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

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

REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Defendants, Reymundo "Rey" Trevino, III ("Trevino"), Eagle Rio Energy Companies, Inc. ("Eagle Rio"), and Okoto Okpo ("Okpo") (collectively "Defendants"), submit this Reply to Plaintiff's Response to Defendants' Motion for Summary Judgment and would therefore show as follows:

I. ARGUMENTS IN REPLY AND AUTHORITIES

A. The Receiver's TUFTA Claims Were Extinguished by the Statute of Repose.

There Are No Disputed Facts

1. The Receiver's Response tacitly admits that there are no genuine issues of material fact as to his claims against Defendants under the Texas Uniform Fraudulent Transfer Act, Texas Business & Commerce Code Section 24.001. et seq. ("TUFTA"). TUFTA has a hard statute of repose that extinguishes the claimant's cause of action unless a lawsuit is filed within four (4) years after the transfer occurred, or if, within one (1) after the claimant knew or reasonably should have known of the transfer. TUFTA Section 24.010(a). Here, the Receiver filed his Complaint on February 18, 2020. There is no dispute that Defendants, Eagle Rio and Trevino, received their last transfers from the Receivership Entities (as defined in the Complaint) on April 22, 2014 and May 20, 2014 respectively. There is no dispute that Okpo received his last transfer from the Receivership Entities on February 8, 2016. (Appx Pages 47, 49-56, 70-71). Defendants received all of their transfers (i.e. salary) more than four (4) year before this lawsuit was filed.

2. There is no dispute the Receiver knew about the transfers to Defendants and already declared them to be avoidable as fraudulent transfers no later than February 7, 2018. On that date, the Receiver sent demand letters to the Defendants directing them to return the precise transfers he complains about in this lawsuit and expressly stated that the transfers were

recoverable as actual fraudulent transfers pursuant to TUFTA Section 24.005(a)(1). (Appx. Pages 65-67, 72-74). The Receiver's Response to Defendants' Motion for Summary Judgment does not dispute any of those facts or present any summary judgment evidence that might controvert them. Thus, there is no genuine issue of material fact regarding whether the Receiver's TUFTA claims were extinguished by the statute of repose in TUFTA Section 24.010(a). Plainly, they were.

The Receiver's Legal Arguments and the Statute of Repose Have No Merit.

3. Since the facts are undisputed, the Receiver make two legal arguments: (1) there is no difference between a statute of limitation and a statute of repose (the Receiver calls it "a distinction without a difference") and Paragraph 34 of the Court's Receivership Order tolled all statutes of limitations; and (2) the Court has broad "equitable" power to override Texas substantive law when crafting remedies for defrauded investors. Neither argument has merit. Defendants will address them seriatim.

4. First, the Receiver's assertion that there is no difference between a statute of repose and a statute of limitation is plainly wrong, as a matter of law. *In CTS Corporation v. Waldburger*, 573 U.S. 1, 134 S.Ct. 2174 (2014), the United States Supreme Court was asked to determine whether provisions of a federal statute, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) pre-empted state statutes of repose on environmental liability. The Supreme Court held that CERCLA Section 9658 of CERLA pre-empts state law statutes of limitations but does not pre-empt state law statutes of repose. The Court posed the question to be answered: "It is undoubted that the discovery rule in (CERCLA) §9658 pre-empts state statutes of limitations that are in conflict with its terms. The question presented in this case is whether §9658 also pre-empts state statutes of repose." *Waldburger*, 573

U.S. at 6; 134 S.Ct. at 2180. The Supreme Court explained one of the principal distinctions between a statue of limitations and a statute of repose:

> One central distinction between a statute of limitation and statutes of repose underscores their differing purposes. Statutes of limitation, but not statutes of repose, are subject to equitable tolling, a doctrine that "pauses the running of, or "tolls" a statute of limitation when a litigant has pursued his rights diligently, but some extraordinary circumstance prevents him from bringing a timely action. (citation omitted). Statutes of repose, on the other hand, generally may not be tolled even in cases of extraordinary circumstances beyond a plaintiff's control. See e.g. *Lampf*, [501 U.S.] at 363, 111 S.Ct. 2773 ("[A] period of repose [is] inconsistent with tolling") 4 *C. Wright & A. Mille*r, Federal Practice & Procedure § 1056, p. 240 (3d ed. 2002) ("[A] critical distinction is that a repose period is fixed and its expiration will not be delayed by estoppel or tolling"); *Restatement (Second) of Torts* § 899, Comment g (1977).

Waldburg, 573 U.S. at 9, 134 S.Ct. at 2183. After an extensive textual analysis, the Supreme Court concluded that CERCLA § 9658 does not pre-empt state law statutes of repose:

> In light of the distinct purpose for statutes of repose, the definition of "applicable limitations period" ... in §9658 is best read to encompass only statutes of limitations, which generally begin to run only after a cause of action accrues and so always limit the time in which a civil action may be brought. A statute of repose, however, may preclude an alleged tortfeasor's liability before a plaintiff is entitled to sue, before an actionable harm even occurs.

*Waldburge*r, 573 U.S. at 17, 134 S.Ct. at 2187.[1] Furthermore, the Supreme Court held that the federal pre-emption of substantive state law is disfavored and should not be applied absent clear language in an Act of Congress.

