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 RESPONSE IN OPPOSITION TO DEFENDANTS' AMENDED MOTION FOR SUMMARY JUDGMENT ON ALL COUNTS AND BRIEF IN SUPPORT

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Plaintiff Thomas L. Taylor III, solely in his capacity as Court-appointed 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.*[1] ("Receiver"), respectfully files this Response and Brief in Support ("Response") in Opposition to Defendants Reymond Trevino ("Trevino"), Eagle Rio Energy Companies, Inc. ("Eagle Rio"), and Okoto Okpo's ("Okpo") (collectively "Movants") First Amended Motion for Summary Judgment on All Claims (ECF No. 71) ("Amended Motion")[2] pursuant to Rule 56 of the Federal Rules of Civil Procedure (the "Rules").

The Court should deny the Amended Motion in its entirety.[3] With respect to Count I under TUFTA, the Receiver timely filed his action within all limitations and repose periods as amended and tolled by this Court in its Receivership Orders. With respect to Count II for Money Had and Received, the Receiver's claim is not foreclosed by an adequate legal remedy because he is permitted in the Rules to assert alternative claims. Moreover, Movants have not, and cannot, establish as a matter of law that the Receivership Entities acted voluntarily in transferring to them the funds at issue in this case. Additionally, Count II was timely filed within the respective limitations period(s) because limitations were tolled under the discovery rule, and later by this Court in its Receivership Orders. Finally, should Movants prevail on any of their requests for summary judgment, they are not entitled to attorney's fees and costs. *Inter alia*, It would be neither equitable nor just to award fees and costs to parties that the undisputed summary judgment evidence establishes as bad faith actors.

[1] Referred to generally as the "Receivership Entities."

[2] Receiver cites to Movants' Brief in Support of their Amended Motion (ECF No. 72) ("Brief" or "Br.") and Appendix (ECF No. 73) ("Appendix" or "Appx.") throughout this Response.

[3] Capitalized terms not defined herein have the same meaning attributed to them by Movants in their Amended Motion.

I. PRELIMINARY STATEMENT

It takes cheek for Movants to assert that it was "morally" improper to be sued for their roles recruiting victims into the Breitling fraudulent scheme because they were merely "low-level salaried employees, who simply did their jobs." *E.g.*, Br. at ¶83. By their own admission, Movants earned hundreds of thousands of dollars for merely sitting at a desk and cold-calling strangers. Although they hide behind the position that they only "performed the duties they were asked to perform" and were "paid … their agreed upon compensation and nothing more," *e.g.*, Br. at ¶ 73, in reality Movants were paid 5% commissions commensurate with pay received by licensed brokers, R APPX 198, 221, who are highly regulated by the federal and state governments and who have obtained substantial education, training, and other expertise and have passed extensive licensing examinations and background checks, and are required to engage in continuing education including ethics education. Movants' "telemarketing"[4] required no education and no training, R APPX 147, 148, 155 – 57, 207 – 209, although it seems that it did require the "moral" fortitude to ask no questions about what they were doing or why they were being paid so much.[5]

In fact, Movants' moral compasses were not exactly pointing North -- each of the Movants failed to inform the Internal Revenue Service ("IRS") about income they were paid from the Receivership Entities. Trevino and Eagle Rio filed federal tax returns which omitted income paid to them by Breitling. R APPX 2, 161, 165, 178, 187. Okpo did not bother filing federal tax returns for the years in which he received compensation from Receivership Entities -- although he purports to have filed federal tax returns for the years prior to and following the years in which he received compensation from Receivership Entities. R APPX 210 – 11. Notwithstanding the irony of

[4] Br. at ¶66 n.19.

[5] R APPX 150, 215.

Movants being paid commissions that were concealed from investors and subsequently concealing those commission payments from the IRS, their assertion that they "acted in good faith at all times," Br. at ¶¶11, 15, is wholly without basis in fact.[6] Okpo moved on to work similar jobs for two separate companies selling oil and gas-related securities, one of which landed him in front of the SEC as a witness in an investigation. R APPX 205 – 06.

