UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

VDF FUTURECEUTICALS, INC., *Plaintiff*	§	
v.	§	**CIVIL NO. 1-20-CV-855-LY**
FREED FOODS, INC. d/b/a NURTURME, NM RESIDUAL, INC., and NURTURME, INC., *Defendants*	§	

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE LEE YEAKEL
UNITED STATES DISTRICT JUDGE

Before the Court are Defendant NM Residual, Inc.'s Motion to Dismiss, filed October 22, 2020 (Dkt. 19); Defendant NurturMe, Inc.'s Motion to Dismiss First Amended Complaint and Brief in Support, filed October 22, 2020 (Dkt. 20); VDF FutureCeuticals, Inc.'s Motion to Deny or, in the Alternative, Defer Consideration of Defendants' Converted Motions for Summary Judgment Pursuant to Rule 56(d), filed April 14, 2021 (Dkt. 30); and the associated response and reply briefs.

The District Court referred the motions and related filings to the undersigned Magistrate Judge for Report and Recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B), Federal Rule of Civil Procedure 72, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas.

I. General Background

Plaintiff VDF FutureCeuticals, Inc. alleges that it had a longstanding agreement with Freed Foods, Inc. in which Plaintiff agreed to sell certain food and nutritional products to Freed Foods

in exchange for purchase orders. In 2017, Freed Foods experienced "financial hardship" and failed to pay Plaintiff for a large purchase order. Dkt. 3 ¶ 26. Plaintiff alleges that Freed Foods owes it $243,505.50 in unpaid purchase orders.

Plaintiff alleges that instead of paying Plaintiff, Freed Foods and its purported owner, Advantage Capital Agribusiness Partners, L.P. ("ACAP"), transferred all of Freed Foods' assets to NM Residual, Inc. ("NM") in exchange for NM's cancellation of a $657,000 pre-existing debt owed by Freed Foods to NM. Plaintiff alleges that NM then sold those same assets to NurturMe, Inc. in exchange for a majority of NuturMe's outstanding common stock. Plaintiff contends that ACAP owned and controlled both Freed Foods and NM at the time of the transfer and that these transactions were fraudulent conveyances of Freed Foods' assets, in violation of Texas law. Plaintiff alleges that Freed Foods, ACAP, NM, and NuturMe engaged in the fraudulent transactions "for the express purpose of continuing Free Foods' business without interruption, avoiding its obligations to FutureCeuticals and keeping the substantial value and equity in Freed Foods that should have gone to pay Freed Food's creditors, like FutureCeuticals." *Id.* ¶ 7.

On August 14, 2020, Plaintiff filed suit against Freed Foods, NM, and NurturMe (collectively, "Defendants"), alleging: (1) breach of contract against Freed Foods; (2) four claims of fraudulent transfer under the Texas Uniform Fraudulent Transfer Act ("TUFTA"), Tex. Bus. & Com. Code §§ 24.005(a)(1), (a)(2), 24.006(a)-(b); (3) a claim for exemplary damages under Tex. Civ. Prac. & Rem. Code § 41.009; and (4) a claim for attorneys' fees and costs under TUFTA and Tex. Civ. Prac. & Rem. Code § 38.001(8).

Defendants NM and NurturMe each move to dismiss Plaintiffs' Amended Complaint for failure to state a claim on which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). In NM's Motion to Dismiss, NM contends that Plaintiff "is an unhappy

unsecured creditor of Freed Foods," and that other lenders of Freed Foods had a security interest in substantially all of Freed Food's property. Dkt. 19 at 6. NM argues that when Freed Foods defaulted on loan payments to its secured lenders, "the secured lenders exercised their legal and contractual rights and held a properly noticed Article 9 Uniform Commercial Code ('UCC') public foreclosure sale in August 2019 of the collateral for the loan (the 'UCC Sale')." *Id.* NM contends that at the UCC Sale, the secured lenders purchased all collateral and transferred and assigned it to NM, and that after the UCC Sale, NM sold the collateral to NurturMe, which began operating the former business of Freed Foods. NM argues that Plaintiff "cannot use a fraudulent transfer claim to overcome a valid security interest that Freed Foods's secured lenders properly foreclosed under UCC Article 9." *Id.* Thus, NM argues, all of Plaintiff's TUFTA claims fail.

