

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

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

vs.

CHRISTOPHER A. FAULKNER, et al.,

Defendants.

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Civil Action No. 3:16-CV-1735-D

**RECEIVER'S MOTION TO ENTER PROPOSED FINAL BAR ORDER
AND BRIEF IN SUPPORT**

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Thomas L. Taylor III (“Receiver”), solely in his capacity as temporary receiver for the Breitling group of companies,¹ respectfully moves the Court to enter an order barring all third-party claims against Rothstein Kass P.A. d/b/a/ Rothstein Kass & Co. P.C. (“Rothstein Kass P.C.”), Rothstein Kass & Company, PLLC (“Rothstein Kass PLLC” and together with Rothstein Kass P.C., “Rothstein Kass”) and the Rothstein Kass Released Parties² (the “Bar Order”). The Receiver has reached a settlement of his claims against Rothstein Kass and Brian Matlock (the “Rothstein Kass Settlement”),³ the terms of which require entry of the Bar Order.

The Receiver requests that this Court find that the Bar Order is fair, equitable, and in the best interests of the Receivership Estate⁴ and all of its claimants. In support thereof, the Receiver respectfully states the following:

I. INTRODUCTION

1. Following a lengthy and thorough investigation of the Breitling fraud scheme, the Receiver commenced the lawsuit styled *Taylor v. Rothstein Kass & Company PLLC, et al.*, Civil Action No. 3:19-cv-1594-D, in the Northern District of Texas, Dallas Division (the “Rothstein

¹ Specifically, the Receiver files this Motion in his capacity as court-appointed Receiver for Breitling Oil & Gas Corporation (“BOG”), Breitling Royalties Corporation (“BRC”), Breitling Energy Corporation (“BECC”) f/k/a Bering Exploration, Inc. (“Bering”), Crude Energy, LLC (“Crude Energy”), Crude Royalties, LLC (“Crude Royalties”), and Patriot Energy, Inc. (“Patriot”).

² The “Rothstein Kass Released Parties” includes Rothstein Kass and their officers, directors, shareholders, partners, attorneys, associates, employees (including, without limitation, Brian Matlock (“Matlock”)), contractors, servants, agents, and representatives, and their predecessor or successor companies, predecessors or successors in business and interest, and their insurers, including, without limitation, Mendes & Mount, and their attorneys, including, without limitation, Paul Hastings LLP, Thomas A. Zaccaro, Nicolas Morgan, Carter Arnett PLLC, E. Leon Carter, Linda R. Stahl, and Courtney Barksdale Perez.

³ The agreement memorializing the Rothstein Kass Settlement (ECF No. 592, pp. 3-14) is included in the appendix to the Unopposed Motion to Approve Proposed Settlement with Rothstein Kass and Expedited Request for Entry of Scheduling Order. ECF No. 591 (the “Settlement Motion”).

⁴ As defined at ECF No. 496, ¶ 7(A).

Kass Action”) on July 1, 2019. Following two mediation sessions undertaken in that action, the Receiver reached a settlement of his claims against Rothstein Kass and Matlock, who provided audit services to BOG, BRC, and BECC (collectively the “Audit Entities”). Under the Rothstein Kass Settlement, once approved and effective, Rothstein Kass’s insurance carrier, on behalf of Rothstein Kass, would pay \$7.0 million (the “Settlement Payment”) to the Receiver. The Settlement Payment would become a Receivership Asset (as defined below) and ultimately be distributed pursuant to this Court’s approved plan of distribution (the “Distribution Plan” or “Plan” as approved in Orders entered at ECF Nos. 541, 541) to Breitling claimants whose claims have been allowed by the Receiver. In return, as part of the Rothstein Kass Settlement, Rothstein Kass and Matlock⁵ seek an order barring all claims against them and the Rothstein Kass Released Parties related to the Breitling fraud scheme that have been -- or could have been -- asserted against them.

2. The Bar Order would permanently bar, restrain, and enjoin the Receiver, the Receivership Estate, claimants of the Receivership (including investors in the Receivership Entities (as defined below)), the *Jinsun* Plaintiffs,⁶ and all other persons or entities, all and individually, from continuing or commencing claims or legal proceedings against Rothstein Kass or the Rothstein Kass Released Parties related to the Receivership Entities.

3. The Receiver asks the Court to approve the Bar Order because:

⁵ Matlock is a defendant in the Rothstein Kass Action but as a condition of the Settlement will be dismissed with prejudice within ten (10) days of Rothstein Kass’s payment of the Settlement Payment.

⁶ “*Jinsun* Plaintiffs” refers to plaintiffs in the case styled *Jinsun, L.L.C., et al v. Rothstein Kass & Co., PLLC*, No. CC-17-06249, in the County Court at Law No. 3, Dallas County, Texas (the “*Jinsun* Action”).

- a) The Rothstein Kass Settlement, which is contingent on the entry of the Bar Order, would result in the payment of \$7 million on behalf of Rothstein Kass to the Receivership for the benefit of *all* Receivership claimants;
- b) The only currently pending claims against Rothstein Kass -- the *Jinsun* Action claims -- infringe on Receivership Assets and are derivative and not independent of the Receiver's own claims against Rothstein Kass;
- c) In the absence of the Rothstein Kass Settlement -- and by necessity, the Bar Order -- there is meaningful risk that factual or legal issues could be resolved adversely to the Receivership, which could result in no recovery or a recovery significantly lower than the Settlement Payment; and
- d) Continuing to litigate the Rothstein Kass Action will result in the expenditure of Receivership Assets for payments of attorneys' fees, expert witness fees, and other litigation expenses and will risk the remaining Rothstein Kass insurance policy proceeds being eroded through payment of defense costs for the litigation.