The Movants are not entitled to summary judgment with respect to either of the Receiver's causes of action. The Receiver timely asserted his causes of action vis-à-vis the Court's litigation injunction regarding Ancillary Actions, and Movants have not presented undisputed material facts which overcome any elements of the Receiver's causes of action or establish affirmative defenses as a matter of law. The Amended Motion should be denied in its entirety.

II. ARGUMENT AND AUTHORITY

A. Determining motions for summary judgment under Rule 56

Summary judgment is proper only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *see also Carrizales v. State Farm Lloyds*, 518 F.3d 343, 345 (5th Cir. 2008). A fact is genuinely in dispute "if a reasonable jury could return a verdict for the non-moving party." *Fordoche, Inc. v. Texaco, Inc.*, 463 F.3d 388, 392 (5th Cir. 2006).

The party moving for summary judgment bears the burden of showing all evidence demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S.

[6] Trevino's use of Eagle Rio purportedly "[f]or his own business and tax reasons," Br. at ¶13, is further evidence of his knowing bad faith. Trevino cannot or will not explain these "business and tax reasons," R APPX 150, and his non-disclosure of his compensation from Receivership Entities on his federal tax returns begs the question as to what tax purposes Eagle Rio served.

317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). To defeat summary judgment, "the non-moving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (quoting FED. R. CIV. P. 56(e)). The Court must view the evidence in the light most favorable to the non-movant and draw all justifiable inferences in favor of the non-movant. *Envtl. Conservation Org. v. City of Dallas, Tex.*, 529 F.3d 519, 524 (5th Cir. 2008).

B. Movants are Not Entitled to Summary Judgment on the Receiver's Count I Asserting Claims Under TUFTA

1. **The Court's injunction regarding Ancillary Actions applies to the Receiver's claims under TUFTA**

In their Amended Motion, Movants continue to ignore wholesale this Court's "broad powers and wide discretion to determine the appropriate relief in an equity receivership." *SEC v. Safety Fin. Serv., Inc.*, 674 F.2d 368, 372 – 73 (5th Cir. 1982) (quoting *SEC v. Lincoln Thrift Ass'n*, 577 F.2d 600, 606 (9th Cir. 1978)); *see also SEC v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992) (citing *Safety Fin. Serv., Inc.*). Such "authority derives from the inherent power of a court of equity to fashion effective relief." *Id*. at 372 (quoting *SEC v. Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980)).

As previously stated in the Receiver's initial response, Courts across the country have recognized the complex and time-consuming nature of receivers' investigations into the assets and liabilities constituting the estates that have been placed under their control. *See*, *e.g.*, *SEC v. Forex Asset Mgmt. LLC*, 242 F.3d 325, 327 – 28 (5th Cir. 2001); *United States v. Durham*, 86 F.3d 70, 71 – 72 (5th Cir. 1996); *Elliott*, 953 F.2d at 1564 – 66 ("The district court and Receiver had a mammoth task before them, and they did a thorough job."); *SEC v. Credit Bancorp, Ltd.*, 290 F.3d 80, 83 – 86 (2d Cir. 2002). Schemes to defraud public investors through the offering and sale of

securities are of particular complexity. That is the case with the fraudulent scheme implemented by Faulkner through the Breitling entities.

When this Court appointed the Receiver, it recognized this maxim[7], not only tolling the accrual of causes of action of the Receivership Entities but staying all Ancillary Actions[8] in their entirety and enjoining anyone with notice of the Receivership Order "from commencing or continuing any such legal proceeding, or from taking any action, in connection with any such proceeding, including, but not limited to, the issuance or employment of process." SEC Action, ECF No. 496 at ¶¶ 32 – 34. This Court exercised its "inherent power of a court of equity" to enjoin and stay Ancillary Actions, including with respect to the Receiver's TUFTA cause of action, and toll the accrual of such causes of action in favor of the Receivership Entities so long as that injunction was in effect.

It was within the Court's "broad powers and wide discretion to determine the appropriate relief in an equity receivership" to do so. *Safety Fin. Serv.,* 674 F.2d at 372 – 73 (quoting *Lincoln Thrift Ass'n*, 577 F.2d at 606); *see also Elliott*, 953 F.2d at 1566 (citing *Safety Fin. Serv., Inc*.). The Receiver's TUFTA causes of action did not accrue, or become extinguished, as ordered by this Court. Accordingly, the Court should deny summary judgment with respect to the Receiver's Count I.