> Because the States are independent sovereigns in our federal system, the Court "assum[es] that the historic police powers of the States will not be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

Waldburger, 573 U.S. at 18-19, 134 S.Ct. at 2188. The Receiver has not cited any Act of

[1] The Fifth Circuit reached the same conclusion on the same issue in *Burlington Northern Santa Fe Railway Co., v. Skinner Tank Company*, 419 F.3d 355, 364 (5th Cir. 2005). The Court held that Texas Civil Practice and Remedies Code § 16.012(b) is a statute of repose, not a statute of limitations, and CERCLA § 9658 does not toll its effect.

Congress that pre-empts the statute of repose in TUFTA Section 24.010.[2]

5. Second, this Court has no authority to ignore or override the provisions of TUFTA when applying that statute. In the context of an equity receivership, federal courts have discretion when fashioning remedies, but that discretion is not limitless. *SEC v. Faulkner*, 2018 U.S. Dist. LEXIS 94950, *20 (N.D. Tex. 2018). The Court has no roving commission to do equity. *Id.* at 20-21. Nor may it create new substantive rights. The Receiver has invoked TUFTA, a Texas statute, as the basis of his claim. The fact that the Receiver filed his lawsuit in a federal court, rather than a Texas state court does not change the controlling law. The black letter rule of the *Erie* doctrine is that federal courts apply state substantive law and federal procedure law. *All Plaintiffs v. All Defendants*, 645 F.3d 329, 335 (5th Cir. 2011). When interpreting a state statute, the federal court must follow the lead of the state's highest court. *Occidental Chem. Corp. v. Elliott Turbomachinery Co*., 84 F.3d 172, 175 (5th Cir. 1996); *see also Dyack v. Commonwealth of the N. Marianas Islands*, 317 F.3d 1030, 1034 (9th Cir. 2003). More specifically, the Fifth Circuit expressly recognizes that the Texas Supreme is the final authority on the interpretation of TUFTA. *Janvey v. Golf Channel, Inc.*, 834 F.3d 570, 573 (5th Cir. 2016). The Texas Supreme has specifically and unambiguously held that TUFTA Section 24.010 is a statute of repose, not a statute of limitation:

> Considering the actual language of ***TUFTA*** *section 24.010* and the Commissioners' comments to UFTA section 9 on which it is modeled, we agree with the parties and the court of appeals in this case that it is a ***statute*** of ***repose***, rather than a ***statute*** of ***limitations***. By its own terms, the provision does not just procedurally bar an untimely claim, it substantively "extinguishes" the cause of action. As the Commissioners' Prefatory Note explains (despite its reference to a "***statute*** of ***limitations***"), the provision "bars the right rather than the remedy on expiration of the statutory periods prescribed."" UNIF. FRAUDULENT

[2] Such Acts are rare, but they do exist. 11 U.S.C. §§ 544(b) and 546(a) may suspend a statute of repose for up to two (2) years in a bankruptcy case, but the Breitling Energy Receivership is not a Title 11 proceeding, and the Receiver is not a trustee in bankruptcy. He cannot use §§ 544(b) and 546(a). Even those provisions do not revive a statute of repose that has already expired before the bankruptcy case was filed.

TRANSFER ACT, 7A part II U.L.A. 7 (2006) (Prefatory Note).

Nathan v. Whittington, 408 S.W.3d 870, 873-74 (2013). This Court is bound to respect the Texas Supreme Court's interpretation of Section 24.010 as definitive. *Occidental Chem.*, 84 F.3d at 175. As a statute of repose, the provisions of TUFTA Section 24.010 are substantive Texas law. The Court has no "equitable" powers to disregard Texas substantive law merely because its faithful application to the undisputed facts extinguishes the Receiver's TUFTA claims.

6. Furthermore, TUFTA's statute of repose is not a new issue in the Northern District of Texas. This Court has previously recognized that TUFTA Section 24.010 is a statute of repose and must be enforced as written. *Taylor v. Rothstein Kass & Co.*, PLLC, 2020 U.S. Dist. LEXIS 17435 *24 (N.D. Tex. February 4, 2020) (*citing Nathan*, 408 S.W.3d at 874); *O'Chesky v. American Housing Foundation*, 543 B.R. 245, 257 (Bankr. N.D. Tex. 2015) ("TUFTA's § 24.010 is a statute of repose and is immune to procedural tolling"). The time limits in TUFTA Section 24.010(a) are fixed. They are not subject to equitable or procedural tolling. *Waldburg*, 573 U.S. at 9, 134 S.Ct. at 2183. To preempt the TUFTA statute of repose would require unambiguous congressional intent, expressed in an Act of Congress, which is absent here. *Waldburger*, 573 U.S. at 18-19, 134 S.Ct. at 2188. There is no factual dispute. The Receiver's legal arguments have no merit. The statute of repose extinguished the Receiver's Count I TUFTA claims before the lawsuit was filed. Defendants are entitled to summary judgment on those claims.