II. BACKGROUND

A. Authority of the Receiver

4. On June 24, 2016, the United States Securities & Exchange Commission ("SEC") commenced the above-styled enforcement action (the "SEC Action") against several of the Receivership Entities as well as several individuals, including Breitling's CEO and the primary perpetrator of the Breitling fraud scheme, Christopher A. Faulkner ("Faulkner"). On August 14, 2017, the Court appointed Thomas L. Taylor III as temporary receiver for "all oil-and-gas related assets" of Defendants Faulkner, BOG, and BECC. *See* ECF No. 108, pp. 1-2. The Receiver

currently serves as temporary receiver for the estates of (including all assets of) Defendants Faulkner, BOG, BECC, Crude Energy, and Patriot, and non-parties BRC, Breitling Ventures Corporation, Breitling Holdings Corporation, Breitling Operating Corporation, Breitling Energy Companies, Inc., Breitling Royalty Funds, LLC, Crude Royalties, Inwood Investments, Inc. and Grand Mesa Investments, Inc. (and their predecessor companies, including BECC's predecessor Bering) (collectively, excluding Faulkner, the "Receivership Entities"). ECF No. 496, ¶ 2.⁷

5. The Receiver was specifically appointed as receiver for and over the "Receivership Assets," Receivership Order, ¶ 2, which include "all assets—in any form or of any kind whatsoever—owned, controlled, managed, or possessed by..., directly or indirectly," Faulkner and the Receivership Entities. *Id.*, p. 1. The Receivership Order also specifically authorizes and empowers the Receiver to investigate and prosecute claims "in his discretion" to recover assets for the Receivership Estate. *Id.*, ¶¶ 42-43.

6. Following his own investigation -- including interviews of witnesses, review of thousands of pages of Breitling records, and analysis of the facts surrounding certain parties that may have assisted or participated in the Breitling fraud scheme -- on July 12, 2019 the Receiver filed his Unopposed Motion for Leave to Engage Litigation Counsel on a Contingency Fee Basis, ECF No. 456, in order to retain the law firm Castillo Snyder P.C. as litigation counsel ("Litigation Counsel") to prosecute claims in Ancillary Proceedings (as defined at ECF No. 496, ¶ 32) against Rothstein Kass and Brian Matlock, as well as to investigate and prosecute claims against any other potentially liable third parties involved in the Breitling fraud scheme. The Court granted said Motion by Order dated July 15, 2019. ECF No. 457. The Receiver thereafter shared with Litigation

⁷ ECF No. 108, as amended by Orders entered at ECF Nos. 142, 320, 418, and 496, are collectively referred to as the "Receivership Order." Unless otherwise specified, citations to the Receivership Order refer to pages and paragraphs in ECF No. 496.

Counsel the evidence regarding Rothstein Kass and Matlock that he had gathered and, following Litigation Counsel's review of said materials and further discussions with the Receiver concerning the facts of the potential claims against Rothstein Kass and Matlock, on July 12, 2019 the Receiver engaged Litigation Counsel on a 30% contingency fee basis to prosecute the Receiver's litigation claims against Rothstein Kass and Matlock.

B. The *Jinsun* Action

7. Upon initially appointing the Receiver on August 14, 2017 (ECF No. 108) and expanding the scope of Receivership Assets on September 25, 2017 beyond only oil and gas-related assets (ECF No. 142), the Court also enjoined the continuation or commencement of all Ancillary Proceedings involving, among other things, Receivership Assets or current or former officers, directors, and agents of the Receivership Entities (the "Stay Order").⁸

8. Notwithstanding the Stay Order's clear terms, on November 28, 2017, former officers, directors, and shareholders of Bering sued Rothstein Kass PLLC⁹ in Texas state court for various claims related to Rothstein Kass's audits of BOG, BRC, and BECC. Bering was a public corporation that, by a reverse-merger transaction with BOG and BRC closing on or about December 9, 2013, was renamed BECC (the "Merger"). Bering/BECC issued approximately 461 million shares of common stock to BOG and BRC (approximately 92.5% of shares of common stock following closing) in exchange for the acquisition and assumption, respectively, of certain assets and liabilities of BOG and BRC. App. at 14, Ex. A ("Merger APA," Sec. 1.6). As the

⁸ References to the "Stay Order" refer to the provisions of ECF No. 108, ¶¶ 20-22, and ECF Nos. 142, 320, 418, and 496, ¶¶ 32-34.

⁹ The Receiver and the *Jinsun* Plaintiffs have since argued that Rothstein Kass P.C., rather than Rothstein Kass PLLC, is the proper defendant in both suits. For ease of reference, the Receiver will refer to Rothstein Kass collectively in discussing the suits and the Rothstein Kass entities.

predecessor to BECC, Bering is considered a Receivership Entity. *See SEC v. Faulkner*, 3:16-CV-1735-D, 2020 WL 584614, at *6 (N.D. Tex. Feb. 6, 2020) (“Bering, however, became the receivership defendant BECC. The Receiver is entitled to pursue, and has, in fact, pursued, claims for damages both to Bering (pre-merger) and to BECC (post-merger).”)