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[7] In fact, the language of the Texas Uniform Fraudulent Transfer Act, TEX. BUS. & COM. CODE §§ 24.001 *et seq.* ("TUFTA") is in harmony with this maxim, incorporating a discovery rule for causes of action brought under TEX. BUS. & COM. CODE § 24.005(a)(1) -- transfers made with actual intent to hinder, delay, or defraud any creditor of the debtor -- but not under §§ 24.005(a)(2) or 24.006(a) -- transfers for which, *inter alia*, reasonably equivalent value was not received in exchange for the transfer. *Compare* TUFTA § 24.010(a)(1) and (2).

[8] "All civil legal proceedings of any nature, including, but not limited to, bankruptcy proceedings, arbitration proceedings, foreclosure actions, default proceedings, or other actions of any nature involving: (a) the Receiver, in his capacity as Receiver; (b) any Receivership Assets, wherever located; (c) the Receivership Entities, including subsidiaries and partnerships; or, (d) any of the Receivership Entities' past or present officers, directors, managers, agents, or general or limited partners sued for, or in connection with, any action taken by them while acting in such capacity of any nature, whether as plaintiff, defendant, third-party plaintiff, third-party defendant, or otherwise." *See*, *e.g.*, SEC Action, ECF No. 496 at ¶ 32.

2. **The Court Should Deny Summary Judgment with respect to Transfers Made to Okpo after February 8, 2016**

Okpo admits that he received $10,200 in payments from Breitling between February 18, 2016 and March 31, 2016 but asserts that these transfers "are not part of this action" because they do not appear on Exhibit A to the Receiver's Amended Complaint. Br. at ¶22. Although it is true that the Original Complaint references February 8, 2016 (R APPX 019) and the final transfer to Okpo on Exhibit A to the Amended Complaint occurred on February 8, 2016 (R APPX 095), it is also clear from the face of the Receiver's pleadings that he sought to recover all transfers made to Okpo (and the other Defendants) by the Receivership Entities, and not some subset of those transfers.[9] The Receiver is not required to allege all eventual damages in his pleading, and the fact that evidence obtained in the litigation establishes additional liability does not foreclose the Receiver's right to recover those amounts. These transfers were of the same nature as all of the other transfers received by Okpo and alleged by the Receiver in his Original and Amended Complaints -- compensation for the recruitment of victims into the Breitling fraudulent scheme. They fall within a plain reading of the language of the Receiver's pleadings and should not be excluded from the Court's analysis of the Amended Motion.

Alternatively, the Receiver asks the Court to grant leave to amend the Receiver's live pleading pursuant to Rule 15. In this regard, "a party may amend its pleading … with … the court's leave," and "[t]he court should freely give leave when justice so requires." *Id*. 15(a)(2). Additionally, "[a] party may move-at any time … to amend the pleadings to conform them to the evidence." *Id*. 15(b)(1). Evidence submitted by Okpo establishes that he received transfers from

[9] *See*, *e.g.*, R APPX 023 (Compl. ¶57) ("Breitling entities, and therefore the Receiver, have suffered the loss of at least $833,500 in funds fraudulently transferred from the Breitling entities to the Defendants as alleged herein.") (emphasis added), 087 (Am. Compl. ¶67) ("Breitling entities, and therefore the Receiver, have suffered the loss of **at least** $833,500 in funds fraudulently transferred from the Breitling entities to the Defendants as alleged herein.") (emphasis added).

the Receivership Entities after the dates alleged in the Original and Amended Complaint. Justice requires that these transfers be "part of this action" and leave to make such amendment "freely" granted.