In support of its Motion to Dismiss, NM relies on several documents related to the secured debt and foreclosure sale. *See* Exhibits A-H to Dkt. 19. Defendant NuturMe also relies on these exhibits in its Motion to Dismiss. *See* Dkt. 20 at 11-12. Because Defendants presented matters outside the pleadings that were not excluded, the Court converted the motions to dismiss to motions for summary judgment under Federal Rule of Civil Procedure 56 and ordered the parties to file any additional material in support of, or in opposition to, the motions for summary judgment on or before April 15, 2021. In response, Plaintiff filed a Motion to Deny or, in the Alternative, Defer Consideration of Defendants' Motions for Summary Judgment Pursuant to Rule 56(d). Defendants oppose Plaintiff's Motion. Dkts. 33 and 34. The Court makes the following recommendations on the pending motions.

II. Plaintiff's Rule 56(d) Motion

Plaintiff moves pursuant to Rule 56(d) to deny or, in the alternative, delay consideration of Defendants' Motions for Summary Judgment "because no discovery has taken place, numerous

factual issues remain that require discovery, and the facts that pertain to those issues are entirely in the possession of the Defendants." Dkt. 30 at 1.

A. Legal Standard

Federal Rule of Civil Procedure 56(d) provides:

> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) defer considering the motion or deny it;
>
> (2) allow time to obtain affidavits or declarations or to take discovery; or
>
> (3) issue any other appropriate order.

The rule "protects a party opposing a summary judgment motion who for valid reasons cannot by affidavit—or presumably by any other means authorized under Rule 56(c)—present facts essential to justify the adverse party's opposition to the motion." 10B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2740 (4th ed. 2021 Update) ("WRIGHT & MILLER"). Rule 56(d) is "usually invoked when a party claims that it has had insufficient time for discovery or that the relevant facts are in the exclusive control of the opposing party." *Union City Barge Line, Inc. v. Union Carbide Corp.*, 823 F.2d 129, 136 (5th Cir. 1987) (analyzing Rule 56(d)'s predecessor, Rule 56(f)).

> Rule 56(d) motions for additional discovery are broadly favored and should be liberally granted because the rule is designed to safeguard non-moving parties from summary judgment motions that they cannot adequately oppose. Nevertheless, non-moving parties requesting Rule 56(d) relief may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts. Instead, the non-moving party must set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist and indicate how the emergent facts, if adduced, will influence the outcome of the pending summary judgment motion.

Am. Family Life Assurance Co. of Columbus v. Biles, 714 F.3d 887, 894 (5th Cir. 2013) (cleaned up). The Fifth Circuit has noted that Rule 56(d) "is not difficult to comply with: the party opposing summary judgment need only file the specified non-evidentiary affidavits, explaining why it cannot oppose the summary judgment motion on the merits." *Union City*, 823 F.2d at 137. The court's disposition of a Rule 56(d) motion is reviewed for abuse of discretion. *Raby v. Livingston*, 600 F.3d 552, 561 (5th Cir. 2010).

B. Analysis

Plaintiff alleges that Defendants improperly transferred Free Foods' assets "to insiders – in exchange for the forgiveness of debts that were worth substantially less than those assets, and in order to avoid paying money that Freed Foods undisputedly owed to FC." Dkt. 30 at 2. Plaintiff argues that its complaint and Defendants' Motions for Summary Judgment "raise numerous factual issues that cannot be conclusively decided without permitting FC to fully engage in discovery of information that is currently outside of its control." *Id.*

