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.	§	

RESPONSE TO PLAINTIFF'S RULE 56(D) MOTION TO DEFER DETERMINATION OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Defendants, Reymundo "Rey" Trevino, III, Eagle Rio Energy Companies, Inc., and Okoto Okpo ("Defendants"), submit this Response to Plaintiff's Rule 56(D) Motion to Defer Determination of Defendants' Motion for Summary Judgment ("Motion to Defer") and would therefore show as follows:

I.

INTRODUCTION

There are no genuine issues of material fact in this case. Defendants are entitled to summary judgment based upon the undisputed facts and the applicable law. No amount of additional discovery will change those facts or the law. The Court should deny the Motion to Defer and decide the Motion for Summary Judgment on the existing record. Additional discovery would be wasteful and futile. The Receiver's Count 1 claims for recovery of alleged

fraudulent transfers was extinguished by the applicable statute of repose in Texas Business & Commerce Code Section 24.010(a). No other facts are relevant, and no amount of additional discovery will turn back the clock and revive those extinguished claims.

The Receiver's Count 2 "equitable" claims for "unjust enrichment" or "money had and received" are fatally defective based upon undisputed facts and applicable Texas law. The Receiver stands in the shoes of the Receivership Entities, whose claims he represents. The Receiver seeks recovery, on equitable grounds, of money that the Receivership Entities, voluntarily paid to its salaried employees, with full knowledge of all relevant facts. Under the voluntary payment rule, those claims fail as a matter of law. Nothing will change the facts or the applicable law. Furthermore, the statute of limitations in Texas Civil Practice & Remedies Code Section 16.003 bars all of the Receiver's Count 2 claims against Trevino and Eagle Rio and most of his claims against Okpo. That relevant dates are undisputed. No new "facts" will turn back the limitations clock. Additional discovery would be futile and wasteful.

Furthermore, the Receiver has the burden to show that further discovery would produce relevant evidence that would influence the outcome of the summary judgment motion. He fails to do so. Vague assertions that additional discovery would yield unspecified facts do not satisfy a movant's burden under Rule 54(d). The Motion to Defer makes, at best, broad and nonspecific assertions about what the Receiver hopes to learn from additional discovery. Those empty platitudes do not meet the standard. The Court should deny the Receiver's Motion to Delay and decide Defendants' pending Motion for Summary Judgment.

II.

UNDISPUTED FACTS

A. Count I – Fraudulent Transfer Claims.

1. In Count 1 of the Complaint, the Receiver sues Defendants under Texas Uniform Fraudulent Transfer Act ("TUFTA") Section 24.005(a)(1) for allegedly receiving transfers made by the Receivership Entities with actual intent to hinder, delay, or defraud their creditors. 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 later, within one (1) year after the claimant knew or reasonably should have known of the transfer. TUFTA Section 24.010(a); *Nathan v. Whittington*, 408 S.W.3d 870, 873-74 (2013); *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"). 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)[1]. Thus, Defendants received all transfers (i.e. payment of salary) more than four (4) years before this lawsuit was filed.

2. There is no dispute the Receiver knew about the payments to Defendants and declared them to be recoverable as fraudulent transfers no later than February 7, 2018, more than two (2) years before the Complaint was filed. On that date (February 7, 2018), 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 15-16, 65-67, 72-74). The

[1] All references to "Appx." refer to the Defendants' Appendix in Support of Summary Judgment [Docket No. 40].

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). No additional facts will turn back the clock and revive these extinguished claims. Additional discovery would be futile.

B. Count II – Unjust Enrichment of Money Had and Received Claims.

Texas Recognizes No Independent Cause of Action for "Unjust Enrichment."

3. The Receiver's Count 2 claims assert "unjust enrichment" as the basis for recovery. Texas law does not recognize that 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:

> 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 as 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 expressly 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.") (*citing Doss v. Homecoming Fin. Network, Inc.*, 210 S.W.3d 706, 709 n. 4 (Tex.App.-Corpus Christi 2006, no pet.). (Fitzwater, J.) Additional discovery will not create a Texas cause of action for "unjust enrichment."