Justice also requires granting leave to amend because Okpo made numerous false assertions regarding these transfers in his pleadings. In his December 1, 2020 amended answer to the Receiver's Original Complaint, Okpo asserted that he "received his last payment from the Receivership Entities on February 8, 2016" and that "[a]ll transfers received by Okpo pre-dated February 18, 2016." R APPX 030, 37, 38, 40 (*id*. p. 3, ¶¶ 40, 46, 60). Okpo continued to falsely claim he received no transfers after February 8, 2016 in his Answer to the Receiver's Amended Complaint. R APPX 110 (*id*. ¶42) ("Okpo denies that he received any transfers after February 8, 2016."). Receiver's counsel was eventually able to confront Okpo with respect to these false statements in his pleadings at deposition on May 10, 2021. He finally admitted that he had received such transfers contrary to the false claims in his pleadings. R APPX 212. Okpo should not be rewarded for misleading the Receiver and leave to amend should be granted.

Importantly this amendment would not be "futile" as Movants assert, Br. at ¶44, as the amendment would "relate back" to the date of the Receiver's Original Complaint (February 18, 2020) pursuant to Rule 15(c)(1)(B). In this regard, an amendment to include additional transfers made to Okpo under the same circumstances and for the same reasons as the transfers alleged in the Receiver's original pleading would "assert[] a claim … that arose out of the conduct, transaction, or occurrence set out-or attempted to be set out-in the original pleading." *Id*.

Moreover, such amendment is not foreclosed by any purported expiration of limitations or repose in the interim timeframe[10]. "[T]he 'critical' inquiry is 'whether the opposing party was put

[10] The Receiver contends, for the reasons stated in §B(1), *supra*, that no such expiration occurred. However, should

on notice regarding the claim raised' by the facts alleged in the original pleading." *O'Cheskey v. CitiGroup Global Mkts., Inc. (In re Am. Hous. Found.)*, 543 B.R. 245, 261 (Bankr. N.D. Tex. 2015) (quoting *Holmes v. Greyhound Lines, Inc.*, 757 F.2d 1563, 1566 (5th Cir. 1985); *accord Buchwald Capital Advisors LLC. v. JP Morgan Chase Bank, N.A. (In re M. Fabrikant & Sons, Inc.)*, 480 B.R. 480, 492 (S.D.N.Y.2012)) (additional citations omitted). "Put simply, '[t]he test is whether the original complaint apprised the [defendant] of the ... claims set forth in the ... amended complaint." *Id*. at 262 (quoting *McGregor v. La. State Univ. Bd. of Supervisors*, 3 F.3d 850, 864 (5th Cir. 1993)).

In this case, the Receiver's Original Complaint placed Okpo on notice that the Receiver sought to recover all transfers made to him by the Receivership Entities. R APPX 023 (*id*. ¶57) ("Breitling entities, and therefore the Receiver, have suffered the loss of **at least** $833,500 in funds fraudulently transferred from the Breitling entities to the Defendants as alleged herein.") (emphasis added). The transfers made after February 8, 2016 were made for the same purpose and under the same circumstances as the transfers alleged to have been made through February 8, 2016 in the Original Complaint -- compensation for Okpo's recruitment of victims into the Breitling fraudulent scheme. The circumstances of this amendment are the opposite of the proposed amendment in *O'Cheskey*, which the court declined to relate back. In that case, the plaintiff asserted new allegations seeking to avoid fraudulent obligations under TUFTA. The court held that because the original complaint had only sought to avoid fraudulent *transfers*, the defendant was not on notice with respect to the *obligations*. 543 B.R. at 262. Here, the Receiver seeks to include transfers occurring on dates not specifically alleged in the Original Complaint, but which were made under

the Court hold otherwise, there would be no effect on the present "relate-back" analysis regarding these post-February 8, 2016 transfers.

the same circumstances and for the same reasons as those transfers that were alleged in the Original Complaint -- "out of the conduct, transaction, or occurrence" alleged in the Original Complaint. Such an amendment relates back to the date of the Original Complaint.[11] To the extent the Court holds that amendment is necessary, it should "freely give leave" to the Receiver to amend, as justice requires.

C. Movants are not entitled to summary judgment on Count II of the Receiver's Amended Complaint

Movants are not entitled to summary judgment on Count II of the Complaint for Money Had and Received R APPX 086 – 87 (Am. Compl. ¶¶ 60 – 66) because the material facts underlying the elements of such a cause of action, and the affirmative defenses asserted by Movants, are in dispute -- summary judgment is not appropriate. Movants are only entitled to summary judgment if the undisputed material facts negate an element of that cause of action as a matter of law or establish an affirmative defense. Neither circumstance is present here, and summary judgment should be denied.

