing to apply

adverse domination doctrine because it is limited to suits against officers or directors of the company); *Graff v. 2920 Park Grove Venture, Ltd.*, No. 05-16-01411-CV, 2018 WL 2949158, at *5 (Tex. App.—Dallas June 13, 2018, review denied (May 31, 2019)) (mem. Op.) (recognizing that adverse domination doctrine only applies "to toll limitations while wrongdoer defendants dominated the plaintiff corporation"). Because Rothstein Kass PA never "dominated" the Breitling Entities, the doctrine is inapplicable as a matter of law.

Second, even if it could be applied against unrelated third parties, the adverse domination theory requires proof of culpable conduct on behalf of a "majority" of the corporation's board of directors. *See Dawson*, 4 F.3d at 1309-10; *Bright*, 872 F. Supp. at 1561(quotation marks omitted) (applying doctrine only to majority of the board members for conduct that amounts to more than "mere negligence"). Thus, Plaintiff must prove that a majority of the Breitling Entities' directors was culpable participants in the wrongdoing. *Dawson,* 4 F.3d at 1311. The doctrine is not satisfied "based on the mere negligence of a majority of a corporation's directors." *Id.* Instead, Plaintiff must show that a majority of the directors "were guilty of at least gross negligence or breach of fiduciary duty." *FDIC v. Henderson*, 849 F. Supp. 495, 499 (E.D. Tex. 1994), *aff'd*, 61 F.3d 421, (5th Cir. 1995). Plaintiff comes nowhere close to providing evidence satisfying this requirement.

Even Plaintiff admits the majority of BECC's Board of Directors was not only independent, but capable of stopping Mr. Faulkner from using BECC, Crude Energy, Crude Royalties, and Patriot "to commit fraud, violate the securities laws, or to loot those companies."[120] The independent directors testified that BECC's bylaws and committee charters granted the Board control over BECC, including authority to:

[120] App. at 1669-70, Ex. DB at 125:14-127:16; *see also* App. at 1683, Ex. DC at 52:24-53:11; App. at 1696, Ex. DD at 18:7-18; App. at 1549, Ex. CS 227:10-229:3; App. at 1611-12, Ex. CX at 144:9-145:12, 146:17-147:11.

- Hire independent outside counsel to conduct internal investigations;
- Oversee audits of BECC's financial statements;
- Hire consultants and advisors;
- Hire and fire BECC's management; and
- Call meetings of committees to meet in executive session. [121]

These independent directors further testified that Mr. Faulkner never impeded the Board of Directors or its committees from exercising these powers.[122] Combined with the undisputed evidence that Mr. Faulkner was never a majority shareholder of BECC, Mr. Faulkner certainly did not dominate the Receiver Entities.

2. **Brian Matlock and Rothstein Kass & Company, PLLC Lack the Necessary Privity to be Liable for Professional Negligence (Count I).**

A professional negligence claim requires privity of contract. *SEC v. Faulkner*, No. 3:16-CV-1735-D, 2019 WL 1040679, at *4 (N.D. Tex. Mar. 5, 2019) (Fitzwater, J.).[123] The only evidence of privity of contract between the parties are the engagement letters signed between

[121] App. at 1679-82, 1688-89 Ex. DC at 31:9-32:25, 40:10-41:22, 45:13-19, 46:10-13, 145:15-147:8; *see also* App. at 1697, Ex. DD at 26:16-27:2, 27:14-21; App. at 955, Ex. AQ (Request for Admission No. 136).

[122] App. at 1679-, 1681, 1684-85, 1689, Ex. DC at 32:10-14, 44:14-20, 64:14-20, 94:5-15, 147:15-148:17; App. at 1697-1700, Ex. DD at 27:22-28:3, 31:3-25, 33:23-34:5, 39:15-21, 39:22-40:7, 41:10-14.

[123] *See also Ervin v. Mann Frankfort Stein & Lipp CPAs, L.L.P.*, 234 S.W.3d 172, 182 (Tex. App.—San Antonio 2007, no pet) ("A professional negligence claim requires privity of contract.") (citation omitted); *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 792 (Tex. 1999); *W. Hous. Airport, Inc. v. Millennium Ins. Agency, Inc.*, 349 S.W.3d 748, 752 (Tex. App.—Houston [14th Dist.] 2011, pet denied) ("[O]ne who has sustained damages because of professional negligence may not proceed against the professional unless there is privity of contract. Privity for purposes of professional negligence is the contractual connection or relationship existing between two or more parties.") (internal citations omitted); *SC & E Admin. Servs., Inc. v. Deloitte*, No. A-05-CA-929-SS, 2006 WL 6747974, at *7 (W.D. Tex. July 25, 2006) ("Because the professional's legal duty arises out of the contract for professional services, [], it runs only to those who are in privity with the professional.").