B. The Receiver's Count II, Equitable Claims for Unjust Enrichment also Fail.

There Are No Disputed Facts

7. Despite Plaintiff's unsupported assertions to the contrary, there are no disputed facts as to the Court II claims. Defendants were regular W-2 employees of the Receivership Entities. They went to work every day and did their jobs. They were not officers, directors, or

owners. They had no managerial duties. They performed the duties they were asked to perform. The Receivership Entity paid Defendants their agreed upon compensation as employees and nothing more. (Appx. Pages 62-64, 69-70). Those Receivership Entities made those payments voluntarily. The Receivership Entities were not defrauded or deceived by Defendants. The Receivership Entities were not under duress. The Receiver Entities did not pay Defendants by mistake. The Receivership Entities had full knowledge of all relevant facts when they paid Defendants their employee compensation. The Receiver does not allege differently.

8. The Receiver has access to the payroll records of the Receivership Entities. The Receiver has documented Defendants' regular bi-weekly compensation in his discovery responses, which are part of the summary judgment record. Every payment and every date of payment is listed. (Appx. Pages 47, 49-56). If the Receiver had any evidence that the Receivership Entities paid Defendants involuntarily, as a result of mistake, duress, deception, or fraud committed by Defendants, he would have pleaded those allegations and put supporting evidence into the summary judgment record. There are no such allegations in Plaintiff's Compliant, and the deadline for amendment of pleadings has passed. Nor is there any evidence that Defendants received anything other than their agreed regular compensation as W-2 employees. The Receivership Entities routinely paid that compensation, bi-weekly for several years, as stated in Defendants' Declarations and as reflected in the Receiver Rule 26(a) Disclosures. (Appx, Pages 49,49-56, 63-64, 70-71).

9. Moreover, the Receiver is not new to this matter. He was appointed on August 10, 2017. The Receiver has possessed and controlled the Receivership Entities' books and records for more than three (3) years. The Receiver has filed a flurry of lawsuits, often suing people in

the same position as Defendants.[3] The Receiver has had ample opportunity to review the books and records of the Receivership Entities and to depose Defendants' manager and co-workers. The Receiver knows that Defendants were employed by the Receivership Entities to cold call potential investors. He expressly pleaded those facts. *See* Complaint, Paragraphs 32 and 36. (Appx. Page 12-14). The Receiver knows how the Defendants were compensated, when they compensated, how much they were compensated, and why they were compensated. *See* Complaint Paragraphs 32, 39, 40-42; Rule 26(a) Disclosures, attached Exhibit "A." (Appx. Pages 47, 49-56). Defendants have submitted summary judgment Declarations wholly consistent with the Receiver's Rule 26(a) Disclosures regarding their employment status, job duties, and compensation. (Appx. Page 62-64, 69-71). The Receiver will not learn anything new or material by conducting further discovery. He already knows the relevant facts.

Texas Recognizes No Independent Cause of Action for Unjust Enrichment.

10. Though case law is not unanimous, the great weight of Texas case law holds that unjust enrichment is not an independent cause of action. *Davis v. OneWest Bank, N.A.*, 2015 Tex. App. LEXIS 3470, *2-3 (Tex.App.-Fort Worth 2015, no pet.) ("Most of the Texas courts of appeals and federal courts that have considered the question under Texas law have rejected the existence of an independent cause of action for unjust enrichment.") (Internal citations omitted); *Mission Trading Co. v. Lewis*, 2017 U.S. LEXIS 181094 *15 (S.D. Tex. 2017) (no independent cause of action for "unjust enrichment" exists in Texas); *Barnett v. Coppell North Texas Court, Ltd.*, 123 S.W.3d 804, 816-17 (Tex.App.-Dallas 2003, pet. denied) ("[U]njust enrichment is not an independent cause of action." Rather, "unjust enrichment" is a general equity theory of recovery for an action based upon restitution:

[3] The Receiver just sued other defendants sooner, without missing the deadlines in the statute of repose. *See* TUFTA § 24.010(a). The Receiver is subject to the statute of repose, like any other litigant. There is no special rule for equity receivers.

> Although the [Supreme Court of Texas] in HECI refers to the "cause of action of unjust enrichment, it also refers to unjust enrichment as a "remedy," "basis for recovery" and speaks of a "cause of action based on" unjust enrichment. We do not see these statements a recognition of unjust enrichment as an independent cause of action, but simply as a reiteration of the well- established principle that a suit for restitution may be raised against a party for unjust enrichment.

Mowbray v. Avery, 76 S.W.3d 663, 680 n. 25 (Tex.App.-Corpus Christi 2002, pet. denied). This Court has expressed recognized that rule of law:

> This Court agrees with *Mowbray's* interpretation. Plaintiffs have cited no cases in which the Supreme Court of Texas has recognized a cause of action for unjust enrichment as independent from an action for money had and received, and the court concludes that Texas law indicates that they are not separate and independent claims.

Hancock v. Chicago Title Ins. Company, 635 F.Supp. 2d 539, 560-61 (N.D. Tex. 2009) (Fitzwater, Chief Judge), s*ee also Redwood Resort Properties, LLC v. Holmes Co.*, 2006 U.S. Dist. LEXIS 85996, 2006 WL 3531422 at *9 (N.D. Tex. Nov. 27, 2006) ("Unjust enrichment is not an independent cause of action but rather characterizes the result of a failure to make restitution of benefits either wrongfully or passively received under circumstances which give rise to an implied or quasi-contractual obligation to repay.") (c*iting Doss v. Homecoming Fin. Network, Inc.*, 210 S.W.3d 706, 709 n. 4 (Tex.App.-Corpus Christi 2006, no pet.). (Fitzwater, J.)