9. The *Jinsun* Plaintiffs’ claims have continually shifted, but as of their Ninth Amended Petition, they sought damages for (a) loss of share price in BECC and (b) the alleged loss of an oil and gas field owned by Bering, the “North Edna” field. *See App.* at 60, Ex. B (“Accordingly, Plaintiffs have been damaged (i) by the failure to realize the full potential of Bering’s combined proved and probable oil and gas assets and (ii) the loss of the BECC shares received through the Transaction resulting from their reliance on Breitling/BECC’s fraudulent financial statements.”).¹⁰ However, in their recently filed Third Motion to Lift Stay, Request for Judicial Notice of Receiver’s Settlement with Rothstein Kass, and Brief in Support, ECF No. 587 (“Motion to Lift Stay”), filed April 7, 2021, the *Jinsun* Plaintiffs now claim they are seeking damages for their shares in *Bering* and for control over Bering. Motion to Lift Stay, p. 8. The oil and gas field allegedly owned by Bering -- North Edna -- is not discussed.

10. On four occasions, the Court found that the *Jinsun* Action implicated Receivership Assets, including Receivership claims, and therefore stayed the action.

11. *First*, in August 2018, Rothstein Kass moved for clarification of the Stay Order, asking this Court to clarify whether the Stay Order applied to the *Jinsun* Action. ECF No. 301. In

¹⁰ These two damages theories tie directly to the value of the shares of Bering/BECC stock that the *Jinsun* Plaintiffs own and to Bering’s assets. Bering/BECC shareholders were permitted to assert claims against the Receivership as part of the Court-approved Plan. In this regard, the Plan contemplates first-priority distributions to the class of “Investor Claimants”: those “who have suffered a ‘net out-of-pocket loss’ as a result of an investment in or through” certain Receivership Entities, including BECC/Bering, which class includes shareholders. *See* ECF No. 541, p. 3.

an October 24, 2018 Memorandum Opinion and Order, the Court held that the Stay Order did apply to the *Jinsun* action based on language in the Stay Order itself and because the *Jinsun* action threatened a Receivership Asset (*i.e.*, the potential claim of the Receiver against Rothstein Kass for disgorgement). *SEC v. Faulkner*, 3:16-CV-1735-D, 2018 WL 5279321, at *4-5 (N.D. Tex. Oct. 24, 2018).

12. *Second*, the *Jinsun* Plaintiffs filed a motion to vacate the Court's October 24, 2018 order, arguing that they would nonsuit their equitable forfeiture and disgorgement claim and that two of the *Jinsun* Plaintiffs, J. Leonard Ivins and Steven Plumb, were suing in their capacities as shareholders, not as directors or officers of Bering. ECF No. 358. On March 5, 2019, the Court rejected the *Jinsun* Plaintiffs' argument and held that the *Jinsun* Plaintiffs' professional negligence claim against Rothstein Kass is an asset of the Receiver and that despite the *Jinsun* Plaintiffs' attempts to clarify the capacities in which Ivins and Plumb sued, the *Jinsun* Action fell within the plain scope of the Stay Order. *SEC v. Faulkner*, 3:16-CV-1735-D, 2019 WL 1040679, at *3-5 (N.D. Tex. Mar. 5, 2019).

13. *Third*, as the *Jinsun* Action continued, the Receiver filed his Original Complaint against Rothstein Kass and Matlock on July 1, 2019. Rothstein Kass Action, ECF No. 1. Undeterred by the Court's clear orders, and without receiving permission from the Court to do so, the *Jinsun* Plaintiffs nevertheless then filed their Ninth Amended Petition in the *Jinsun* action, alleging, among other claims, a claim against Rothstein Kass for aiding and abetting a breach of fiduciary duty and conspiracy to aid and abet a breach of fiduciary duty. Because both the *Jinsun* Plaintiffs and the Receiver pursued breach of fiduciary duty claims, and because discovery demonstrated that the *Jinsun* Plaintiffs' claims and damages belonged to Bering (a receivership entity), not the *Jinsun* Plaintiffs, on October 16, 2020, Rothstein Kass was again forced to seek

clarification of the Stay Order, arguing that the *Jinsun* Plaintiffs continued to pursue Receivership Assets in violation of the order. ECF No. 487. On February 6, 2020, the Court again clarified that the *Jinsun* Action was stayed under the Stay Order because the *Jinsun* Plaintiffs' fiduciary duty claim was a Receivership Asset and because the *Jinsun* Action impacted the potential rights or property of the Receivership Estate. *SEC v. Faulkner*, 2020 WL 584614, at *3-7.

14. *Fourth* and finally, on February 10, 2020 the *Jinsun* Plaintiffs filed an Emergency Motion to Lift Stay, or in the Alternative, to Modify Stay, arguing that they would nonsuit their fiduciary duty claim and that they would be prejudiced by the Stay Order. ECF No. 516. Both Rothstein Kass and the Receiver opposed this motion. ECF Nos. 520, 521. On February 25, 2020, the Court rejected the *Jinsun* Plaintiffs' arguments and found that two of the three factors laid out in *SEC v. Wencke*, 622 F.2d 1363 (9th Cir. 1980) weighed in favor of keeping the stay in place. *SEC v. Faulkner*, 3:16-CV-1735-D, 2020 WL 905354, at *3-4 (N.D. Tex. Feb. 25, 2020).