The Receiver's Money Had and Received Claim (if any) Is Barred by the Voluntary Payment Rule.

4. In his Response to Defendants' Motion for Summary Judgment, the Receiver argues that his "real" equitable claims are for "money had and received." However, when pursuing such claims, 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.").

5. Accordingly, the Receiver is subject to any defenses that Defendants could assert against a similar claim brought by the Receivership Entities themselves. *Id.* Texas recognizes a cause of action for money had and received, but also recognizes defenses. The most obvious

defense is the voluntary payment rule, which Texas has recognized since 1880.[2] *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 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 is there any evidence, that the Defendants defrauded the Receivership Entities, deceived the Receivership

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

Entities, or subjected them to duress or coercion. (Appx. Page 12-15).

6. The Receivership Entities employed Defendants as telemarketers, managed them, and voluntarily paid them every two (2) weeks for several years to keep them at the telephones making cold calls to potential investors. (Appx. Pages 12-15, 62-64, 69-70). The Receiver's complaint is that Defendants' salaries included a commission on funds ultimately invested by potential investors whom they had cold-called. Defendants admit that they received commission-based compensation (the actual commission was 5% rather than 10%). However, that reality does not change the undisputed fact that the Receivership Entities paid that compensation voluntarily, with full knowledge of what Defendants did to earn the money. (Appx. Pages 12-15). That voluntary payment, with full knowledge of the facts, bars any recovery of those funds. *BMG Direct Marketing*, 178 S.W.3d at 768-69. Defendants detrimentally relied on the payment of their salaries by continuing to work and by forgoing other employment. If the Receivership Entities had not paid them their agreed salaries, Defendants would have quit their jobs and sought other employment. That is such an obvious inference that no other inference would be reasonable. The Receiver does not need discovery to learn it.

7. The Receivership Entities had full knowledge of all relevant facts when they paid Defendants their employee compensation. Defendants were regular W-2 employees of the Receivership Entities. They went to work every day and did their jobs, as defined by their employers. They were not officers, directors, or owners. They had no managerial duties. They performed the duties they were asked to perform. The Receivership Entities paid Defendants their agreed upon compensation as employees and nothing more. (Appx. Pages 62-64, 69-70). The Receivership Entities were not defrauded or deceived by Defendants. The Receivership Entities were not under duress or coercion. All payments to Defendants were fully voluntary.

8. The Receiver does not plead that the Receivership Entities paid Defendants involuntarily. He does not plead that any the payments resulted from mistake, fraud, deception, duress, or coercion committed by Defendants. The deadline for amendment of pleadings has passed. The Receiver does not plead that Defendants received anything other than their agreed 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). The fact Defendants were routinely paid, biweekly, for several years belies any possible allegation that the payments made by the Receivership Entities were not voluntarily.

9. The Receiver does not need to depose Defendants about their employment status. He specifically alleges that they were salesman hired to cold call potential investors by telephone and that they were managed by Breitling company officers, Parker Hallam and Dustin Michael Miller Rodriguez (Complaint, Paragraphs 31-32 (Appendix Page 12). Defendants did their jobs and were paid the agreed amounts for their work as telemarketers. (Appx, Pages 49,49-56, 63-64, 70-71). The Receiver has had possession of the payroll records and all other books and records of the Receivership Entities for more than three (3) years. 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). Additional discovery will not yield any new relevant facts.

10. 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

[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.

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 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 (Appx. 12-16, 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. Pages 62-64, 69-71). If there were any evidence that Defendants defrauded the Receivership Entities or subjected them to coercion or duress, the Receiver would have pleaded those facts. He does not.

11. The voluntary payment rule in Texas bars the Receiver's recovery of any restitution-based claims for "money had and received" or "unjust enrichment." The relevant facts are known and undisputed. Additional discovery will not yield any material new evidence.