1. **The Receiver's Money Had and Received Claim is not foreclosed by an adequate legal remedy**

Movants' cannot seem to make up their minds. On the one hand, they assert that they "acted in good faith at all times," Br. at ¶¶11, 15, that they were "paid what the Receivership Entities had

[11] Applying both the federal and Texas relation-back tests, *O'Cheskey*, 543 B.R. at 262 – 63, does not change the outcome of the analysis. "The wording of Texas Rule § 16.068 differs from Federal Rule 15(c), but the application is virtually the same." *Id*. at 263 (citing *Lexington Ins. Co. v. Daybreak Exp., Inc.*, 393 S.W.3d 242, 244 (Tex. 2013)). "[A]mended complaints relate back [under the Texas state test] 'only if they ar[i]se out of the same transaction.'" *Id*. (quoting *Walker v. Presidium, Inc.*, 296 S.W.3d 687, 695 (Tex.App.—El Paso 2009, no pet.)). The post-February 8, 2016 transfers arise out of the same transaction as the pre-February 8, 2016 transfers -- Okpo's recruitment of victims into the Breitling fraudulent scheme. They were made for the same reasons, under the same circumstances, and for the same purpose as the pre-February 8, 2016 transfers the Receiver sought to avoid in the Original Complaint.

agreed to pay [them] for this work, and nothing more," *see*, *e.g.*, Br. at ¶13, and that they exchanged reasonably equivalent value for the transfers they received. R APPX 197 – 98, 220 – 21. Under these circumstances, the Receiver would not have an adequate legal remedy under TUFTA which would preclude Count II. *See id*. § 24.009. On the other hand, Movants assert that the Receiver's TUFTA claim is colorable. Br. at ¶59.

Moreover, Movants admit that the Receiver is permitted to assert his equitable claims in the alternative to his TUFTA claims. Br. at ¶60 (citing *In Official Stanford Investors Committee v. Traurig,* 2014 LEXIS 190621, at *31-32 (N.D. Tex. 2014)).[12] It is apparent from the face of the Amended Complaint that the Receiver has done just that -- he seeks the recovery of the same funds transferred to Movants under two separate theories. "No technical form is required" in pleading. Fed. R. Civ. P. 8(d)(1). There is no technical requirement for the Receiver to form his alternative claims in a certain way. His Count II claim for Money Had and Received is not foreclosed because he asserts the Count I TUFTA claim. Summary judgment on these grounds should be denied.

Additionally, TUFTA does not preempt the Receiver's separate, equitable cause of action for the disgorgement of funds had and received by Movants, and their contention otherwise, Br. at ¶57 – 58, should be rejected. The cases cited by Movants are inapplicable here. In *Cadle Co. v. Wilson*, 136 S.W.3d 345, 353 (Tex.App.—Austin 2004, no pet.), the plaintiff specifically asserted "a common-law claim for fraudulent transfer," which the court held had been extinguished. *Id*. at 353. This is distinguishable from the Receiver's case, in which he has not asserted a "common-law claim for fraudulent transfer," but rather has alleged a money had and received claim. That

[12] *See also* Rule 8(d)(2) ("[a] party may set out 2 or more statements of a claim … alternatively …. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.")

this separate cause of action also seeks the disgorgement of funds which were transferred in violation of TUFTA does not negate the Receiver's ability to bring an alternative cause of action.

Movants' second case does not address alternative causes of action at all. In *Reagan National Advertising of Austin, Inc., v. Lakeway 620 Partners, L.P.*, 2001 Tex. App. LEXIS 4375 (Tex.App.—Austin 2001, pet. denied), the appellate court reversed the lower court's summary judgment against appellant's TUFTA claims, finding material facts in dispute with respect to those claims. *Id.*, at *37 – 38. The Court upheld the lower court's granting of summary judgment with respect to a claim under the Home Solicitation Act, TEX. BUS. & COM. CODE §§ 39.001-.009, but not because it was preempted by TUFTA -- it did so on the basis that the appellant was not a "consumer" under that act, a prerequisite for a cause of action thereunder. *Id*., at *41 – 42.