C. The Investigation of Claims Against Rothstein Kass

15. Based on the preliminary evidence gathered and reviewed by the Receiver concerning Rothstein Kass's auditor relationship with the Audit Entities, which evidence the Receiver found sufficient to warrant the filing of a complaint, the Receiver filed the Original Complaint against Rothstein Kass and Matlock on July 1, 2019. Rothstein Kass Action, ECF No. 1.

16. Shortly after said filing and following their July 12, 2019 retention by the Receiver, Litigation Counsel entered appearances in the case as lead counsel and thereafter vigorously prosecuted the case for over a year and a half until the Rothstein Kass Settlement was reached. Litigation Counsel spent hundreds of hours over a roughly six-month period performing a detailed review and analysis of all the paper and electronic records that Rothstein Kass and the SEC had

previously produced to the Receiver, including the review of months of e-mail communications between Rothstein Kass and Faulkner and other individuals at Breitling, as well as thousands of pages of documents belonging to the Receivership Entities that were in the custody of the Receiver. Furthermore, and because the SEC had taken the testimony of dozens of former Breitling executives as well as of Rothstein Kass's employees beginning in 2013, Litigation Counsel reviewed over 35 deposition transcripts which detailed facts relevant to the history of the Breitling/Rothstein Kass relationship and internal operations of the Receivership Entities.

17. The investigation and prosecution of the Receiver's claims against Rothstein Kass necessarily required Litigation Counsel, on the front end, to spend hundreds of hours investigating and understanding the background and history of the complex web of the Receivership Entities, the financial transactions, securities offering materials, interrelationships and dealings between and among the various Receivership Entities and the investors that invested with the Receivership Entities, and the complex facts relating to Faulkner's fraud scheme and how it was perpetrated through the various Receivership Entities.

D. The Rothstein Kass Action

18. The Receiver commenced the Rothstein Kass Action on July 1, 2019.

19. On September 3, 2019 Rothstein Kass and Matlock filed a Motion to Dismiss the Receiver's Original Complaint in its entirety. Rothstein Kass Action, ECF No 19. The Receiver filed his Response to this Motion to Dismiss on September 20, 2019, *id.*, ECF No. 22, and Rothstein Kass and Matlock filed their Reply in support of their Motion to Dismiss on October 4, 2019. *Id.*, ECF No. 25.

20. By its Memorandum Opinion and Order dated February 4, 2020, Rothstein Kass Action, ECF No. 34, the Court granted in part and denied in part Rothstein Kass and Matlock's

Motion to Dismiss, denying Rothstein Kass's and Matlock's motion with respect to the Receiver's participation in breach of fiduciary duty and negligence claims, but granting it with respect to the Receiver's other claims. The Receiver then filed his Amended Complaint against Rothstein Kass and Matlock on April 24, 2020. *Id.*, ECF No. 45. The Amended Complaint asserted claims against Rothstein Kass and Matlock for negligence and participation in breaches of fiduciary duties.

21. Thereafter, the parties engaged in substantive discovery, producing and reviewing thousands of documents and taking 19 depositions of individuals and entities related to the Receivership Entities, as well as of each party's expert witnesses.

22. On December 8, 2020, Rothstein Kass and Matlock filed their Motion for Summary Judgment and Brief in Support, asking the Court to dismiss the Receiver's remaining claims. Rothstein Kass Action, ECF Nos. 94 and 95. On January 12, 2021, the Receiver filed his response to Rothstein Kass's and Matlock's Motion for Summary Judgment. *Id.*, ECF No. 100. The parties then engaged in two mediation sessions with Judge Kaplan prior to the due date for Rothstein Kass's and Matlock's Reply in Support of their Motion for Summary Judgment.

23. As detailed in the Settlement Motion, *id.* at ¶¶ 15-23, following the second mediation session the parties agreed to terms ultimately incorporated into the Rothstein Kass Settlement, including the entry of the Bar Order by the Court.

E. The Bar Order

24. The proposed Bar Order was negotiated and agreed to following arm's-length negotiations resulting in the Rothstein Kass Settlement. The proposed Bar Order would bar, restrain, and enjoin the Receiver, the Receivership Estate, the *Jinsun* Plaintiffs, and all other persons or entities, collectively or individually, from directly, indirectly, or through a third party, instituting, reinstating, intervening in, initiating, commencing, maintaining, continuing, filing,

encouraging, soliciting, supporting, participating in, collaborating in, or otherwise prosecuting, against Rothstein Kass or any of the Rothstein Kass Released Parties, any action, lawsuit, cause of action, claim, investigation, demand, complaint, or proceeding of any nature, including but not limited to litigation, arbitration, or other proceeding, in any forum, whether individually, derivatively, on behalf of a class, as a member of a class, or in any other capacity whatsoever, that in any way relates to, is based upon, arises from, related to, or is connected with (i) the Rothstein Kass audits of BOG, BRC, and BECC; (ii) the Receivership Entities; (iii) any investment of any type with any one or more of the Receivership Entities; (iv) any one or more of Rothstein Kass's relationships with any one or more of the Receivership Entities; (v) the *Jinsun* action; (vi) Rothstein Kass's provision of services to or for the benefit or on behalf of the Receivership Entities; or (vii) all matters that were or could have been asserted in the SEC Action, the Rothstein Kass Action, the *Jinsun* Action, or any proceeding concerning the Receivership Entities pending or commenced in any forum.