Rothstein Kass PA, on the one hand, and BOG and BRC (2011-2012 Audit) and BECC (2013 Audit), on the other hand. *Faulkner*, 2019 WL 1040679, at *4; *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996). On April 24, 2013, the Breitling Energy Companies, comprised of BOG and BRC, signed an engagement letter with Rothstein Kass PA to conduct an audit of the financial statements for 2011 and 2012.[124] On December 17, 2013, BECC signed an engagement letter for Rothstein Kass PA to conduct an audit of the financial statements for 2013 and the balance sheet for March 31, 2014.[125] Mr. Matlock was not a party to the engagement letters and, therefore, is not in privity with BOG, BRC or BECC. *See Ervin*, 234 S.W.3d at 182; *Brooks v. United Dev. Funding III, L.P.*, No. 4:20-CV-00150-O, 2020 WL 6132230, at *29 (N.D. Tex. Apr. 15, 2020) (dismissing professional negligence claim against auditor with prejudice for failure to allege privity).[126]

Likewise, there is no privity of contract between Rothstein Kass & Company, PLLC and the Receiver Entities. As Plaintiff concedes, Rothstein Kass & Company, PLLC dissolved on December 11, 2012, prior to any engagement with the Breitling Entities. (Dkt. No. 45, ¶¶ 9, 82 ("the Receiver only recently discovered that Rothstein PA is the real party in interest and the party responsible for the audits in dispute").) Therefore, summary judgment on the professional negligence claims should be granted in favor of Mr. Matlock and Rothstein Kass & Company, PLLC. *See SC & E Admin. Servs., Inc.*, 2006 WL 6747974, at *11 (dismissing professional negligence claims because it was not "adequately alleged they were clients of, or otherwise in privity with, KPMG, the Court holds KPMG owed them.").

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[124] App. at 30-36, Ex. A.

[125] App. at 38-44, Ex. B.

[126] By signing the engagement letter on behalf of Rothstein Kass PA, Mr. Matlock did not become a party to the agreements. *See Roe v. Ladymon*, 318 S.W.3d 502, 521 (Tex. App.—Dallas 2010, no pet.).

3. Plaintiff Cannot Assert Professional Negligence (Count I) on Behalf of Receiver Entities that Lack Privity with Rothstein Kass PA.

Lack of privity also defeats any professional negligence claim (or damages related thereto) for Crude Energy, Crude Royalties, and Patriot. Neither Crude Energy, Crude Royalties, nor Patriot had entered into an engagement with Rothstein Kass PA. Crude did not exist until just before the audits were completed, and Patriot did not exist until a year after they were completed. Thus, Plaintiff's professional negligence claim must be dismissed to the extent it is brought on behalf of these entities.

4. Plaintiff's Claim for Professional Negligence (Count I) is Not Supported by Evidence that Defendants Were Negligent.

Plaintiff's expert, Saul Solomon, opined on the "duty" Rothstein Kass PA supposedly failed to meet. Specifically, Mr. Solomon's core contention is that Rothstein Kass PA ultimately had a duty to inform the member of management charged with corporate governance, the Board of Directors, *or* the SEC of the Key Audit Issues.[127] Informing the Breitling Entities' management, the Audit Committee, or the SEC, according to Mr. Solomon, would have satisfied Rothstein Kass PA's professional duties and purportedly prevented alleged damages incurred by the Receiver Entities after December 2013.[128] Mr. Solomon's contention is based on several false assumptions belied by the actual evidence.

Mr. Solomon admits that Rothstein Kass PA's initial duty was to notify the Breitling Entities' management at the company "with the proper level of governance."[129] Accepting this definition of "duty" for the purposes of this Motion, Rothstein Kass PA plainly satisfied it.

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[127] App. at 650, Ex. AJ ¶¶ 4-6; App. at 1629-32, 1635, Ex. CZ at 120:24-122:17, 132:11-15, 145:7-16, 208:2-6, 245:13-24.

[128] *See* App. at 1637, Ex. CZ at 248:15-249:2.

[129] App. at 1635, Ex. CZ 208:2-6.

Plaintiff does not dispute that, at a minimum, Rothstein Kass PA informed Mr. Hoover and Mr. Wagers (the officer charged with corporate governance) of each of the Key Audit Issues as soon as they arose in the audit.[130] And, combined with Rothstein Kass PA's formal audit letter to BECC's Audit Committee, Mr. Nymeyer's testimony proves that Rothstein Kass PA told Mr. Williford of each of the Key Audit Issues.[131]

5. **Plaintiff's Claim for Professional Negligence (Count I) Is Not Supported by Evidence of Proximate Causation.**

This Court has already noted "[u]nder Texas law, a cause of action based upon negligence requires proof of . . . proximate[ ] caus[e]." (See Dkt. No. 34 at 8 (quoting *Ernst & Young*, 967 F.2d at 170).) "Proximate cause includes two essential elements: (1) foreseeability, and (2) cause in fact . . . . Cause in fact means that the act or omission was a substantial factor in bringing about the injury and without which no harm would have occurred." *Id.* "For there to be cause in fact, the act or omission must be a substantial factor in bringing about the injury such that without it no harm would have occurred." *Miller Glob. Props., LLC v. Marriott Int'l, Inc.*, 418 S.W.3d 342, 351 (Tex. App.—Dallas, 2013, pet. denied) (citing *Ernst & Young*, 967 F.2d at 170); *see also NexBank, SSB v. Winstead PC*, No. 05-18-01345-CV, 2020 WL1921683, at *3 (Tex. App.—Dallas, Apr. 21, 2020, no pet.). Although "[t]he Texas Supreme Court has not expressly held that injury caused by reliance is a necessary element of negligence," where a plaintiff alleges professional negligence by auditors, "a claim that reliance is not a component of causation strains credulity." *Ernst & Young,* 967 F.2d at 170. This is because if "nobody relied upon the audit, then the audit could not have been a 'substantial factor in bringing about the injury.'" *Id.* Plaintiff's

[130] *See* Section IV.B, *supra*; *see also* App. at 1657-68, Ex. CU at 33:24-345:3; App. at 1403, 1405, Ex. CH at 94:21-95:2, 338:7-13.

