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

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

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

Plaintiff Thomas L. Taylor III, solely in his capacity as Court-appointed temporary receiver in *SEC v. Faulkner et al.*, Case No. 3:16-CV-1735-D (N.D. Tex. 2016) (the "SEC Action") for Breitling Energy Corporation, *et al.*, files this Reply in Support of his Motion (ECF No. 49) ("Rule 56(d) Motion") pursuant to Rule 56(d) of the Federal Rules of Civil Procedure ("Rules"). The Receiver has asked the Court to deny the Motion for Summary Judgment (ECF No. 38) ("Summary Judgment Motion")[1] of Defendants Reymond Trevino ("Trevino"), Eagle Rio Energy Companies, Inc. ("Eagle Rio"), and Okoto Okpo ("Okpo") (collectively "Movants") upon numerous bases.

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[1] Receiver cites to Movants' Brief in Support of their Summary Judgment Motion (ECF No. 39) ("Brief" or "Br.") in this Reply.

ECF No. 48 ("Summary Judgment Response"). In the alternative with respect to Count II[2] of the Receiver's Original Complaint (ECF No. 1) ("Complaint"), the Receiver filed the Rule 56(d) Motion asking the Court to defer consideration of the Summary Judgment Motion under Rule 56(d) until the Receiver can conduct certain discovery with respect to germane underlying facts. ECF No. 49.

Movants' Response asserts that the Rule 56(d) Motion should be denied because (1) it insufficiently details the discovery that the Receiver seeks and how that discovery would affect the determination of the Summary Judgment Motion, and (2) granting the Rule 56(d) Motion would be futile. Resp. at ¶¶ 21 – 30. Neither position is supported by the underlying facts or applicable law. If the Court does not deny the Summary Judgment Motion outright, the Rule 56(d) Motion should be granted in the alternative.

A. <u>The Rule 56(d) Motion Sufficiently Details the Discovery Sought by the Receiver and its Application to the Court's Determination of the Summary Judgment Motion</u>

The Receiver sufficiently details specific discovery which he seeks with respect to the facts material to the determination of the Summary Judgment Motion for Count II. In this regard, Movants have asserted that the Court should grant summary judgment in their favor with respect to the Receiver's Count II because their situation was analogous to that of defendants in *Regional Properties, Inc. v. Financial & Real Estate Consulting Co.*, 678 F.2d 552 (5th Cir. 1982). Summary Judgment Br. at 23. In *Regional Properties, Inc.* the Court held that fees paid to an unlicensed real estate broker could not be recovered even though the unlicensed broker was not entitled to certain fees that had not yet been paid. *Id.* at 563 – 65. As the Receiver detailed in the Rule 56(d) Motion,

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[2] ECF No. 1 at ¶¶ 52 – 56. Movants address the Receiver's Count I in their Response. ECF No. 52 at ¶¶ 1 – 2. However, the Receiver only seeks relief with respect to Count II. Rule 56(d) Mot. at 3.

courts weigh determination of this issue upon "a balance of the factors in [each] specific case," namely:

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

Regional Properties, Inc. at 564 (citing 2 G. Palmer, The Law of Restitution § 8-1, at 174 (1978)). This fact intensive balancing test does not lend itself to summary judgment determination, and the Receiver asserted that Movants' evidence did not support a finding they had met their initial burden under applicable summary judgment standards for movants. Summary Judgment Resp. at 20 – 21.

If, however, the Court finds that Movants met their initial burden under Rule 56 regarding this legal issue (*i.e.*, the summary judgment evidence establishes each of these elements in favor of Movants), such a fact intensive balancing test requires delay under Rule 56(d) for the Receiver to elicit specific facts that would place the issue in dispute, and preclude any judgment on the issue as a matter of law. The Receiver specifically detailed the discovery which would be necessary to obtain in this regard:

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

Rule 56(d) Mot. at 5. Such information is necessary for the Receiver to show that, at minimum, a material factual dispute exists with respect to "the degree of unjustness wrought by [the] retention [of these funds by Movants] weighed against the policy against enforcement," "whether a judgment depriving the violator of the benefits received will subvert the policy underlying the rule

of law that makes the transaction illegal," and "the extent of the [Movants'] participation" in the Breitling fraudulent scheme. *Id.* at 4 (*citing Regional Properties, Inc.* at 564).

Movants' assertions that this information the Receiver seeks to obtain is "vague" and "unspecified" are specious. Movants admit that they made hundreds of thousands of dollars selling fraudulent securities without a license. They were paid by terms that contradicted the language of the securities offerings they were selling. Eliciting their knowledge with respect to these matters goes directly to the balancing test propounded in *Regional Properties, Inc.*

Establishing the extent of the Movants' knowledge of and participation in the fraudulent scheme goes directly to the factors the Court must weigh in determining the Summary Judgment Motion. Discovery obtained by the Receiver establishing that Movants objectively knowingly sold the underlying fraudulent securities, turned a blind eye to obvious red flags regarding those securities offerings, and had previous experience selling securities without a license (including fraudulently offered securities) would contradict the "we know nothing" position Movants take in their affidavits and constitute a clear basis for the Court to deny summary judgment.