25. For the reasons described herein, the Bar Order is fair and reasonable, and entry of the Bar Order is in the best interests of the Receivership Estate and all those who would claim substantive rights to a distribution of Receivership Assets.

III. REQUEST FOR APPROVAL OF THE BAR ORDER

A. Legal Standards

26. “[T]he district court has broad powers and wide discretion to determine the appropriate relief in an equity receivership.” *SEC v. Kaleta*, 530 F. App'x 360, 362 (5th Cir. 2013) (per curiam) (“*Kaleta*”) (quoting *SEC v. Safety Fin. Serv.*, 674 F.2d 368, 372-73 (5th Cir. 1982)); see also *Zacarias v. Stanford Int'l Bank, Ltd.*, 945 F.3d 883, 895 (5th Cir. 2019). “These powers

include the court's 'inherent equitable authority to issue a variety of "ancillary relief" measures in actions brought by the SEC to enforce the federal securities laws.'" *Kaleta*, 530 F. App'x at 362 (quoting *Wencke*, 622 F.2d at 1369). "[N]o federal rules prescribe a particular standard for approving settlements in the context of an equity receivership; instead, a district court has wide discretion to determine what relief is appropriate." *SEC v. Kaleta*, 2012 WL 401069, at *4 (S.D. Tex. Feb. 7, 2012) (quoting *Gordon v. Dadante*, 336 F. App'x 540, 549 (6th Cir. 2009)), *aff'd*, 530 F. App'x 360 (5th Cir. 2013). Congress enacted a "loose scheme" for federal equity receivers "on purpose" and "wished to expand the reach and power of federal equity receivers, especially in the context of consolidation." *Janvey v. Alguire*, No. 3:09-CV-00724-N, 2014 WL 12654910, at *11, *15 (N.D. Tex. July 30, 2014), *aff'd*, 847 F.3d 231 (5th Cir. 2017).

27. Moreover, "courts have consistently held that Congress intended for federal equity receivers to be utilized in situations involving federal securities laws, like the present receivership," and in such cases for the court to act as a court in equity for the benefit of defrauded investors. *See Janvey v. Alguire*, 2014 WL 12654910, at *16; *see also* 15 U.S.C. § 80a-41(d). "Now . . . the corporations created and initially controlled by [Faulkner] are controlled by a receiver whose only object is to maximize the value of the corporations for the benefit of their investors and any creditors." *Janvey v. Alguire*, 2014 WL 12654910, at *20 (quoting *Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 191 (5th Cir. 2013) (quoting *Scholes v. Lehmann*, 56 F.3d 750, 755 (7th Cir. 1995))).

28. The Receivership Order in the SEC Action closely reflects and furthers all of the above objectives, directing the Receiver to prosecute, defend, and compromise actions in order to maximize timely distributions to claimants.

29. To protect receivership assets, the Court may “issue bar orders to prevent parties from initiating or continuing lawsuits that would dissipate receivership assets or otherwise interfere with the collection and distribution of the assets.” *SEC v. Stanford Int’l Bank, Ltd.*, 927 F.3d 830, 840 (5th Cir. 2019) (“*Lloyds*”). Indeed, a receiver’s role in distributing assets would be diminished if claimants -- such as the *Jinsun* Plaintiffs -- could “jump the queue” by bringing their own actions against third parties against whom the receiver is pursuing claims. *See Zacarias*, 945 F.3d at 896-97. However, the Court may only bar claims that the receiver has standing to assert and compromise, which includes claims that are derivative and non-independent of the receiver’s own claims. *See Rotstain v. Mendez*, 986 F.3d 931, 939-40 (5th Cir. 2021). Claims are derivative and non-independent when they are dependent on injuries to the receivership entities and compete with receivership assets by seeking the same recovery the receiver seeks. *See Zacarias*, 945 F.3d at 900-901; *Rotstain*, 986 F.3d at 940-41. The *Jinsun* Plaintiffs’ claims in the *Jinsun* Action fall within both of the preceding circumstances.

B. The *Jinsun* Plaintiffs’ Claims are Derivative and Non-Independent of the Receiver’s Claims

30. The *Jinsun* Plaintiffs have -- undeterred by the Court’s orders staying the case -- pursued claims against Rothstein Kass (a) in their capacities as officers and directors of a Receivership Entity, (b) that belong to the Receivership and (c) that pursue Receivership Assets. These claims are derivative of the Receiver’s own claims and infringe on the proper function of the Receivership. *Zacarias*, 945 F.3d at 896 (“The receivership’s role is undermined if investor-claimants jump the queue, circumventing the receivership in an attempt to recover beyond their pro rata share.”).