[131] *See* Section IV.B, *supra*.

professional negligence claim survived the Motion to Dismiss because Plaintiff alleged "that the Breitling Entities relied on the audit opinion, and that, without it, the Breitling Entities would not have continued or incurred the stated damages . . . ." (Dkt. No. 34 at 8 at 11). But, Plaintiff's claim cannot survive this Motion for Summary Judgment because there are no facts to support this allegation.[132]

First, there is no evidence that Rothstein Kass PA's provision of audit opinions had any causal relationship to BOG, BRC, Crude Energy, Crude Royalties, and Patriot's private offerings of working interests and royalty interests, which are the source of Plaintiff's claimed damages. BOG and BRC raised all of their funds prior to any of Rothstein Kass PA's audit opinions, and BECC did not conduct any offerings. Obviously, these audit opinions could not have been the "cause in fact" for damages incurred prior to their issuance. For the time after Rothstein Kass PA issued the audit opinions, nothing in the record suggests that Crude Energy or Crude Royalties (which just came into existence after the Reverse Merger) and Patriot (which came into existence over a year later) would not have performed any offerings without the 2011-2012 Audit and the 2013 Audit. Indeed, there is no evidence that any purchasers of oil and gas interests offered and sold by Crude and Patriot relied on Rothstein Kass PA's audit opinions, or would not have purchased these interests if Rothstein Kass PA had not issued the audit opinions.

Second, the facts in this case provide a real-world test case for Plaintiff's causation theory. On September 4, 2015, BECC filed an 8-K disclaiming reliance on its prior financial statements. This filing publicly highlighted that Rothstein Kass PA's prior audit opinions could be in error.

[132] Furthermore, BOG, BRC, and BECC's management, and BECC's Board of Directors' knowledge of the Key Audit Issues is imputable to the Breitling Entities, which precludes any cognizable claim that the Breitling Entities relied on the audit. *See Ernst & Young*, 967 F.2d at 170-72.

Nevertheless, Patriot continued to raise millions of dollars in private offerings between September 4, 2015 and June 2016. Patriot's ability to continue raising funds despite a public statement that Rothstein Kass PA's audit opinions could not be relied upon proves that even without the audit opinions, the Receiver Entities continued to incur purported damages through sales of private offerings.[133] Plaintiff's claim for professional negligence therefore fails because there is no evidence that Rothstein Kass PA was the cause in fact of Plaintiff's purported damages. *See Akin, Gump, Strauss, Hauer & Feld, LLP v. Nat'l Dev. & Res. Corp.*, 299 S.W.3d 106, 123 (Tex. 2009) (in malpractice claim related to fees incurred in appellate proceedings following attorney's negligence at trial, evidence for cause in fact "legally insufficient" where there was no evidence that the opposing party would not have appealed if the attorney had not committed negligence).

In addition to Mr. Solomon's recitation of the relevant duty discussed above, he also suggested that Rothstein Kass PA should have withdrawn from the audits by November or December 2013 instead of issuing any audit opinion.[134] Assuming *arguendo* that this duty applied to Rothstein Kass PA, there is no support in the record for Rothstein Kass PA's failure to withdraw being the cause in fact of Plaintiff's purported damages. Even if Rothstein Kass had resigned at that time, Rothstein Kass's resignation—let alone the reason for the resignation—would not have been publicly disclosed.[135] Furthermore, Plaintiff has conceded that Rothstein Kass PA's

[133] App. At 1638, Ex. CZ at 258:21-260:24.

[134] *See* App. At 1638, Ex. CZ at 132:3-15.

[135] To be sure, SEC regulations require *public* companies to disclose the resignation of their independent auditor on a Form 8-K. *See* 17 C.F.R. § 229.304. But, at the time Mr. Solomon contends that Rothstein Kass should have resigned (*i.e.*, by December 2013), Rothstein Kass was auditing the financial statements of two *private* companies—BOG and BRC. BECC did not disclose that it engaged Rothstein Kass as its independent auditor until February 17, 2014. App. At 1655, Ex. DA at 119:9-120:9. Mr. Solomon does not disagree. *See* App. At 1633, Ex. CZ at 148:15-149:9.

withdrawal would have resulted in no more than the deregistration of BECC's stock at some future time.[136] There is no evidence, however, that such deregistration would have impacted Crude Energy's, Crude Royalties's or Patriot's ability to conduct private offerings of working and royalty interests.

B. Defendants Should Be Granted Summary Judgment With Respect to Plaintiff's Claim for Participation in Breach of Fiduciary Duty (Count II).