11. The Receiver has not pleaded any cause of action for money had and received. *See* Complaint. (Appx. 17-20). He pleaded a claim for "unjust enrichment," which is not a recognized cause of action in Texas. The deadline to amend pleadings was December 1, 2020, and it has passed. *See* Scheduling Order, Page 2 [Docket No. 31]. The Receiver cannot plead new causes of action in a response to a motion for summary judgment. The Receiver is stuck with the legal theories that he timely pleaded. Defendants are entitled to summary judgment on the cause of action actually pleaded by the Receiver, which does not exist in Texas.

The Receiver Has No Claims for "Money Had and Received."

12. Defendants recognize that the Court has discretion to treat the Receiver's "unjust enrichment" claim as if it were a cause of action for "money had and received." If so, the result is the same. The Receiver stands directly in the shoes of the Receivership Entities and has no greater rights. *Janvey v. Democratic Senatorial Campaign Committee, Inc.*, 712 F.3d 185, 190 (5th Cir. 2013). "A federal equity receiver has standing to assert **only** the claims of the entities in receivership, and not the claims of the entities' investor-creditors[.]" (Emphasis added). *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86, 114 S.Ct. 2048, 2054 (1994) ("[A]ny defense good against the original party is good against the receiver."). Accordingly, the Receiver is subject to any defenses that Defendants could assert against a similar claim brought by the Receivership Entities themselves. *Id.*

13. While Texas recognizes a common law cause of action for "money had and received," it also recognizes common law defenses to such claims. The most obvious defense is the voluntary payment rule, which Texas has recognized since 1880.[4] *See BMG Direct Marketing v. Peake*, 178 S.W.3d 763, 767 (Tex. 2005). As explained by the Texas Supreme Court:

> Money voluntarily paid on a claim of right, with full knowledge of all the facts, in the absence of fraud, deception, duress, or compulsion, cannot be recovered back merely because the party at the time of payment was ignorant of or mistook the law as to his liability. (internal citations omitted). The rule is a defense to claims asserting unjust enrichment; that is, when a plaintiff sues for restitution claiming a payment constituted unjust enrichment, a defendant may respond with the voluntary payment rule as a defense.

BMG Direct Marketing, 176 S.W.3d at 767 (*citing Randazzo v. Harris Bank Palatine, N.A.*, 262 F.3d 663, 670 (7th Cir. 2001)) and *Restatement (Third) of Restitution and Unjust Enrichment* § 6

[4] Defendants would have pleaded the voluntary payment rule as a defense if the Receiver had pleaded money had and received as a cause of action.

comment e. (Tentative Draft No. 1, 2001) ("The restitution claim to recover a payment in excess of an underlying liability ... meets an important limitation in the voluntary payment rule."). The Supreme Court further explained the important public policy that underlies the rule:

> A party who pays a claim is deemed to have made his own decision that it is justly due. If he thinks otherwise, he should resist. He should not pay out his money, leading the other party to act as though the matter is closed, and then be in a position to change his mind and invoke the aid of courts to get it back. *R.G. McClung Cotton Co. Cotton Concentration Co.*, 479 S.W.2d 733, 743 (Tex.Civ.App.-Dallas 1972, writ ref'd n.r.e.) We have acknowledged that public policy favors protecting the finality of payments when a person is aware of all the facts upon the liability to make payment depends, and there is no fraud, deception, duress, or coercion involved. Because of these policy concerns, this Court and Texas courts of appeals have, at times, applied the voluntary payment rule between private parties.

BMG Direct Marketing, 178 S.W.3d at 768-69. The Receiver does not plead, nor is there any evidence that Receivership Entities did not pay Defendants voluntarily for their daily work of cold calling potential investors. The Receiver's Complaint does not allege, nor there any evidence that the Defendants defrauded the Receivership Entities, deceived the Receivership Entities, or subjected them to duress or coercion. The Receivership Entities employed Defendants as salesmen and voluntarily paid them every two (2) weeks to keep them at the telephones making cold calls. (Appx. Pages 62-64, 69-70). Defendants detrimentally relied on the payment of their salaries by continuing to work and by forgoing other employment. If the Receivership Entities has not paid them their agreed wages, Defendants would have quit their jobs and sought other employment.

14. It makes no difference whether the Receivership Entities knew that paying transaction-based compensation, i.e. a commission to a non-license salesman was illegal.[5] If the

[5] The common law does prohibit paying commissions to unlicensed salesman. The "illegality" that the Receiver complains of arises from the Texas Securities Act ("TSA"), particularly Sections 29 and 33. However, the Receiver has not pleaded any cause of action against Defendants under the TSA, and the deadline for amendment of pleadings has expired. Furthermore, the (3) year and (5) year time limits under the Texas Securities Act's own statute of

Receivership Entities knew that their compensation program was illegal (and they probably did), they have no right to recover those payments from the employees. "Money had and received," and "restitution" are equitable claims. A fundamental concept of equity jurisprudence is that he who seeks equity must do equity. A person who comes to equity seeking redress, must come with clean hands. "Equity does not adjust differences between wrong-doers." *Humphries-Mexia Co. v. Arseneaux*, 116 Tex. 603, 614-15, 297 S.W. 225, 231 (Tex. 1927); *see also Jones v. Jimmerson*, 302 S.W.2d 161 (Tex.Civ. App.-Texarkana 1957, writ ref'd n.r.e.). The Receivership Entities do not have clean hands. The Complaint colorfully details their fraud, deceit, and gross misconduct. They paid transaction-based compensation with guilty knowledge that they should not have done so.[6] As between the Receivership Entities, who wrongfully paid transaction-based compensation and Defendants, who received transaction-based compensation, a court of equity leaves the parties where it finds them. The Receiver stands in the muddy shoes of the very culpable Receivership Entities and has no claim for equitable relief.