31. The *Jinsun* Plaintiffs’ claims are derivative of the Receiver’s own claims on a fundamental level. First, like the claimants in *Zacarias*, the *Jinsun* Plaintiffs bring claims against

a third-party for injuries allegedly stemming from that third-party's interactions with receivership entities and the underlying fraudulent scheme -- in this case, from Rothstein Kass's conduct and representations during its audits of the Audit Entities. *Zacarias*, 945 F.3d at 900-02; *see also Rotstain*, 986 F.3d at 941 (“As in *Zacarias*, the Defendants here are alleged to be participants in the Ponzi scheme, even if unknowing ones, and the investors' claims are based on conduct in furtherance of that scheme.”). The Receiver brought suit to recover for damages, in part, from the injuries to the Audit Entities in the form of additional liabilities incurred to investors -- like the *Jinsun* Plaintiffs -- in the Audit Entities. The *Jinsun* Plaintiffs' injuries, allegedly incurred in their individual capacities as investors in an Audit Entity,¹¹ are dependent on injuries to the Receivership Estate. *Rotstain*, 986 F.3d at 940 (Third-party claims in *Zacarias* were derivative of the receiver's claims because the receiver sought recovery for injuries in the form of additional liabilities, and “the [*Jinsun* Plaintiffs'] claims depended on that injury; had the [Receivership Entities] not been injured, neither would the individuals who invested in them.”).

32. If this were not enough, the *Jinsun* Plaintiffs' claims go a step farther by directly seeking recovery for damages to Bering itself. Indeed, this Court has already held on two separate occasions that the *Jinsun* Plaintiffs were pursuing claims belonging to the Receiver for this very reason. The *Jinsun* Plaintiffs seek damages for the alleged loss of their share value in BECC f/k/a Bering.¹² But as this Court has already held, “to extent the *Jinsun* Plaintiffs seek to recover for the loss in value of their shares in Bering, an individual shareholder generally has ‘no separate and

¹¹ As discussed below, the *Jinsun* Plaintiffs' claims stem from alleged injuries to Bering itself, rather than to the individual investors, despite the *Jinsun* Plaintiffs' protestations otherwise.

¹² While the *Jinsun* Plaintiffs' damages expert opined on their damages for alleged loss of share value in BECC, the *Jinsun* Plaintiffs now claim they are seeking damages for their shares in Bering. *Compare* App. at 60, Ex. B, *with* Motion to Lift Stay, p. 8. Regardless, Bering and BECC are two names for the same company, and because that company is a Receivership Entity (under either name), the analysis remains the same.

independent right of action for injuries suffered by the corporation which merely result in the depreciation of the value of their stock.” *Faulkner*, 2020 WL 584614, at *6 (quoting *Wingate v. Hajdik*, 795 S.W.2d 717, 719 (Tex. 1990)).

33. As of their recent Motion to Lift Stay, the *Jinsun* Plaintiffs have doubled down and now assert claims seemingly as officers and/or control persons of Bering, stating that but for Rothstein Kass’s actions,

[*Jinsun*] Plaintiffs would not have allowed Bering to go forward with the transaction, [*Jinsun*] Plaintiffs would still own their shares in Bering, and [*Jinsun*] Plaintiffs could have either continued operating Bering as a public company or they could have otherwise sold it to another company with scrupulous business practices.

Motion to Lift Stay, p. 8. The *Jinsun* Plaintiffs now seem to be asserting that they were injured because they lost control over Bering and would have sold the public company elsewhere.¹³ In effect, they are claiming damages for the lost value of Bering itself. But the loss of value of a corporation must belong to the corporation itself, not to its shareholders. *Hajdik v. Wingate*, 753 S.W.2d 199, 201 (Tex. App. Houston [1st Dist.] 1988) (“The cause of action for injury to the property of a corporation, or the impairment or destruction of its business is vested in the corporation, as distinguished from its shareholders.”), *aff’d*, 795 S.W.2d 717 (Tex. 1990).

¹³ This claim has its own flaws. Only the officers and directors of Bering had control over it. And only the Bering board of directors -- not its shareholders -- had the authority to approve, and did approve, the Merger. *See* App. at 30-31, Ex. A (Merger APA, Sec. 3.3) (“The Company has full corporate power and authority to execute and deliver this Agreement The execution, delivery and performance of this Agreement ... [has] been duly and validly authorized by the Company’s board of directors, and no other corporate proceedings on the part of the Company are necessary to authorize this Agreement”). To the extent the *Jinsun* Plaintiffs are now claiming damage from loss of control and/or for their decisions as officers and directors of Bering, the *Jinsun* Plaintiffs previously agreed they could not pursue these claims in that capacity when the court stayed them, and, for the same reasons, those claims should now be barred.

34. Further, the *Jinsun* Plaintiffs continue to pursue damages for the alleged loss of an oil and gas well they have explicitly admitted belonged to Bering. *See* App. at 110-11, Ex. C (“Bering Exploration owned the [North Edna] lease....”). Although the *Jinsun* Plaintiffs do not mention the North Edna well in their recent Motion to Lift Stay, they presumably intend to continue seeking damages for it. But any injury derivative of Bering’s property must belong to Bering itself, not the individual shareholders. *See Wingate*, 753 S.W.2d at 201.

35. The *Jinsun* Plaintiffs’ repeated attempts to modify their claims to evade the Court’s stay orders -- and to avoid the derivative nature of the claims -- should be treated as what they are: “word play.”¹⁴ *See Zacarias*, 945 F.3d at 900 (noting that objectors’ attempts to distinguish their claims from the receiver’s with different theories of liability for the underlying scheme was “word play” and that the only injury came from the underlying fraudulent scheme.) Regardless of how they shift their claims, the *Jinsun* Plaintiffs cannot escape the simple fact that any injuries they may have suffered, if at all, derive from injuries to Bering and/or BECC, and therefore are derivative of the Receiver’s own claims. *Id.*; *Rotstain*, 986 F.3d at 940.