A cause of action for participation in a breach of fiduciary duty requires proof that: (i) there was an underlying breach of fiduciary duty; (ii) the defendant knew of the fiduciary relationship; (iii) the defendant was aware of his or her participation in the third party's breach of its duty; and (iv) the third party's breach of fiduciary duty proximately caused the plaintiff's damages. *See D'Onofrio v. Vacation Publ'ns, Inc.*, 888 F.3d 197, 216 (5th Cir. 2018); *CBIF Ltd. P'ship v. TGI Friday's, Inc.*, No. 05-15-00157-CV, 2017 WL 1455407, at *16 (Tex. App.—Dallas Apr. 21, 2017, pet. denied); *Darocy v. Abildtrup*, 345 S.W.3d 129, 138 (Tex. App.—Dallas 2011, no pet.); *Hunter Bldgs. & Mfg., L.P. v. MBI Glob., L.L.C.*, 436 S.W.3d 9, 15 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

Knowledge requires proof that Defendants "had an ***actual awareness***," at the time of Mr. Faulkner's conduct, that Mr. Faulkner owed a fiduciary duty and that he was breaching that duty. *See Franklin D. Azar & Assocs., P.C. v. Bryant*, No. 4:17-CV 00418-ALMKPJ, 2019 WL 5390172, at *4 (E.D. Tex. July 30), *report and recommendation adopted*, 2019 WL 4071782 (E.D. Tex. Aug. 29, 2019) (emphasis added) (*citing Seven Seas Petroleum, Inc. v. CIBC World Mkts. Corp*., No. H–08–3048, 2013 WL 3803966, at *14 (S.D. Tex. July 19, 2013)).

[136] App. at 1667-68, Ex. DB at 116:19-120:7.

Moreover, Plaintiff must prove that Defendants engaged in activity that was more than mere negligence. If he does not, then Plaintiff's claims are merely fractured professional negligence claims, which is impermissible under Texas's anti-fracturing rules.[137] *See Deutsch v. Hoover, Bax & Slovacek, L.L.P.*, 97 S.W.3d 179, 189 (Tex. App.—Houston [14th Dist.] 2002) (if the "gist" of a complaint is that an attorney did not exercise the degree or care and skill ordinarily possessed, then the claim should be pursued as negligence, rather than a different claim); *J.A. Green Dev. Corp. v. Grant Thornton, LLP*, No. 05-15-00029-CV, 2016 WL 3547964, *8 (Tex. App.— Dallas June 28, 2016, pet. denied) (mem. Op.) (applying anti-fracturing rule to claims against accountants).

Thus, to the extent that Plaintiff's participation in a breach of fiduciary claim is premised on allegations that Defendants failed to recognize this "fraudulent scheme;" should have done more to investigate the Key Audit Issues; should not have relied on BOG, BRC, and BECC's management's representations regarding the Key Audit Issues; should have discovered that the Breitling Entities were engaged in an offering fraud; or simply should have approached the Key Audit issues differently, such allegations are insufficient as a matter of law because they collapse his professional negligence and participation claims into a single claim thereby violating Texas's anti-fracturing rule. *See Taylor*, 2020 WL 554583, at *7; *Deutsch*, 97 S.W.3d at 189.

Plaintiff therefore must offer evidence that Defendants ***knowingly*** and ***intentionally*** aided Mr. Faulkner in what the Defendants ***knew*** was a breach of Mr. Faulkner's own fiduciary duty. *See Azar & Assocs.,* 2019 WL 5390172, at *4; *JSC Neftegas–Impex v. Citibank, N.A.*, 365 S.W.3d

[137] This is consistent with the Court's holding in *Taylor*, 2020 WL 554583, at *7, which held that Plaintiff's claim for participation in a breach of fiduciary duty survived the anti-fracturing rule because Plaintiff's "allegations that Rothstein Kass PA issued an unqualified opinion ***despite knowledge of its falsity*** exceed what is typically characterized as negligence . . . ." *Id.* (emphasis added).

387, 411 (Tex. App.—Houston [1st Dist.] 2011, pet. denied). On the facts of this case, Plaintiff cannot meet his evidentiary burden on summary judgment.[138]

1. There Is No Evidence that Mr. Faulkner Owed a Fiduciary Duty to Crude Energy, Crude Royalties, or Patriot

As a preliminary matter, Plaintiff has not offered any evidence of a fiduciary duty owed by Mr. Faulkner to Crude Energy, Crude Royalties, or Patriot. "Under Texas law, fiduciary duties arise as a matter of law in certain formal relationships," including for corporate officers to the entities they serve. *Duke Energy Int'l, L.L.C. v. Napoli,* 748 F.Supp.2d 656, 667 (S.D. Tex. 2010). "Where the underlying facts are undisputed, determination of the existence, and breach, of fiduciary duties are questions of law, exclusively within the province of the court." *Meyer v. Cathey,* 167 S.W.3d 327, 330 (Tex. 2005) (citations omitted). It is undisputed that Faulkner was not an officer or director (or member or manager) of Crude Energy, Crude Royalties, or Patriot.[139] Therefore, there is no evidence that Mr. Faulkner owed these entities formal fiduciary duties.