These specific topics of discovery propounded by the Receiver go directly to the Movants' legal position in the Summary Judgment Motion. It is self-evident that this discovery would be germane to the Court's determination of that motion, and particularly with respect to the fact-based balancing test at issue here. Accordingly, if the Summary Judgment Motion is not denied on the merits with respect to Count II, the Rule 56(d) Motion should be granted so that the Receiver may obtain the above information before it is determined by the Court.

B. <u>Granting the Rule 56(d) Motion Would not be Futile</u>

1. **The voluntary payment rule does not foreclose the relief sought by the Receiver**

The voluntary payment rule does not foreclose the relief sought by the Receiver because

(1) it is an affirmative defense that Movants failed timely to plead, and they cannot rely on it here, and (2) even if applied, fact issues are disputed with respect to the elements of the rule that must be established by Movants -- namely, the voluntary nature of the payments made by "zombie" entities under the "robotic" control of Christopher Faulkner. *See Janvey v. Democratic Sen. Campaign Comm., Inc.*, 712 F.3d 185, 192 (5th Cir. 2013) ("*DSCC*") (citing *Scholes v. Lehman*, 56 F.3d 750, 753 – 55 (7th Cir. 1995)).

The voluntary payment rule is an affirmative defense. *BMG Direct Marketing v. Peake*, 178 S.W.3d 763, 778 (Tex. 2005). Rule 8 "requires any matter constituting an affirmative defense to be set forth in a defendant's responsive pleading." *Allied Chemical Corp. v. Mackay*, 695 F.2d 854, 855 (5th Cir. 1983). Movants do not assert this affirmative defense in their First Amended Answer (ECF No. 41) ("Answer"). *See* Ans. at ¶¶ 59 – 70 (asserting "Extinguishment of Cause of Action Under TUFTA," "Good Faith and Reasonably Equivalent Value," "The Unjust Enrichment Claim is the Extinguished TUFTA Claim by Another Name," "Unjust Enrichment Is Not an Independent Cause of Action in Texas," "The Receiver Lacks Standing to Assert His Unjust Enrichment Claim," and "Statute of Limitations for Unjust Enrichment and Laches").

Although "technical failure to comply precisely with Rule 8(c) is not fatal" when it "does not result in unfair surprise," *Allied Chemical Corp.* at 855 – 56 (*citing Jones v. Miles*, 656 F.2d 103, 107 n. 7 (5th Cir. 1981)), Movants' raised this affirmative defense for the first time in their Reply in support of their Summary Judgment Motion (ECF No. 51) ("Summary Judgment Reply"). *E.g.*, *id*. at ¶¶ 13 – 16. Raising it for the first time in the final briefing on their Summary Judgment Motion "result[s] in unfair surprise" to the Receiver.

Movants cannot excuse their untimely assertion of this affirmative defense based upon the Receiver's pleading. *See* Summary Judgment Reply at ¶ 13 n.4 (Movants "would have pleaded the

voluntary payment rule as a defense if the Receiver had pleaded money had and received as a cause of action."). As the Movants' cited caselaw asserts, the "rule is a defense to claims asserting *unjust enrichment*." Reply at ¶13 (citing *BMG Direct Marketing*, at 767) (emphasis added). Count II to the Receiver's Complaint seeks the disgorgement of funds which unjustly enriched Movants. Movants had actual notice of the Receiver's claim and the opportunity to assert the voluntary payment rule affirmative defense in their original and first amended answers. They failed to do so. They cannot cure that failure through the Summary Judgment Reply and their Response to the Rule 56(d) Motion.

Moreover, even if the Court were to permit Movants to assert this defense, its application cannot be sustained here. Movants have the burden to prove the affirmative defense. *See e.g., Thomson Oil Royalty, LLC v. Graham*, 351 S.W.3d 162, 165 (Tex. App.—Tyler 2011, no pet.) (movant for summary judgment has burden of proving affirmative defenses). Movants must have established as a matter of law that the money they received was "voluntarily paid on a claim of right, with full knowledge of all the facts, [and] in the absence of fraud, deception, duress, or compulsion…'" *BMG Direct Marketing*, at 768 (*quoting Pennell v. United Ins. Co.*, 150 Tex. 541, 243 S.W.2d 572, 576 (1951); 40 Am.Jur. § 205 (1942)). They did not establish these facts in their Summary Judgment Motion and Reply, nor did they in the present Response.