36. Second, the *Jinsun* Plaintiffs’ claims are derivative of the Receiver’s claims because they compete with Receivership Assets. *Rotstain*, 986 F.3d at 940 (Third party claims in *Zacarias* were derivative of the Receiver’s claims because they competed with Receivership assets); *Zacarias*, 945 F.3d at 900 (“The [*Jinsun* Plaintiffs’] claims affect receivership assets because every dollar the [*Jinsun* Plaintiffs] recover is a dollar that the receiver cannot, frustrating the receiver’s pro rata distribution to investors—a core element of its draw upon equity.”) The only potential recovery from Rothstein Kass is through its “wasting” insurance policies. Any

¹⁴ The *Jinsun* Plaintiffs have previously stated they will nonsuit their breach of fiduciary duty claims in light of the Court’s order stating such claims belong to the Receiver. The amendment will result in the *Jinsun* Plaintiffs’ **tenth** amended petition.

recovery the *Jinsun* Plaintiffs manage to obtain by jumping the queue of Receivership claimants and filing their own claims directly against Rothstein Kass must necessarily come from the remains of these insurance policies, which would frustrate the Receiver's own recovery from those same policies.

37. Because the *Jinsun* Plaintiffs' claims are derivative of the Receiver's claims, the Receiver has standing to settle them, and the Court may therefore bar them. *Rotstain*, 986 F.3d at 941 ("Because the [investors'] claims were derivative and dependent, the receiver was authorized to bring them and to settle them.").

C. The Bar Order is Fair, Equitable, and Achieves the Goals of the Receivership

1. *Receivership claimants, including the Jinsun Plaintiffs, have received due process with respect to their claims through the Plan of distribution and the proposed Scheduling Order*

38. All potential claimants in the Receivership have had their due process rights recognized and upheld through the Court's approval process regarding the Plan and the process outlined in the proposed scheduling order permitting proceedings related to the approval of the Rothstein Kass Settlement and entry of the Bar Order. *See Zacarias*, 945 F.3d at 903 (noting objectors to bar order had due process upheld through opportunity to object to settlement and bar order and opportunity to submit claims in the receivership).

39. First, as part of the Receiver's court-approved distribution Plan, *see* ECF Nos. 541, 542, investors in the Receivership Entities -- including BECC/Bering shareholders like the *Jinsun* Plaintiffs -- were afforded the opportunity to submit claims to the Receivership regarding injuries they may have suffered from the Breitling fraud scheme. Indeed, Bering investors such as the *Jinsun* Plaintiffs had access to a separate claim form on the Receiver's website. *See* App. at 116, Ex. D. To the extent that any Audit Entity investor believes Rothstein Kass injured them through

its alleged conduct related to the Breitling fraud scheme, that investor could have sought recovery through the claims process. To this end, the Settlement Payment received by the Receiver on behalf of Rothstein Kass will become a Receivership Asset, which ultimately will be distributed on a *pro rata* basis to Receivership claimants with allowed claims. Accordingly, potential claimants, including the *Jinsun* Plaintiffs, have been afforded due process. *Id.* (finding “all due process has been afforded” in part because objectors to bar order had notice and opportunity to submit claims in the receivership).

40. Second, the proposed Scheduling Order submitted with the concurrently filed Settlement Motion allows any interested party, including the *Jinsun* Plaintiffs, to submit objections to either the approval of the Rothstein Kass Settlement or entry of the Bar Order. Potential claimants will be made aware of this right to object to the Rothstein Kass Settlement or Bar Order; as discussed in the Settlement Motion, the Receiver will provide notice of the Rothstein Kass Settlement, the Bar Order, and the opportunity to object to same to interested parties, and will publish notice in the *Wall Street Journal* and *Dallas Morning News*. The opportunity to object to the Rothstein Kass Settlement and/or Bar Order likewise affords claimants due process. *Zacarias*, 945 F.3d at 903 (“[T]he court afforded the Plaintiffs-Objectors all the process due: notice and opportunity to be heard on the proposed settlement and bar orders—an opportunity they seized.”)

2. *The proposed settlement is valuable and entry of the Bar Order is necessary for the settlement*

41. The \$7 million Settlement Payment is substantial given the complex nature of the claims, the vigorous defense of the litigation, and the depleting nature of the applicable insurance policies. “A proposed settlement need not obtain the largest conceivable recovery . . . to be worthy of approval; it must simply be fair and adequate considering all the relevant circumstances.” *Klein v. O’Neal, Inc.*, 705 F. Supp. 2d 632, 649 (N.D. Tex. 2010) (Fitzwater, C.J.). In the absence of

evidence otherwise, a district court may conclude that a proposed settlement amount is sufficient. *Kaleta*, 2012 WL 401069, at *4. The value of the Rothstein Kass Settlement to the Receivership Estate and the Breitling victims, when taken in context, is therefore significant.

42. The Settlement Payment will become a Receivership Asset, and the Receiver will distribute the Receivership Assets to the Breitling claimants pursuant to the Court approved Plan. Thus, the relief requested herein will further “[t]he primary purpose of the equitable receivership [which] is the marshaling of the estate’s assets for the benefit of all the aggrieved investors and other creditors of the receivership entities.” *SEC v. Parish*, 2010 WL 8347143, at *6 (D.S.C. Feb. 10, 2010), *modified*, 2010 WL 8347144 (D.S.C. Apr. 8, 2010) (approving settlement).