Likewise, Plaintiff cannot provide any evidence that Mr. Faulkner had the "moral, social, domestic, or purely personal relationship of trust and confidence" that would create an informal fiduciary duty to these entities. *Meyer,* 167 S.W.3d at 331 (citations omitted). Informal fiduciary duties are not created "lightly" and mere subjective trust will not transform arms-length dealing into a fiduciary relationship. *Id; Plotkin v. Joekel*, 304 S.W.3d 455, 479 (Tex. App.— Houston

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[138] Rothstein Kass & Company, PLLC should also be granted summary judgment on Count II because, as the Receiver concedes, "Rothstein PA is the real party in interest and the party responsible for the audits in dispute," and not Rothstein Kass & Company, PLLC. (Dkt. No. 45, ¶ 82.) Rothstein Kass & Company, PLLC had dissolved before the Breitling Entities engaged Rothstein Kass PA. *See* App. at 645-47, Ex. AI.

[139] *See* App. at 1063, 1071-74, 1079, 1101-02, Ex. AZ; App. at 1106, 1110, 1112, 1132-33, Ex. BA; App. at 1221-23, Ex. BS; App. at 1218-19, Ex. BR (Mr. Faulkner not included among Patriot's personnel). Indeed, the SEC pleaded in its First Amended Complaint in *SEC v. Faulkner* that "Miller is Patriot's President and its ***sole*** Director." *SEC v. Faulkner, et al.*, No. 3:16-cv-01735-D, Dkt. No. 22, ¶¶ 34 (emphasis added).

[1st Dist.] 2009, pet. denied) (citations omitted). Mr. Faulkner did not have a relationship of "trust and confidence" with Crude Energy, Crude Royalties, or Patriot that existed "prior to, and separate from" any agreements with these entities. *See HT Res., Inc. v. Ralston*, No. 1:17-CV-350-LY, 2017 WL 7921242, at *6 (W.D. Tex. Dec. 7, 2017) (granting motion to dismiss claim for breach of informal fiduciary duty where the plaintiffs "alleged no facts that a special relationship of trust and confidence existed prior to and independent of their business agreements that would demonstrate an informal fiduciary relationship"). At most, Plaintiff contends somehow that Mr. Faulkner "controlled" Crude Energy, Crude Royalties, and Patriot. Standing alone, however, conclusory statements about control of an entity are insufficient to establish a fiduciary duty. *See Melanson v. Navistar, Inc.*, No.3:13-CV-2018-D, 2014 WL 4375715, at *11 (N.D. Tex. Sept. 4, 2014) (J. Fitzwater) (vague assertions regarding control insufficient to create triable question of fact regarding whether employer owed employee an informal fiduciary duty). Without any fiduciary duty owed by Mr. Faulkner, Plaintiff cannot prove that Mr. Faulkner breached any duties to these entities.

2. **There Is No Evidence that Defendants Knew About Mr. Faulkner's Alleged Breaches of Fiduciary Duty**

Plaintiff cannot produce any evidence showing that Defendants had *actual knowledge* that Mr. Faulkner was breaching any fiduciary duties owed to the Receiver Entities. *Azar & Assocs.,* 2019 WL 5390172, at *4. First, as a practical matter, it is impossible for Defendants to have learned of Mr. Faulkner breaching any fiduciary duties to Crude Energy, Crude Royalties, and Patriot at the time of the audits, even if Mr. Faulkner did owe fiduciary duties to these entities (which he did not). As discussed above Crude Energy and Crude Royalties did not exist until December 2013, Patriot did not exist until March 2015, and not one of Crude Energy, Crude Royalties, or Patriot had active business operations at the time of the audits. Defendants could not

have known about these entities' future business operations, Mr. Faulkner's involvement in these operations, whether Mr. Faulkner had any fiduciary duty to these entities, or that these entities would engage in fraud. *See Cox Tex. Newspapers, L.P. v. Wootten*, 59 S.W.3d 717, 722 (Tex. App.—Austin 2001, pet. denied) (Defendants did not knowingly participate in a breach of fiduciary duty because they did not know about the duty).

Second, there is no evidence that Defendants knew that Mr. Faulkner was breaching any fiduciary duties owed to BOG, BRC, and BECC. From a preliminary standpoint, Defendants never knew there was an alleged "fraudulent scheme" occurring at the Breitling Entities and believed that the audit issues were being caused by a variety of factors at the entities, not by the fraudulent actions of any particular individual, *e.g.* Mr. Faulkner.[140] Plaintiff can offer no evidence to show that Defendants had ***actual knowledge*** that *Mr. Faulkner* was engaged in fraud or was breaching his fiduciary duties to the entities, as opposed to Defendants identifying various issues occurring at the entities. Although Defendants identified the Key Audit Issues that Plaintiff now contends constituted parts of this alleged "fraudulent scheme," the undisputed evidence in this case shows that the Engagement Team investigated the Key Audit Issues; communicated them to members of management and the Board of Directors; and memorialized them in their workpapers.[141] Defendants furthermore relied on BOG, BRC, and BECC's management's knowledge and explanations of these issues to complete the 2011-2012 Audit and 2013 Audit.[142] For example, Mr. Wagers and Mr. Hoover explained to Defendants that the CIMs permitted the Breitling Entities to transfer oversold investors to different wells and that all oversold purchasers had been properly

[140] *See, e.g.*, App. at 1366-69, Ex. CD 134:18-137:16.

[141] *See* Section IV, *supra*.