The Receivership Entities Have Unclean Hands and Are Not Eligible for Equitable Relief.

12. The Receiver's "equitable" claims suffer other incurable infirmities. According to the Receiver's Complaint, the Receivership Entities acted deplorably. When pursuing the "equitable claims" of the Receivership Entities, the Receiver is fully burdened by their 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 willfully defrauded their investors and knowingly paid commission-based compensation to unlicensed salesmen. (Appx. Pages 12-16). As admitted wrongdoers, they are ineligible for equitable relief. *Humphries-Mexia Co. v. Arseneaux,* 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 any recovery by the Receiver on equitable claims.

The Texas Two (2) Year Statute of Limitations Bars All Claims against Trevino and Eagle Rio and most of the Receiver's Claims against Okpo.

13. The Receiver's claims are subject to the two (2) year Texas statute of limitations for non-contractual restitution claims. 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."). The appointment of a receiver does not revive any claims already barred by limitations on the day of his appointment. *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).

14. Most Texas cases hold that the two (2) year statute of limitations in Texas Civil Practice & Remedies Code ("CPRC") Section 16.003(a) 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 [1st 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 CPRC 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 limitations in CPRC Section 16.004. Case law after *Amoco Production* has clarified this issue.

15. 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 CPRC 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 a contractual context, 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) year statute of limitations should apply. Judge Solis further reasoned that the two (2) year statute of limitations would apply if the plaintiff had alleged wrongdoing by the defendant. *Id.*

16. If the Receiver were suing Defendants under a contract-based theory, such as recovery of an accidental overpayment, the four (4) year statute of limitations in Section 16.004 would apply. However, the Receiver does not sue Defendants to enforce a contract or to recover a contractual 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. Page 18). The Receiver makes specific allegations of wrongdoing by Defendants 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 CPRC Section 16.003(a).

17. 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.[4] 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 two (2) year statute of limitations in CPRC Section 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 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. Page 53-54). That would be the outer limit of Okpo's potential liability, even if the Receiver could

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

otherwise prove a claim for "money had and received," which he cannot. The Receiver has the Receivership Entities' payroll records. He does not need additional discovery to determine when and how much the Defendants' received. The Receiver's limitations problem is that nothing will turn back the clock. Additional discovery would be futile.

III.

STANDARD FOR RULE 54(D) MOTIONS

18. A litigant may move for summary judgment at any time until 30 days after the close of discovery. Fed. Rule Civ. Proc. 56(a). There is no requirement to wait until discovery is completed. *Hayes v. Radford*, 2012 U.S. Dist. LEXIS 142675 at *6 (D. Idaho 2012). Rule 56 does not require that any discovery take place before summary judgment may be granted. *Sistrrunk v. TitleMax, Inc.*, 2017 U.S. Dist. LEXIS 85258 at *4 (W.D. Tex. 2017) (citing *Mendez v. Poitevent*, 823 F.3d 326, 336 (5th Cir. 2016). Here, the Receiver asks the Court to defer ruling on an otherwise proper motion for summary judgment on the alleged basis that he needs more time to conduct discovery. While Rule 56(d) gives the Court that discretion, the Motion to Delay does not meet the applicable standard. Case law holds that "deferring summary judgment and ordering discovery is appropriate only if the nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition. (internal citation omitted). A party may not rely on vague assertions that additional discovery will produce needed unspecified facts." *Sistrrunk,* 2017 U.S. Dist. LEXIS 85258 at *5 (*citing* Rule 56(d) and *Baker v. American Airlines, Inc.*, 430 F.3d 750, 756 (5th Cir. 2005). Instead, "the party must set forth a plausible basis for belief that specified facts, susceptible of collection within a reasonable period of time, probably exist and indicate how the emergent facts, if adduced will influence the outcome of the summary judgment motion." *Id.*, (*citing American Family Life Assurance Co. of*

Columbus v. Biles, 887, 894 (5th Cir. 2013)).