15. The result would be the same if the Receivership Entities did not know that paying transaction-based compensation to unlicensed salesmen was illegal. Texas law prohibits recovery of a voluntary payment "when the money was paid under a mistake of law with respect to liability to make payment, but with full knowledge of all the facts on the which the claim for payment is based, and on which the right to resist it depends[.]" *BMG Direct Marketing*, 178 S.W.3d at 769 (*citing Gilliam v. Alford*, 69 Tex. 267, 6 S.W. 757, 759 (Tex. 1887). The Receivership Entities directed Defendants activities and knew what they were doing. The Receivership Entities knew that they were paying transaction-based compensation to unlicensed salesman. *See* Complaint,

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repose have expired. *See* TSA Section 33(H)(2). Finally, any such cause of action under the TSA would belong to the defrauded investors, not to the Receiver.

[6] Unlike like the Receivership Entities, which raised tens of millions of dollars and had the benefit of legal counsel, Defendants did not have counsel and did not know that their compensation scheme potentially violated the Texas Securities Act.

Paragraphs 31-40. (Appx Pages 12-15). Whether the Receivership Entities knew it was illegal to pay that compensation is irrelevant. The voluntary payment rule cuts off any equitable right to recover that compensation from the employees who received it. *Id.*

16. There are statutory exceptions to the voluntary payment rule. Usury is such an exception. *BMG Direct Marketing*, 178 S.W.3d at 770. So is TUFTA. Excessive interest and fraudulent transfers may be recovered, even if paid voluntarily. However, Defendants did not charge excessive interest to the Receiver Entities, and the TUFTA claims were extinguished by the statute of repose. Those statutory exceptions do not apply here. The Receivership Entities employed Defendants to help market their investment products. The Receivership Entities set the terms of compensation and voluntarily paid Defendants the agreed amounts. The Receivership Entities are not legally entitled to recover those payments. The Receiver stands in their shoes with no greater rights.

17. In his Response, the Receiver cites *Janvey v. Alguire*, 846 F.Supp. 2d 662 (N.D. Tex. 2011) for the proposition that "money had and received" might be a viable cause of action. However, *Alquire* was a ruling on a Rule 12(b)(6) motion to dismiss, not a ruling on a motion for summary judgment. The Court simply analyzed whether the complaint stated a potential cause of action, not whether that potential cause of action had any merit. The *Alguire* court broadly stated that Texas law recognizes a cause of action for money had and received and that the cause of action is not premised on proof of wrongdoing by the recipients. *Alguire*, 846 F.Supp.2d at 674.

18. As a broad statement of Texas law, that is pronouncement is correct. However, the *Alguire* court did not address the voluntary payment rule or assess whether the receivership entities' own inequitable behavior (in that case) might bar any recovery under applicable Texas

law.[7] When suing Defendants for "money had and received," the Receiver is asserting the equitable claims of the very culpable Receivership Entities, not the claims of the "innocent" defrauded investors, which claim he does not own. *Janvey*, 712 F.3d at 190. The "innocent" investors did not pay anything to Defendants. (Appx. Pages 64 and 70). The "money had and received" by Defendants is the bi-weekly salary that the Receivership Entities paid to Defendants as employee compensation for their daily work on the telephones contacting potential investors. The Receivership Entities paid that money voluntarily, with full knowledge of all relevant facts. That fact alone, under long-standing Texas law, bars any recovery by the Receivership Entities, and thus the Receiver. *O'Melveny & Myers*, 512 U.S. at 86, 114 S.Ct. 2054 ("[A]ny defense good against the original party is good against the receiver."); *BMG Direct Marketing*, 176 S.W.3d at 767 (money voluntarily paid under a claim of right, with knowledge of the relevant facts, cannot be recovered).

19. Furthermore, when pursuing the "equitable claims" of the Receivership Entities, the Receiver is fully burdened by their prior inequitable conduct. *O'Melveny & Myers*, 512 U.S. at 86, 114 S.Ct. 2054; *Janvey*, 712 F.3d at 190. The Receivership Entities come to "equity" with unclean hands. They are ineligible for equitable relief. *Humphries-Mexia Co,* 116 Tex. 603, 614-15, 297 S.W. 225, 231 ("Equity does not adjust differences between wrong-doers"). Regardless of whether Texas law recognizes a cause of action for unjust enrichment or money had and received, under the undisputed facts of this case, Texas law bars recovery by the Receiver of the salaries voluntarily paid. Defendants are entitled to judgment as a matter of law.