In this regard, Movants' position that the entities that transferred money to them did so voluntarily is based upon the imputation of knowledge to the entities from those in control -- namely Christopher Faulkner. However, entities placed under the control of a receiver are innocent of any wrongdoing done in their name. *DSCC*, 712 F.3d at 190 – 92 (Stanford entities' actions were "coerced" by Allen Stanford who used them like "robotic tools" and "evil zombies") (*citing Scholes v. Lehman*, 56 F.3d 750 (7th Cir. 1995); *Janvey v. Alguire*, 847 F.3d 231, 241 (5th Cir.

2017) (same); *Jones v. Wells Fargo Bank*, 666 F.3d 955, 965 – 967 (5th Cir. 2012) (corporation is entity separate from its individual bad actors)). An entity whose actions -- like payments of illegal commissions to unlicensed salespersons in a fraudulent securities offering -- are "coerced" by a fraudster using them like "robotic tools" cannot have acted voluntarily, but rather only under "compulsion." *BMG Direct Marketing*, at 768. Movants cannot prevail upon the affirmative defense of the voluntary payment rule. Therefore, granting the Rule 56(d) Motion would not be futile.

2. **Entities under the Receiver's control are not prevented from recovering damages and restitution due to unclean hands.**

The Fifth Circuit's holding in *DSCC* also fatally undermines Movants' position that "[t]he Receivership Entities Have Unclean Hands and Are Not Eligible for Equitable Relief." Resp. at 14. As detailed above, receivership entities themselves are innocent of wrongdoing and cannot have intended to violate the law or deceive investors. *DSCC*, at 190 – 92 (citations omitted). "Put differently, the defense of *in pari delicto* loses its sting when the person who is *in pari delicto* is eliminated." *Id.*, at 191 (quoting *Scholes*, 56 F.3d at 754–55) (other citations omitted). Because the receivership entities on whose behalf the Receiver has sued the Movants do not have unclean hands with respect to the payments which unjustly enriched Movants, granting the Rule 56(d) Motion would not be futile.

3. **Movants' limitations defenses do not foreclose the Receiver's Count II**

Because the discovery rule applies to the Receiver's Count II, and the Receiver's claim under Count II did not accrue until some time after his appointment and the tolling of all limitations by the Court, summary judgment is not available based upon the passing of limitations deadlines -- granting the Rule 56(d) Motion would not be futile.

As detailed in the Receiver's Summary Judgment Response, Count II of the Receiver's Complaint asserts a cause of action for the disgorgement of funds that unjustly enriched Movants, whether as an independent cause of action or whether framed as a claim for disgorgement of money had and received. *Id*. at 11 – 14. Whether a two-year or four-year statute of limitations applies to claims for unjust enrichment/money had and received is immaterial, because the discovery rule applies to the Receiver's Count II. *Id*. at 17 – 19.

In this regard, the Receiver's claim under Count II did not accrue until some time after his appointment on September 25, 2017. *See DSCC*, 712 F.3d at 196 ("upon the Receiver's appointment … it was not readily evident to him or to anyone not privy to the inner workings of the Stanford corporations that these entities were part of a massive Ponzi scheme perpetrated by Stanford"). Additionally, this Court tolled the accrual of all claims of entities in the receivership simultaneously with the appointment of the Receiver. *See, e.g.*, SEC Action ECF No. 108 at ¶ 22. Therefore, any limitations with respect to Count II claims against Movants have not accrued at all prior to the Court's lifting of the Receivership Order litigation stay in response to Receiver's motion for leave to initiate this lawsuit. *See* SEC Action ECF No. 495. The Receiver's Count II is timely, and therefore granting the Rule 56(d) Motion would not be futile.

CONCLUSION

With respect to Count II of the Receiver's Complaint, if the Court does not deny summary judgment for Movants' failure to meet their Rule 56 burdens, it should alternatively grant the Rule 56(d) Motion and defer consideration of the Summary Judgment Motion until the Receiver is able to conduct the requested discovery with respect to underlying facts germane to that motion.

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Respectfully submitted,

THE TAYLOR LAW OFFICES, PC

Thomas L. Taylor III, Receiver
Texas Bar: 19733700
taylor@tltaylorlaw.com

245 West 18th Street
Houston, Texas 77008
Tel: 713.626.5300
Fax: 713.402.6154

GOFORTH LAW, PLLC

/s/ Andrew M. Goforth
Andrew M. Goforth

Andrew M. Goforth
Texas Bar: 24076405
andrew@goforth.law

7614 Fairdale Lane
Houston, Texas 77063
Phone: (713) 464-2263
Fax: (713) 583-1762

COUNSEL FOR PLAINTIFF RECEIVER
THOMAS L. TAYLOR III

CERTIFICATE OF SERVICE

I certify that on January 21, 2021, I filed the foregoing document through the Court's CM/ECF filing system, which satisfies service requirements under FED. R. CIV. P. 5(b)(2)(E).

/s/ Andrew M. Goforth
Andrew M. Goforth