19. Furthermore, the Court should deny a Rule 56(d) motion if further discovery would be futile or irrelevant to the dispute. *Langille v. Berthel, Fisher & Co. Financial Services, Inc.*, 2019 U.S. Dist. LEXIS 160153 at *9 (E.D. Cal 2019) (*citing Pflingston v. Ronan Engineering Co.*, 284 F.3d 999, 1005 (9th Cir. 2002); *Sistrunk*, 2017 U.S. Dist. LEXIS 85258 at * 14-15 (further discovery denied as irrelevant and futile); *Beckman Coulter, Inc v. Sysmex America, Inc.*, 2020 U.S. Dist. LEXIS 32573 *5-6 (N.D. Ill. 2020) (motion denied as the requested discovery would be futile)

20. Summary judgment is not a disfavored procedure, "but is instead the principal tool by which factually insufficient claims or defenses can be isolated and prevented from going to trial with the attendant unwarranted consummation of public and private resources." *Hayes,* 2012 U.S. Dist. LEXIS 142675 at *11-12 (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 327 (1986). Furthermore, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Hayes*, 2012 U.S. Dist. LEXIS 142675 at *12 (*Citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). "Rather there must be a *genuine* issue as to a *material* fact in order for a case to survive summary judgment." *Id.* "Disputes over irrelevant or unnecessary facts will not preclude an award of summary judgment." *Id.* (*citing T.W. Electric Service, Inc., v. Pac. Electric Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987)). The moving party is entitled to summary judgment if it can show that each material fact cannot be disputed. That is the case here.

IV.

THE RULE 54(D) MOTION HAS NO MERIT

21. The Receiver's Rule 54(d) Motion to Defer is insufficient on its face. It does not

explain what "discoverable" facts, if any, would overcome the extinguishment of the Receiver's Count 1 TUFTA claims pursuant to the TUFTA Section 24.010(a) statute of repose, and how additional discovery might uncover them.

22. Nor does the Motion to Defer explain what new facts the Receiver expects to learn from deposing Defendants about their employment by the Receivership Entities. He knows that Defendants were employed as telemarketers, cold-calling potential investors to ascertain their interest in buying oil and gas investments from the Receivership Entities. The Receiver has pleaded those facts, and Defendants admit them. The Receiver has pleaded that company officers (specifically Parker Hallam and Dustin Michael Miller Rodriguez) managed and directed Defendants' activities as salesmen. Defendants admit that. The Receiver had pleaded that Defendants were not licensed to sell securities and their compensation was based in part on the dollars ultimately invested by potential investors whom they had cold-called on the telephone. Defendants admit those facts as well.

23. The Receiver has had the Receivership Entities' payroll records for more than three (3) years. He knows every payment that they received, when they received it, and how much received. (Appx. Pages 15-16, 47, 49-56). Defendants do not dispute the receipt of that compensation for their work as employees. The Receiver's inescapable problem is that the Receivership Entities voluntarily paid ever dollar Defendants received, under a claim of right (they were salaried employees), with full knowledge of all relevant facts. *BMG Direct Marketing*, 178 S.W.3d at 768-69. That bars recovery.

24. The Receiver argues that he needs discovery "with respect to facts related to the degree of unjustness wrought by the retention of such funds ... weighed against the policy of enforcement," "whether a judgment depriving the violator of the benefits received will subvert

the policy underlying the rule of law that makes such transactional illegal, and "the extent of [Defendants] participation in the Breitling Fraudulent Scheme." That is precisely the sort of "vague assertion" about "unspecified facts" that does not satisfy the requirement of Rule 54(d). *Sistrrunk,* 2017 U.S. Dist. LEXIS 85258 at *5. The Motion to Defer does articulate "a plausible basis for belief that **specified facts, susceptible of collection within a reasonable period of time, probably exist and indicate how the emergent facts, if adduced will influence the outcome of the summary judgment motion."** *Id.*, (*citing American Family Life Assurance Co. of Columbus v. Biles*, 887, 894 (5th Cir. 2013)). Specifically, the Receiver fails to explain what facts, if any, he might uncover that would defeat the voluntary payment rule.