[7] The *Alguire* opinion contains one statement of law that is clearly wrong. The court stated that the receiver was a "hybrid" who represented the receivership entities and also their creditors. *Alguire*, 846 F.Supp.2d at 668. The Fifth Circuit later emphatically ruled otherwise. "A federal equity receiver has standing to assert only the claims of the entities in receivership, and not the claims of the entities' investor-creditors[.]" *Janvey*, 712 F.3d at 190. The Receiver does not own the investor-creditors' claims, if any, and cannot assert then. When asserting the claims of the Receivership Entities, the Receiver is subject to any defenses that could be asserted against the Receivership Entities had they filed the action themselves the day before the Receiver was appointed.

C. There Are No Facts that Require Further Development

20. The Receiver's Count I claim under TUFTA was extinguished by the statute of repose in TUFTA Section 24.010(a). Defendants received their last payment from the Receivership Entities on February 8, 2016. On February 7, 2018, the Receiver sent demand letters to Defendants specifically asserting that he could recover those transfers (the same ones in Paragraph 40 of the Complaint) as fraudulent transfers pursuant to TUFTA Section 24.005(a)(1), i.e. that the transfers were made with actual intent to hinder, delay, or defraud. (Appx. Pages 65-67, 72-74). The Receiver filed this action on February 18, 2020. That date is more than four (4) years after the last transfer to Defendants and more than one (1) year (indeed more than two (2) years) after the Receiver knew of the transfers and knew the facts that caused him to believe that they were fraudulent. There is no dispute as to any of those facts. They are set in stone. Furthermore, the controlling law is clear. TUFTA Section 24.010(a) is a statute of repose, not a statute of limitations, and cannot be tolled. *Taylor*, 2020 U.S. Dist. LEXIS 17435 *24; *Nathan*, 408 S.W.3d at 873-744); *O'Chesky*, 543 B.R. at 257 ("TUFTA's § 24.010 is a statute of repose and is immune to procedural tolling"); *Waldburg*, 573 U.S. at 9, 134 S.Ct. at 2183 (statutes of repose are different from statutes of limitations and not subject to tolling). TUFTA Section 24.010(a) extinguished the Receiver's cause of action as a matter of law before this lawsuit was filed. The facts require no further development. No amount of discovery will change them.

21. The Receiver's Count II equitable claims also fail as a matter of law. The Receiver has pleaded "unjust enrichment," which is not an independent cause of action in Texas. *Hancock*, 635 F.Supp. 2d at 560-61. In his summary judgment Response, the Receiver contends that his real (though not pleaded) claim is "money had and received." While "money had and received" is a recognized cause of action in Texas, the undisputed facts of this case do not support it. Money had and received (and all similar restitution-based claims) are subject to the

defense of the voluntary payment rule, which Defendants would have specifically pleaded, if the Receiver had actually pleaded money had and received in the Complaint. *See BMG Direct Marketing*, 176 S.W.3d at 767. Indeed, while Defendant did not cite the voluntarily payment doctrine by name, they did point out the relevant facts in their Summary Judgment Brief:

> **The Receivership Investors voluntarily paid those commission-based amounts.** (Appx. Page 64, 70). The Receivership Entities received the services that they paid for; *i.e.*, the efforts of the salesmen on the telephone contacting potential investors. Those services were "value" to the Receivership Entities even if Defendants could not have recovered *unpaid* commissions from the Receivership Entities. *See also Anglo-Dutch Petroleum Int'l, Inc. v. Haskell*, 193 S.W.3d 87, 102-103 & n.13 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (securities violations only made the transactions voidable, not void). **Defendants were not "unjustly enriched" by receiving the agreed compensation that the Receivership Entities voluntarily paid to them as employees** to keep them on the job, calling potential investors.

See Defendants Summary Judgment Brief, at Page 19. (Emphasis added).

22. There is no dispute that Defendants worked for the Receivership Entities as salesmen, cold calling potential investors on the telephone. The Receiver specifically alleges that Parker Hallam and Dustin Michael Miller Rodriguez "led the sales effort" and "managed Breitling's sales staff," including Defendants. See Complaint, Paragraphs 31 and 32 (Appendix Pages 11-12). There is no dispute that Defendants were regular employees who went to work, did the jobs they were directed to do, and were compensated as agreed. (Appx. Pages 62-64, 69-71). Defendants worked for the Receivership Entities for three (3) to four (4) years and were regularly paid, as reflected in the payment summary provided by the Receiver in Exhibit "A" to his Rule 26(a) Disclosures. (Appx. Pages 47, 49-56). Accordingly, there is no dispute that the Receivership Entities voluntarily paid Defendants the compensation that they received. There is no dispute the payments were made under a claim of "right," in the sense that Defendants were regular employees, entitled to compensation for their work, and the Receivership Entities paid

them the agreed amounts. (Appx. Pages 62-64, 69-71).

23. Under the voluntary payment rule, the Receiver Entities' voluntary payment of the salaries received by Defendants is an absolute bar to recovery, absent fraud, deception, duress, or coercion by Defendants, perpetrated on the Receivership Entities. *BMG Direct Marketing*, 176 S.W.3d at 767. The voluntary payment rule serves an important public policy and must be enforced, unless a recognized exception applies. *BMG Direct Marketing*, 178 S.W.3d at 768-69. The Receiver has not pleaded fraud, deception, duress or coercion by Defendants. The deadline for amendment of pleadings has passed. Moreover, new allegations of fraud, deception, duress, or coercion by Defendants against the Receivership Entity would contradict the facts already pleaded in the Complaint, which are that Receivership Entities controlled and directed the activities of Defendants as part of a well-organized fraudulent scheme. *See* Complaint, Paragraphs 31-39. (Appx. Pages 11-14). The Receiver is bound by the facts he has pleaded in the Complaint and cannot deny them now.