43. However, this valuable settlement is conditioned on the Court entering the Bar Order. As the *Zacarias* court noted, “[A Defendant’s] incentives to settle are reduced—likely eliminated—if each [Breitling] investor retains an option to pursue full recovery in individual satellite litigation. Such resolution is no resolution.” 945 F.3d at 900. Individual investors should not be permitted to “[ride] the Receiver train until the end and then decide[] to hold up a settlement” that is beneficial to the Receivership and qualifying claimants. *Id.* Accordingly, the Court should enter the Bar Order.

3. *Recovery from litigation is uncertain and would dissipate Receivership Assets*

44. As discussed more fully in the Settlement Motion, while the Receiver believes that his claims against Rothstein Kass and Matlock are meritorious and would be successful, his claims are not without risk. Indeed, more than half of the original case was dismissed by this Court pursuant to its Memorandum Opinion and Order regarding Rothstein Kass and Matlock’s Motion to Dismiss. Further, Rothstein Kass and Matlock deny any liability to the Receiver and have

vigorously disputed the validity of the remaining claims in the Rothstein Kass Action. Multiple hotly contested issues remain and promise months of uncertain litigation.

45. If the Bar Order is not entered and litigation continues, Receivership Assets would be diminished: any potential recovery from Rothstein Kass would be reduced by the cost of prolonged litigation “not only in the receiver’s own action but also in the [Breitling investors’] myriad satellite suits, into which the receivership is likely to be drawn.” *Zacarias*, 945 F.3d at 900-01. Indeed, the Receiver’s ability to collect the maximum value of a judgment from Rothstein Kass and Matlock is difficult given the nature of Rothstein Kass’s depleting insurance policies. *See id.* (noting that one party’s ability to satisfy judgment was uncertain given its “wasting” insurance policy). As defense costs -- including further motion practice, trial preparation, expert witness fees, and associated trial costs such as trial graphics, mock trial and jury consultant expenses, cost of reproduction of documents and trial exhibits -- mount, any potential recovery for the Receiver and for Receivership claimants will be reduced.

46. The same is particularly true if Rothstein Kass must simultaneously litigate the *Jinsun* Plaintiffs’ claims. Any such claims against Rothstein Kass face the same (and more) factual and legal challenges faced by the Receiver, as discussed further in the Settlement Motion. And because Rothstein Kass’s insurance policies represent a finite amount of resources, prolonged litigation between the Receiver and Rothstein Kass, and the *Jinsun* Plaintiffs and Rothstein Kass, will only diminish the potential recovery for all claimants in the Receivership.

47. Indeed, the Receiver’s own costs of litigating the Rothstein Kass Action would diminish any recovery for claimants. While Litigation Counsel have entered into a contingent fee arrangement with the Receiver to prosecute the claims, the Receiver is paid by the hour and is involved in overseeing the litigation and coordinating strategy with the overall Breitling

Receivership case and other litigation. Further, the Receiver reimburses Litigation Counsel for all expenses associated with the Rothstein Kass Action. The Settlement and Bar Order -- as a necessary condition of the Settlement -- avoids further expense associated with the prosecution of the Rothstein Kass Action and continued monitoring and oversight of the case by the Receiver.

48. If the proposed Bar Order is not entered by the Court, and the Rothstein Kass Settlement does not become effective, the Rothstein Kass Action (and the *Jinsun* Action) would be vigorously defended by Rothstein Kass and Matlock, its prosecution would be expensive and protracted, and the ultimate outcome of such litigation would be uncertain. Further, it would continue to diminish and delay any recovery for the Receivership and its claimants. In light of these issues, the Receiver submits that the proposed Bar Order and the Rothstein Kass Settlement reflect a fair and reasonable compromise between the parties that is in the best interests of the Receivership Estate.

IV. CONCLUSION AND PRAYER

49. The Rothstein Kass Settlement represents a substantial and important recovery for the Receivership Estate and its claimants. Entry of the Bar Order is necessary for this settlement. The Receiver has standing to settle derivative claims like those asserted by the *Jinsun* Plaintiffs which belong to Receivership Entities, and which interfere with the Receivership process and Assets. The amount of the recovery, the time and costs involved in pursuing litigation against Rothstein Kass and Matlock, and the uncertain prospects for obtaining and then recovering on a judgment against Rothstein Kass and Matlock, all weigh heavily toward entering the Bar Order, which is a condition to the Rothstein Kass Settlement. The Receiver asks that the Court grant this Motion, enter the Bar Order, and grant the Receiver all other relief to which he is entitled.

Dated: April 21, 2021

Respectfully submitted,

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COUNSEL FOR RECEIVER

CERTIFICATE OF CONFERENCE

I certify that counsel for the Receiver conferred with counsel for Plaintiff Securities and Exchange Commission, who does not oppose the relief sought herein.

I certify that counsel for the Receiver conferred with counsel for the *Jinsun* Plaintiffs, who oppose the relief sought herein.

 /s/ Andrew M. Goforth
Andrew M. Goforth

CERTIFICATE OF SERVICE

I certify that on April 21, 2021 I served the foregoing document pursuant to FED. R. CIV. P. 5(b)(2)(E) by filing it through the Court's CM/ECF filing system. Notice of this Motion also will be given pursuant to any further Order(s) of the Court.

/s/ Andrew M. Goforth
Andrew M. Goforth