[142] *See* Section IV.B, *supra*; *see also* App. at 1656-57, Ex. DA at 184:13-185:17 and 187:5-189:25.

transferred.[143] Defendants cannot be held to have had ***actual knowledge*** of Mr. Faulkner's purported breach of fiduciary duty when none of the officers or directors (or their outside professionals) at BOG, BRC, and BECC took any action against Mr. Faulkner for his purported breach or even told Defendants that this conduct constituted a breach of fiduciary duty. *See Sw. Sec., Inc. v. Sungard Data Sys. Inc.*, No. 05-98-01216-CV, 2000 WL 1196338, at * 6 (Tex. App.—Dallas Aug. 23, 2000, no pet.) (noting there was no knowledge of fiduciary's breach because appellees believed the appellant had consented to the fiduciary's actions).

One draft workpaper prepared primarily by Mr. Nymeyer (called a "Summary Review Memorandum") did include a statement that BOG and BRC's "utiliz[ation of] the cash received for a prospect as [it sees] fit" prior to completion of that prospect "indicat[es] a lack of fiduciary duty *to the investors* in the well."[144] Mr. Nymeyer's concern was BOG and BRC's representations to investors, nor Mr. Faulkner's conduct toward these entities, and thus does not evidence an awareness by Rothstein Kass of any breach by Mr. Faulkner of fiduciary duties he owed to BOG, BRC, or BECC. Mr. Nymeyer was not an attorney and therefore lacked the knowledge necessary to make a legal determination regarding fiduciary duties that apply for the purposes of this claim. In fact, legally, there is no reason to believe (or evidence to suggest) that the fiduciary duty Mr. Nymeyer referenced exists at all.[145] *See AMX Corp. v. Pilote Films*, No. 3:04-CV-2035-D, 2007 WL 1695120, at *19 (N.D. Tex. June 5, 2007) ("An arm's-length business transaction will not alone support a finding that a fiduciary relationship exists . . . .").

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[143] *See* Section IV.B.1, *supra*.

[144] App. at 1231, Ex. BT (emphasis added).

[145] These individual purchasers did not own any interest in BOG or BRC, so Mr. Faulkner could not owe them any fiduciary duties as shareholders. *See* App. at 1365, Ex. CD at 73:10-25.

Because Plaintiff cannot offer any evidence that Defendants had actual knowledge of Mr. Faulkner's purported breaches of fiduciary duty, his claim fails. *See JSC Neftegas–Impex*, 365 S.W.3d at 411; *Azar & Assocs.,* 2019 WL 5390172, at *4.

3. **There Is No Evidence Defendants Knowingly Aided Mr. Faulkner's Alleged Breaches of Fiduciary Duty**

Plaintiff cannot offer any evidence that establishes that Defendants ***knowingly*** and ***intentionally*** aided in any purported breach of Mr. Faulkner's duties to BOG, BRC, or BECC.[146] To the extent any of the Key Audit Issues Rothstein Kass PA identified were a part of Mr. Faulkner's alleged "fraudulent scheme" (and thus the breach of fiduciary duty alleged by Plaintiff), Defendants actively hindered these breaches, in at least the following ways:

- Defendants' investigation of the Key Audit Issues delayed the completion of the audit.[147]
- Defendants also publicized the conduct that Plaintiff now contends constituted a breach of Mr. Faulkner's fiduciary duty in communications with members of management and the Board.[148]
- Defendants contacted BOG, BRC, and BECC's known outside counsel to determine whether any purchasers of working interests or royalty interests (or regulatory agencies) had asserted legal claims against BOG, BRC, or BECC.[149] As a result of these inquires,

[146] As noted previously, Defendants did not audit Crude Royalties, Crude Energy, or Patriot, and therefore could not have participated in (or known of) any of Mr. Faulkner's alleged breaches of fiduciary duties to these companies.

[147] *See* App. at 152-59, Ex. G; App. at 1487, Ex. CO at 295:22-24.

[148] *See* Section IV.B, *supra*.

[149] See App. at 373-75, Ex. R; App. at 377-80, Ex. S.

Defendants required BOG, BRC, and BECC to book a contingent liability on their financial statements.[150]

- Defendants also required BOG, BRC, and BECC's financial statements to show "big net losses," enraging Mr. Faulkner and leading him to say the financial statements "look [] like shit" and that an average investor would "say WTF" upon reviewing the financial statements.[151]
- Defendants insisted that BECC adopt a new expense policy that would allow management to better control the entity's expenses. Thereafter, BECC's board of directors reviewed expenses every quarter.[152]

In short, Defendants ensured that the other individuals with key management and oversight roles at BOG, BRC, and BECC—the entities to which Mr. Faulkner purportedly owed fiduciary duties—knew about these issues.[153] *See Azar & Assocs.*, 2019 WL 5390172, at *4 (Plaintiff must prove Defendants intentionally aided what they knew was a breach of fiduciary duty); *Kastner v. Jenkens & Gilchrist, P.C.*, 231 S.W.3d 571, 580 (Tex. App.—Dallas 2007, no pet.) (affirming summary judgment in favor of defendant on knowing participation claim because there was no "evidence to raise a fact question as to whether [defendant] knowingly participated in the breach"); *Cox*, 59 S.W.3d at 722 (same).

[150] App. at 221, Ex. K; App. at 347, Ex. N; App. at 318, Ex. M.

[151] App. at 359-61, Ex. O.

[152] App. at 1408, Ex. CH at 473:15-474:9; App. at 1418-19, Ex. CI at 615:6-616:11; App. at 1460-63, Ex. CL at 110:8-111:11, 121:16-122:20.