24. Defendants agree that the Receivership Entities employed them, managed them, and directed their activities, as pleaded in the Complaint.[8] There is no allegation, nor any evidence that Defendants defrauded, deceived, or coerced the Receivership Entities at any time. The facts already "developed" by the Complaint itself bar the Receiver's recovery. Those facts are further supported by Defendants' Declarations, and the Receiver has not cited any contrary evidence. The Receiver has controlled the Receivership Entities' books and records for more than three (3) years. He has had ample opportunity to develop evidence that Defendants defrauded, deceived, or coerced the Receivership Entities, if that had occurred. It did not. There is no genuine issue of material fact. The Receivership Entities voluntarily paid Defendants the

[8] Defendants did not know that the Receivership Entities were running a securities fraud, but their knowledge is irrelevant to the application of voluntary payment rule. The Receivership Entities knew what they were doing and paid Defendants voluntarily. That fact bars recovery.

money the Receiver seeks to recover and did so with full knowledge of the relevant facts. The voluntary payment rule absolutely bars recovery by the Receiver under the equitable theories of restitution or money had and received. The facts are undisputed. No additional "evidence" will change them. No further discovery is needed. Defendants are entitled to summary judgment that the Receiver take nothing on his claims for unjust enrichment, restitution, money had and received, or whatever he may call them.

D. Limitations Still Bars Any Claims that Arose with Two Years of the Appointment of the Receiver.

25. The appointment of a receiver does not revive any claims already barred by limitations on the day of his appointment. The Receiver stands squarely in the shoes of the Receivership Entities. *O'Melveny & Myers,* 512 U.S. at 86, 114 S.Ct. 2054 ("[A]ny defense good against the original party is good against the receiver."). *RTC v. Phelps*, 860 F.Supp. 389, 390 (S.D. Tex. 1994); *FDIC v. Daniel*, 1992 U.S. Dist. LEXIS 22460 * 2 (E.D. Tex. 1992). Texas cases split as to whether the statute of limitation for money had and received is two (2) years or four (4) years. Most Texas cases hold that a two (2) year statute of limitations applies to claims for money had and received. *See T & C Construction Ltd. v. Brown Mech. Services*, 2020 Tex.App LEXIS 5067 at *13 (Tex.App-Houston [14th Dist.] 2020, no pet) (*citing Peregrine Oil and Gas, LP v. HRB Oil and Gas, Ltd.*, 2018 Tex.App. LEXIS 7183, 2018 WL 4137026 at *9 (Tex.App-Houston [1sth Dist.] 2018, pet. denied); *Merry Homes, Inc. v. Luc Dao*, 359 S.W.3d 881, 884 (Tex.App.-Houston [14th Dist.] 2012, no pet.). Those cases analogize "money had and received" to unjust enrichment, which involves wrongfully detaining personal property that belongs to another person. That claim falls within the ambit of Texas Civil Practice and Remedies Code Section 16.003(a), which is a two (2) year statute of limitations. An earlier case, *Amoco Production Co. v. Smith*, 946 S.W.2d 162, 165 (Tex.App.-El Paso 1997, no pet.), held that

an action for money had and received was an action for "debt" and thus subject to the four (4) year statute of limitation in Texas Civil Practice and Remedies Code Section 16.004.

26. Texas Supreme Court has stated unequivocally that a cause of action based upon a theory of unjust enrichment is subject to the two (2) year statute of limitations in Texas Civil Practice and Remedies Code Section 16.003(a). *Elledge v. Friberg-Cooper Water Supply Co.*, 240 S.W.3d 869, 870-71 (Tex. 2007). The Supreme Court explained its reasoning. Section 16.004, the four (4) year statute, applies to breach of contract actions. By contrast, Section 16.003, the two (2) year statute, applies to "actions for taking or detaining the personal property of another," outside the context of a contract. *Elledge*, 240 S.W.3d at 870-71. Thus, the applicable statute of limitations depends upon the factual context in which the claim arises. If the claim arises in the context of a contract, the four (4) year statute applies. Otherwise, the two (2) year statute applies. *Id.* When facing this Texas law issue, the Northern District of Texas "considers the actual injury pleaded." *Verizon Employee Benefit Committee v. Frawley*, 2007 U.S. Dist. LEXIS 50928 at *15-16 (N.D. Tex. 2007) (Solis, J.). *In Frawley*, the actual injury was an accidental overpayment by an employee pension plan. No wrongdoing by the recipient was alleged. The context of the injury was closer to contract than tort. Accordingly, under those facts, Judge Solis concluded that the four (4) statute of limitations should apply. Judge Solis further reasoned that the two (2) year statute of limitation would apply if the plaintiff had alleged wrongdoing by the defendant. *Id.*

27. If the Receiver were suing Defendants under a contract-based theory, such as recovery of an accidental overpayment, the four (4) year statute of limitation in Section 16.004 would apply. However, the Receiver does not sue Defendants to enforce a contract or to recover an overpayment. Rather, the Receiver alleges that Defendants wrongfully received and detained

money that "in equity and good conscience belong to the Receivership Estate." *See* Complaint, Paragraph 52. (Appx. 18). The Receiver makes specific allegations of wrongdoing and demands the return of every dollar received. Under the Texas Supreme Court's holding in *Elledge*, and Judge Solis's reasoning in *Frawley*, the Receiver's unjust enrichment or money had and received claim falls squarely within the two (2) year statute of limitations in Texas Civil Practice and Remedies Code Section 16.003(a).