TUFTA does not preempt the Receiver's cause of action for money had and received, and Movants are not entitled to summary judgment on such grounds.

2. **Movants' Summary Judgment Evidence Does Not Establish an affirmative defense under the Voluntary Payment Rule**

Notwithstanding that Movants purport to "invoke" the Voluntary Payment Rule with respect to the funds that were transferred to them by Receivership Entities, Br. at ¶62, the summary judgment evidence is -- at best -- insufficient to establish as a matter of law that those payments were in fact voluntary. Summary judgment on the Receiver's Count II on these grounds is not appropriate.

As the Fifth Circuit held in *Janvey v. Democratic Sen. Campaign Comm., Inc.*, 712 F.3d 185 (5th Cir. 2013) ("*DSCC*"), receivership entities themselves are innocent of wrongdoing and cannot have intended to violate the law or deceive investors. *Id*. 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)). The Receiver's position here is analogous to that of the Receiver in *DSCC*. In this regard, defendants in *DSCC* sought to dismiss claims against them under TUFTA brought by a Receiver, taking the position that the fraudulent intent of control persons was imputed to the corporations. The Court rejected this position, holding that "the knowledge and effect of the Ponzi scheme principal's fraudulent transfers may not be attributed to his robotic corporate tools, or prevent a receiver from suing on behalf of those entities, once they have been freed from the principal's coercion…." *Id*. at 192.

The same reasoning defeats the Movants' position in this case. Movants seek to impute the knowledge of the fraud scheme principals onto the entities themselves, and thereby establish that the entities acted voluntarily when transferring funds to Movants. "Voluntary" is defined as "proceeding from the will or from one's own choice or consent," and "unconstrained by interference." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/voluntary, accessed 30 Jul. 2021. However, the Receivership Entities could not have acted "voluntarily" if they were "zombies" used by Faulkner as his "robotic tools." They could only have been coerced to do so under the compulsion of Faulkner. They did not act voluntarily.

This line of cases also rejects the reasoning behind Movants' position that the Receiver cannot establish fraudulent intent under TUFTA with respect to transfers from the Receivership Entities without also imputing Faulkner's knowledge onto the entities for purposes of the Voluntary Payment Rule. Br. at ¶¶ 69-70. These cases do just that. The Courts refused to impute the knowledge of the principals to the entities from which the transfers were made, while

simultaneously permitting the receivers' T/UFTA claims to go forward. To assert that this Court cannot do so is nonsensical. "Now that the corporations created and initially controlled by Douglas 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, we cannot see an objection to the receiver's bringing suit to recover corporate assets unlawfully dissipated by Douglas." *DSCC*, at 191 (quoting *Scholes*, 56 F.3d at 754 – 55).

Further, Movants' position that Faulkner's knowledge can be imputed to the Receivership Entities because he was acting for their benefit, Br. at ¶70 – 71, should be rejected. Not only does it contradict the Fifth Circuit's reasoning regarding the imputation of knowledge in the receivership context in *DSCC*, Movants fail to submit any evidence in support of the contention. Rather, they twist themselves in knots with various contentions -- without providing any caselaw or evidence in support -- regarding whether Faulkner, Hallam, and Miller could even have defrauded the Receivership Entities at all or whether Crude and Patriot could be alter egos of BECC, and they supply straw men arguments regarding hypothetical lawsuits against Faulkner himself. These contentions take the Court too far down the rabbit hole and distract from the line of holdings in *Scholes* and its Fifth Circuit progeny. They should be rejected. The summary judgment evidence before the Court is, at best, inadequate to find that the Receivership Entities made the payments at issue "voluntarily" as a matter of law. Summary judgment should be denied.

3. **Movants are not entitled to summary judgment upon a limitations defense**

Courts disagree as to whether a two-year or four-year statute of limitations applies to claims for money had and received. *Compare Amoco Production Co. v. Smith*, 946 S.W.2d 162, 165 (Tex.App.—El Paso 1997, no writ) ("[M]oney had and received is an action for debt, governed by the four-year statute of limitations."), *with Tanglewood Terrace v. Texarkana*, 996 S.W.2d 330,

342 (Tex.App.—Texarkana 1999, no pet.) ("An action for money had and received, being in the nature of an action for conversion, is subject to a two-year statute of limitations.").