[153] *See* Dkt. No. 45. ¶ 87.

As a result of Defendants' conduct during the audit, their relationship with Mr. Faulkner and others in BOG, BRC, and BECC's management was hardly cordial.[154] Indeed, as the SEC alleged, these individuals were actively dishonest in response to Defendants' inquiries.[155] It bends reason to hold that Defendants knowingly assisted in Mr. Faulkner's breach of fiduciary duty when others' misconduct impeded Defendants' ability to diagnose these purported breaches. *C.f. In re Schlotzsky's, Inc.*, 351 B.R. 430, 439 (Bankr. W.D. Tex. 2006) ("It makes no[] sense to say that Grant Thornton knowingly participated in the officers' failure to supervise Grant Thornton—especially if that 'knowing participation' consisted solely of not performing the audit properly due to an alleged lack of supervision.").

Instead, Plaintiff must ground his participation claim on Rothstein Kass PA's provision of audit opinions for BOG and BRC's 2011-2012 Financial Statements, and BECC's 2013 Financial Statements.[156] As an initial matter, Plaintiff contends that Rothstein Kass PA's issuance of the audit opinions was negligent. Defendants disagree. But for the Plaintiff to go one step further and allege Defendants issued those opinions knowingly to participate in a fraudulent scheme strains credulity and is unsupported by the evidence.

In any event, the audit opinions are ill-suited for Plaintiff's intended purpose. Defendants' audits were retrospective; Defendants did not opine on issues currently unfolding at the Breitling

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[154] *See, e.g.*, App. at 1240-45, Ex. BV; App. at 359-61, Ex. O.

[155] *Compare* App. at 373-75; Ex. R, App. at 377-80; Ex. S, and App. at 517, Ex. Y *with* App. at 1508, Ex. CQ at 162:23-165:14 and App. at 1569-70, Ex. CU at 117:13-120:22. Indeed, the SEC asserted that Mr. Faulkner lied to Defendants during the course of the audit to obtain a clean audit opinion. *SEC v. Faulkner, et al.*, No. 3:16-cv-01735-D, Dkt. No. 22, ¶¶ 178-81; App. at 1576, Ex. CV at 324:12-22.

[156] *See* App. at 892, Ex. AM (Supplemental Response to Interrogatory No. 10) ("Defendants participated in Faulkner's breaches of duty . . . by issuing the two 'clean' audit opinions at issue in this case.").

Entities, but rather issues that had already occurred during the 2011, 2012, and 2013 fiscal years. For example, to the extent Plaintiff claims that Mr. Faulkner breached his fiduciary duty in part by misappropriating funds through his expenses, these funds had already been "misappropriated" for years by the time Defendants issued their audit opinion.[157] Similarly, to the extent Plaintiff contends Mr. Faulkner breached his fiduciary duty by engaging in fraudulent offerings, any breaches stemming from BOG or BRC's offerings—whether from inflated AFEs, overselling, or cash segregation—had already occurred by the time of Defendants' audits because the offerings had already been completed. Defendants cannot have "knowingly participated" in alleged breaches that had already occurred years prior. *See First United Pentecostal Church of Beaumont v.* Parker, 514 S.W.3d 214, 225 (Tex. 2017) (noting that aiding and abetting breach of fiduciary duty claim would fail because defendant did not learn about theft until "after the money was gone" and that covering the theft "cannot be the basis for a claim" when there was no evidence that defendant was aware of party's actions "until after they had taken place")[158]; *Salomon v. Kroenk Sports & Entm't, LLC,* No. 3:15-cv-0666-M, 2019 WL 10631256, at *13 (N.D. Tex. Feb. 27, 2019) (no evidence that party participated in breach of fiduciary duty because they did not know about the relevant document creating the breach "at the time it was signed.").

With respect to Crude Energy, Crude Royalties, and Patriot, Defendants cannot have participated in any breach of fiduciary duty owed to these entities for the same reasons they could

[157] App. at 1496, Ex. CP at 225:08-23.

[158] Although *First United* addresses an aiding-and-abetting claim, subsequent courts have analyzed the reasoning of this case in the context of a knowing participation claim. *See Sam Rayburn Mun. Power Agency v. Gillis*, No. 09-16-00339-CV, 2018 WL 3580159, at *10 (Tex. App.--Beaumont July 26, 2018, pet. denied) ("[T]he church alleged . . . that Parker *knowingly participated in Lamb's breach of fiduciary duty* . . . .") (emphasis added); *see also First United*, 514 S.W.3d at 218 (describing Plaintiff's allegations that "Parker *knowingly participated* in Lamb's breach of fiduciary duty") (emphasis added).

not have known of any breaches related to these entities: Rothstein Kass PA did not audit any of these entities' financial statements and they did not have active business operations during the time of Rothstein Kass PA's audits.