28. A cause of action for money had and received accrues, and limitations begins to run, when facts exist that authorize a claimant to seek judicial relief. *T & C Construction*, 2020 Tex.App LEXIS 5067 at *13. According to the Complaint, every dollar Defendants received from the Receivership Entities was wrongfully received and wrongfully detained, since the Receivership Entities ran a fraud scheme, and Defendants received their money "through taking undue advantage vis-à-vis the investors in the Breitling fraudulent scheme." *See* Complaint, Paragraphs 48, 52, 53, 54, and 55. (Appx. Pages 16-19). Thus, the cause of action for money had and received (or unjust enrichment) accrued, and the two (2) year statute began to run, each time that Defendants received a payment from the Receivership Entities, since all such payments were wrongful. The statute of limitations expired as to all transfers two (2) years after receipt, subject to tolling as of August 10, 2017, when the Receiver was appointed.[9] Accordingly, all transfers received by any Defendant before August 10, 2015, which date is two (2) years before the Receiver was appointed, are shielded by expiration of the applicable statute of limitations in Texas Civil Practice and Remedies Code § 16.003(a). The appointment of Receiver did not revive a statute of limitations that had already expired. All transfers to Trevino and Eagle Rio were made on or before May 20, 2014 and long precede the expiration of limitations. All

[9] Due the Receiver's woeful lack of diligence, no tolling should apply, even to payments received by Okpo after August 10, 2015.

transfers made to Okpo before August 10, 2015 lie beyond the two (2) year statute of limitations, and recovery is barred. Okpo received $32,615 from the Receivership Entities after August 10, 2015. (Appx. 53-54). That would be the outer limit of Okpo's potential liability, even if the Receiver could otherwise prove a claim for "money had and received," which he cannot.

E. Defendants Are Entitled to Their Attorneys' Fees under TUFTA

29. Under TUFTA Section 24.013, the Court has discretion to award reasonable attorneys' fees and costs "as are equitable and just." While the Court is not required to award fees, it should do so provided that the amounts are equitable and just. *GE Capital Commercial, Inc. v. Worthington National Bank*, 2012 U.S. Dist. LEXIS 82631 at *51-52 (N.D. Tex. 2012) (Lindsay, J.) (court awarded prevailing party $500,000 in attorneys' fees, which were stipulated to be equitable and just for either side). The Receiver should not have filed this lawsuit. The TUFTA claims were extinguished by the statute of repose before the case was filed. There was no **objective** basis in law or fact for that claim. The Receiver's Count II unjust enrichment claim asserts a cause of action not recognized by Texas law. If the Receiver's Court II claim for "unjust enrichment" is recast as a cause of action for money had and received, it still has no merit under the undisputed facts. Any recovery is barred by the voluntary payment rule and by the inequitable conduct of the Receivership Entities themselves, in whose muddy shoes the Receiver stands. Furthermore, all equitable claims against Trevino and Eagle Rio are barred by the two (2) year statute of limitations. Okpo received only $32,615 in the two (2) year before the Receiver was appointed. The balance of the Receiver's claim against Okpo was already barred by limitations when the lawsuit was filed.

30. Defendants' statutory request for reasonable attorneys' fees and costs is not a motion for sanctions. Defendants do not accuse the Receiver or his counsel of ill motives or

subjective bad faith. However, TUFTA Section 24.013 does not require malicious intent or willful misconduct. The statute authorizes the award of fees and costs as are "equitable and just." The Receiver failed to do appropriate due diligence and exercised poor judgment in filing this lawsuit. Accordingly, the lawsuit was not filed in **objective** good faith. Furthermore, Defendants were not the bad actors in the Breitling securities fraud. There were not officers, director, or managers of the Receivership Entities. Defendants were low-level telemarketers, doing as they were told by their employer. They received nothing but their agreed upon salaries. Nonetheless, Defendants have been forced to incur substantial attorneys' fees and costs to defend themselves against meritless claims that should not have been filed. The Receiver pleads in the Complaint that it would be "inequitable" not to award fees and costs in this case. In that limited regard, he is correct.

II. CONCLUSION

There are no genuine issues of material fact. There is no need for further discovery. Defendants are entitled to judgment as a matter of law that the Receiver take nothing on his claims. It would be equitable and just to award Defendants the reasonable legal fees and costs they have incurred to defend themselves. The Court should authorize and direct Defendants to submit an affidavit or declaration setting forth their reasonable and necessary attorneys' fees and costs, in accordance with TUFTA Section 24.013.

December 31, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on this 31st day of December 2020, that I served a true and correct of the forgoing document, via e-mail to Andrew Goforth, counsel for the Receiver, Thomas Taylor.

/s/ Robert A. Simon
Robert A. Simon