However, the Court's determination in this regard is not dispositive because the discovery rule applies to the Receiver's Count II. *Tanglewood Terrace*, at 337. "In general, the discovery rule applies in those cases where the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable." *Id*. (citing *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 456 (Tex. 1994)). "An injury is inherently undiscoverable if it is the type of injury that is not generally discoverable by the exercise of reasonable diligence." *Id*. (citing *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 886 (Tex. 1998)). "[I]f the discovery rule has been pled or otherwise raised, and the defendant has not conclusively shown that the nature of the injury is not inherently undiscoverable, or that the evidence of injury is not objectively verifiable, then the discovery rule does apply and accrual of the cause of action occurs when the plaintiff knew or should have known of the wrongfully caused injury." *Id*. (citing *KPMG Peat Marwick v. Harrison County Housing Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999)).

Here the Receiver has "pled" the discovery rule with respect to his claims against Movants and raises it again in this Response. R APPX 087 (Am. Compl. ¶ 65) ("The Receiver was only able to discover that the [Movants] hold, and were unjustly enriched by, funds which in equity and good conscience belong to BOG, BRC, Crude Energy, and Patriot after Faulkner was removed from control of the Breitling entities and after a time-consuming and extensive review of thousands of pages of paper and electronic records and documents relating to the Breitling entities.").

Additionally, "the nature of the injury incurred [here] is inherently undiscoverable." In this regard, the Receiver could not possibly have learned the existence and nature of the facts underlying Count II prior to his appointment. Moreover, receivership entities themselves are

innocent of wrongdoing and cannot have intended to violate the law or deceive investors. *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*, 56 F.3d 750; *Janvey v. Alguire*, 847 F.3d at 241 (same); *Jones v. Wells Fargo Bank*, 666 F.3d at 965 – 67 (corporation is entity separate from its individual bad actors)).

In *DSCC* the court refused to impute the controlling fraudster's (Allen Stanford's) knowledge to his entities, holding that the entities' claims could not have accrued prior to the date the Stanford receiver was appointed. *DSCC*, 712 F.3d at 192 – 93. So too here. The Receiver's claims could not have accrued, as a matter of law, until some date after September 25, 2017, the date on which the Receiver was appointed and empowered to specifically pursue "all assets – in any form or of any kind whatsoever". R APPX 007 – 08 (Orig. Compl. at ¶ 1) (citing SEC Action, ECF No. 496 at 1).

Additionally, upon the Receiver's appointment, the accrual of such causes of action were further tolled to enable the Receiver to investigate and discover the nature and extent of the Breitling fraudulent scheme and any claims that the Receivership Estate held against others. SEC Action ECF No. 108 at ¶22; ECF No. 142 at ¶34; ECF No. 320 at ¶34; ECF No. 418 at ¶34. Accordingly, the discovery rule applies to the Receiver's Count II cause of action, and any limitations with respect to that cause of action was tolled prior to the Receiver's initiation of this lawsuit. The Receiver's Count II is timely, and summary judgment should be denied on limitations grounds.

Movants seek to avoid the Receiver's invocation of the discovery rule through a web of various assertions regarding the dates on which certain Receivership Orders were entered and

which entities were explicitly included in such orders. Br. at ¶¶ 78 – 81. Movants' arguments in this regard are nothing more than smoke and mirrors, and should be disregarded.

Movants' assertion that "[t]he appointment of a receiver does not revive any claims already barred by limitations on the day of his appointment," Br. at ¶74 (citing *RTC v. Phelps*, 860 F.Supp. 389, 390 (S.D. Tex. 1994)) ignores an important caveat from that case: "[u]nless the statute was tolled…." *Id*. Here, the limitations period was tolled in two distinct ways: the discovery rule, and by the injunction language vis-à-vis Ancillary Actions in the Receivership Orders. Movants do not address the discovery rule in connection with Count II, and therefore waive any argument for summary judgment on that basis. Further, Movants' arguments that the timing of Patriot and Crude's inclusion in Receivership Orders ignores the tolling of the limitations period due to the discovery rule, which would preserve Count II through the dates of the Second and Third Amended Receivership Orders.[13] The Receiver's cause of action for Money Had and Received is timely, and Movants are not entitled to summary judgment on a limitations defense.