25. Furthermore, and more critically, further discovery would be futile. The Receiver waited too long to file his Court 1 TUFTA claims. The statute of repose in TUFTA Section 24.010(a) extinguished those claims before the lawsuit was filed. There are no disputed facts about the relevant dates, and the dates are all that matters. No amount of discovery will turn back the clock and revise the extinguished TUFTA claims.

26. No amount of discovery will create a cause of action that Texas law does not recognize. The Receiver's "unjust enrichment" claim does not state a cause of action in Texas. If the Court chooses to treat the Receiver's "unjust enrichment" claim as a claim for "money had and received" the voluntary payment rule still bars recovery of the compensation paid, absent fraud, deception, duress or coercion by Defendants. *BMG Direct Marketing*, 176 S.W.3d at 767. The Receiver pleads no facts suggesting that the Receivership Entities did not pay Defendants voluntarily for their sales efforts on the telephone. In fact, the Receiver pleads the opposite, that the Receivership Entities managed and directed Defendants who played "an integral role" the Breitling's entities scheme to defraud investors. The Receiver does not "need" discovery to

contradict the central allegations of the Complaint. There is no dispute and no genuine issue of material fact that the Receivership Entities voluntarily paid Defendants for their work as telemarketers. No additional evidence is needed, and further discovery would be futile.

27. The Receivership Entities behaved deplorably, perpetrated a fraud scheme, and wrongfully paid commission-based compensation to unlicensed salesmen, with full knowledge of the facts. The Receivership Entities are not eligible for equitable relief as against those same salesmen, i.e. Defendants. *Humphries-Mexia Co,* 116 Tex. 603, 614-15, 297 S.W. 225, 231 ("Equity does not adjust differences between wrong-doers"). No new facts will clean the "equitable" mud off the hands of the Receivership Entities. Further discovery would be futile.

28. There is no dispute Trevino and Eagle Rio received no payments from the Receivership Entities after May 20, 2014. There is no dispute that the Receiver was appointed on August 10, 2017, more than three (3) years later. The Receivership Entities knew about the payments and the reasons for them as soon as the payments were made. There is no "discovery rule." No new evidence will change those facts. Thus, the applicable two (2) year Texas statute of limitations in CPR Section 16.003(a) expired as to all payments received by Trevino and Eagle Rio more than a year before the Receiver was appointed. Further discovery would be futile.

29. There is no dispute Okpo received most of his compensation more than two (2) years before the Receiver was appointed. The Receivership Entities knew about the payments to Okpo and the reasons for them as soon as the payments were made. Okpo received only $32,615 from the Receivership Entities between August 10, 2015 and February 8, 2016, when he received his last paycheck. (Appx. Page 47, 49-56). The balance of the Receiver's claim against Okpo was already barred by limitations when the lawsuit was filed. No new evidence will change those undisputed facts, and further discovery would be futile.

30. Defendants should not be forced to the bear the costs of futile and wasteful discovery that would not affect the outcome of the Motion for Summary Judgment. The Motion to Defer should be denied.

V.

REQUESTED RELIEF

Defendants request that the Court deny the Receiver's Rule 54(d) Motion to Defer and proceed immediately to adjudicate their Motion for Summary Judgment. Defendants further request such other and further relief to which they may be justly entitled.

January 7, 2021

Respectfully submitted,

WHITAKER CHALK SWINDLE & SCHWARTZ, PLLC

By: */s/ Robert A. Simon*
Robert A. Simon
Texas Bar No. 18390000
301 Commerce Street, Suite 3500
Fort Worth, Texas 76102
Telephone: (817) 878-0543
Facsimile: (817) 878-0501
rsimon@whitakerchalk.com
ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify on January 7, 2021, 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