C. Plaintiff Has No Standing to Pursue Certain Damages For Either the Professional Negligence Claim (Count I) or Participation of Breach of Fiduciary Duty (Count II)

A court may grant summary judgment on specific issues in order to narrow the issues presented at trial. *Gatt Trading, Inc. v. Sears, Roebuck & Co.*, No. CIV.A.3:02-CV-1573-B, 2004 WL 2511894, at *5 n. 12 (N.D. Tex. Nov. 8, 2004) (citing *Welsh v. Rockmaster Equip. Mfg., Inc.*, 47 F. Supp. 2d 818, 820 (E.D. Tex. 1999)); *Sebastian Int'l, Inc. v. Russolillo*, 151 F. Supp. 2d 1215, 1217 (C.D. Cal. 2001); *In re Seaspan Int'l Ltd.*, 172 F.Supp.2d 1314, 1320 (W.D. Wash. 2001); *see also Durham v. Allstate Vehicle & Prop. Ins. Co.*, No. H-17-1752, 2019 WL 2907263, at *2 (S.D. Tex. Jan. 4, 2019) ("[a]s a dispositive motion, a motion for summary judgment may narrow the issues for trial or resolve the entire case, thereby enhancing judicial efficiency").

Here, Plaintiff seeks damages in part based on the increased liabilities that were sustained by the Receiver Entities (the "Increased Liabilities Damages").[159] But Plaintiff must prove that Defendants' conduct was the proximate cause of those damages. *Reneker v. Offill*, No. 3:08-CV1394-D, 2012 WL 2158733, at *10 (N.D. Tex. June 14, 2012). Since "'[i]t is a well-known legal principle that a receiver can bring only those claims belonging to the entit[ies] it represents and cannot bring claims on behalf of third parties,' such as investors," *id.* at *5 (quoting *Scholes v. Stone, McGuire & Benjamin*, 821 F. Supp. 533, 535 (N.D. Ill. 1993)), "such claims must involve damages which actually belong to the entities, rather than to the investors." *Scholes*, 821 F. Supp. at 536; *see also Reneker v. Offill*, No. 3:08-CV-1394-D, 2009 WL 804134, at *6 (N.D. Tex. Mar.

[159] App. at 704-06, Ex. AJ ¶¶ 104-06.

26, 2009) ("The Receivership Estate's financial inability to satisfy liabilities owed to investors as a result of securities-laws violations harms the investors, not the AmeriFirst Clients."). Put simply, Plaintiff seeks damages for claims that do not belong to the Receiver Entities.

Although Plaintiff has filed claims "to recover damages sustained by the" Receiver Entities, Dkt. No. 45, ¶ 1, Plaintiff's claims improperly seek damages on behalf of the ***investors*** in working interests or royalty interests offered by certain Receiver Entities. This Court faced an identical issue in *Reneker v. Offill*. In *Reneker*, as is the case here, the receiver sought damages for a professional negligence claim based on the entities "causing or increasing liabilities to third parties." 2012 WL 2158733, at *6. The defendant, however, argued the receiver was actually seeking "nothing more than investor losses." *Id.* The Court concluded that the receiver entities' "liability to investors and investor losses are mathematically equivalent," which showed that the "liabilities are not distinct from investor losses." *Id.* Therefore, the Court dismissed the claim "for lack of standing to the extent it is based on liabilities incurred to defrauded investors or the increased amount of such liabilities." *Id.* The Court should do the same here.

Just as in *Reneker*, the Increased Liabilities Damages sought by Plaintiff are a blatant attempt to repackage investor claims as damages to the Receiver Entities. *See* 2012 WL 2158733, at *6 (noting that the "liability to investors and investor losses are mathematically equivalent"). According to Plaintiff's expert, the calculation of Increased Liabilities Damages considers:

(1) amounts received by the Breitling Entities from ***investors***, less

(2) refunds and/or disbursements to ***investors***, less

(3) the value of any remaining assets held by the Receivership Estate (which Mr. Solomon concludes is zero).[160]

[160] App. at 705-06, Ex. AJ ¶ 105 (emphasis added); *see also* App. at 1639, Ex. CZ at 287:17-23.

This calculation is essentially the same as Mr. Taylor uses in his role as Receiver to calculate the monies that he will distribute to investors to cover their losses.[161] By calling these amounts "Increased Liabilities," Plaintiff seeks to skirt well-established Fifth Circuit precedent and prior decisions by this Court. Plaintiff cannot succeed in this endeavor because the Increased Liabilities calculation mirrors the "net out of pocket loss" to investors. *See Reneker*, 2012 WL 2158733, at *6. Thus, Plaintiff lacks standing to pursue his damage claim based upon Increased Liabilities.

VII. CONCLUSION

For the aforementioned reasons, Defendants respectfully request that the Court grant their request for summary judgment dismissing both Count I (negligence/gross negligence) and Count II (knowing participation in breach of fiduciary duty).

Dated: December 8, 2020

Respectfully submitted,

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[161] App. at 1663-65, Ex. DB at 61:7-17; 69:20-70:16; *see also SEC v. Faulkner, et al.*, No. 3:16-cv-01735-D, Dkt. No. 541 ("An Investor Claimant's 'net out-of-pocket loss' would be calculated as the total amount invested in or through the Offering Entities less any amounts, or the value of any assets, received—and retained—with respect to the investment . . . ."); *id.*, Dkt. No. 542 at 2 ("[T]he Receiver shall establish a 'Final Claim Amount' for all Potential Claimants (equal to the greater of zero (0) or the net-out-of-pocket loss of each).").

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been served to all counsel of record in accordance with the Federal Rules of Civil Procedure on December 8, 2020 via ECF notification.

/s/ Nicolas Morgan
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