D. Movants are Not Entitled to Attorney's Fees

If the Court grants summary judgment to Movants, in whole or in part, Movants are not entitled to attorney's fees and costs because awarding such relief would neither be equitable, nor just. As an initial matter, any fee award would necessarily reduce the Receivership Assets available ultimately to be distributed to the investor claimants defrauded by Faulkner through the Breitling

[13] Movants also ignore the broad language of the Receivership Orders with respect to Receivership Assets (which include choses in action). Receivership Assets are defined as "all assets—in any form or of any kind whatsoever—owned, controlled, managed, or possessed by [Faulkner], [BOG], and [BECC], directly or indirectly." Subsequent Receivership Order [ECF No. 142] at p. 1. Faulkner, and through him BECC, "controlled" Crude and Patriot, and therefore the claims at issue would have been tolled as of September 25, 2017. *See*, *e.g.*, ECF No. 141 at p. 8 ("the SEC has met its burden of demonstrating by a preponderance of the evidence that the court should order an asset freeze and appoint a temporary receiver covering Faulkner's assets. This encompasses entities controlled by Faulkner to which the unrebutted evidence indicates he may have redistributed either BOG's or BECC's investors' assets—including [but not limited to] the Breitling Royalties Corporation").

fraudulent scheme -- including those recruited by Movants into the fraudulent scheme. Moreover, the undisputed facts show that Movants acted with bad faith. Movants regularly turned a blind eye to the circumstances of their employment with Breitling. They were paid hundreds of thousands of dollars to cold call strangers and ask them questions about their net worth. They were, essentially, stenographers. And yet they were paid commissions commensurate with brokers licensed with the Commission and FINRA. It would not be "equitable" to award attorney's fees to parties with unclean hands. *Humphries-Mexia Co. v. Arseneaux*, 116 Tex. 603, 614-15, 297 S.W. 225, 231 (Tex. 1927).

Movants' bad faith is further demonstrated by their failure to disclose their income from Breitling to the IRS. Trevino admits that (i) he prepared his tax returns, (ii) he did not receive a W-2 or any tax document from Breitling, and (iii) that he received the transfers alleged in the Amended Complaint. However, his individual tax returns report no 1099 business income, and Eagle Rio's tax returns under report the gross income it received from Breitling. R APPX 003. Okpo failed to file any tax returns at all for the years in which he received income from Breitling. R APPX 210 – 11. It would be neither equitable nor just to award bad faith actors like Movants attorney's fees simply for being a prevailing party.

Movants have not asserted any bad faith on the part of the Receiver.[14] Moreover, Movants cannot support their assertions that there were "deficiencies in the Receiver's claims" nor that any facts were "apparent when the Complaint was filed" which the Receiver ignored. Br. at ¶ 85. The Receiver brought claims against bad faith actors who recruited victims into the Breitling fraudulent scheme, and which on their face were appropriate and within proscribed time limits as modified

[14] Although confusingly they both "do not accuse the Receiver of ill motives or willful misconduct," Br. at ¶ 83, and assert that the present "lawsuit was not filed in objective good faith." Br. at ¶ 82.

by the Receivership Orders. Movants admit that they received compensation for knowingly offering and selling securities to public investors without being licensed to do so.

It would neither be equitable nor just to award attorney's fees and costs to Movants for no other reason than that they are a prevailing party in this action. There is no basis to award attorney's fees and costs to Movants, and the Court should deny the Movants this requested relief should they prevail on their Amended Motion, in whole or in part.

III. CONCLUSION

Movants are not entitled to summary judgment with respect to the Receiver's Counts I and II. The Amended Motion should be denied in its entirety. Should Movants prevail on their Amended Motion, in whole or in part, it would be neither equitable nor just to award attorney's fees and costs to them, and the Court should deny such relief.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 30, 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