Because the District Court stayed discovery "during the completion of all briefing on any motions to dismiss," Dkt. 22 at 1, Plaintiff argues that it has not had an opportunity to conduct any discovery, contending that "all of the facts that support FC's claims are in the possession of the Defendants." *Id.* Specifically, in order to respond to the pending Motions for Summary Judgment, Plaintiff contends that it needs discovery on the following issues: (1) the value of Freed Foods' assets and secured debts at the time of the allegedly fraudulent transfers; (2) the circumstances surrounding the creation of the secured obligations forgiven in the allegedly fraudulent conveyances and the specific details of those conveyances and the foreclosure process; (3) the control and ownership of Defendants and ACAP; (4) Defendants' intent in carrying out the allegedly fraudulent conveyances; and (5) the authenticity of the documents that Defendants

attached to their Motions. Plaintiff argues that it expects information obtained on these topics to establish that the value of Freed Foods' assets exceeds the $657,000 secured debt, and that the secured obligations and Fraudulent Conveyances were sham transactions between insiders undertaken wrongfully to avoid Plaintiff's undisputed debt. Plaintiff contends that it would be improper to decide these fact issues while only Defendants are able to present such evidence.

Defendants argue that Plaintiff could have conducted discovery after the parties completed their briefing on the Motions to Dismiss but chose not to do so. In addition, Defendants complain that Plaintiff has failed to submit "*any* evidence." Dkt. 32 at 2. Defendants further argue that discovery in this case would be futile because Plaintiff cannot prove that an asset was transferred.

Defendants' contentions are misplaced because Rule 56(d) is properly invoked "when a party claims that it has had insufficient time for discovery *or* that the relevant facts are in the exclusive control of the opposing party," as Plaintiff has done here. *Union City*, 823 F.2d at 136 (emphasis added). Additionally, Defendants' arguments raise fact issues that are inappropriate for resolution before discovery has taken place.

The Court finds that Plaintiff has met its burden under Rule 56(d) to support its request for discovery before responding to the Motions for Summary Judgment. *See Xerox Corp. v. Genmoora Corp.*, 888 F.2d 345, 355 (5th Cir. 1989) (finding that party seeking additional discovery met burden where it outlined areas of discovery needed to respond to summary judgment motion). Accordingly, the Court recommends avoiding the possibility of "an improvident or premature grant of summary judgment" by permitting Plaintiff to conduct discovery before it responds to the summary judgment motion. 10B WRIGHT & MILLER § 2740; *see also Benchmark Elecs., Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 726 (5th Cir. 2003) (holding that district court erred in treating motion for judgment on pleadings as motion for summary judgment without allowing parties full

discovery), *modified on reh'g*, 355 F.3d 356 (5th Cir. 2003); *Tillman v. Steadfast Ins. Co.*, No. 5:20-CV-1204-DAE, 2021 WL 1137241, at *2 (W.D. Tex. Feb. 11, 2021) (granting Rule 56(d) motion where parties had yet to conduct discovery "to avoid the possibility of an improvident grant of summary judgment" and dismissing motion for summary judgment without prejudice to refiling). For these reasons, the undersigned Magistrate Judge recommends that Plaintiff's Rule 56(d) Motion should be granted and the Motions for Summary Judgment dismissed without prejudice to refiling after the parties conduct discovery.

Nonetheless, the Court agrees with Defendants that Plaintiff could have sought discovery earlier, after briefing on the Motions to Dismiss was complete, and it does not appear that discovery in this case will be particularly burdensome. Therefore, the Court further recommends that the District Court order an abbreviated discovery period to expedite the timely resolution of this case.

III. Recommendation

Based on the foregoing, the undersigned **RECOMMENDS** that the District Court **GRANT** VDF FutureCeuticals, Inc.'s Motion to Deny or, in the Alternative, Defer Consideration of Defendants' Converted Motions for Summary Judgment Pursuant to Rule 56(d) (Dkt. 30) and **DISMISS WITHOUT PREJUDICE** Defendants' Converted Motions for Summary Judgment (Dkts. 19 and 20), permitting Defendants to refile their Motions for Summary Judgment after there has been time for discovery. The Court **FURTHER RECOMMENDS** that the District Court order an abbreviated discovery period in order to expedite the timely resolution of this case.

IT IS FURTHER ORDERED that the Clerk **REMOVE** this case from the Magistrate Court's docket and **RETURN** it to the docket of the Honorable Lee Yeakel.

IV. Warnings

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987). A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except on grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 150-53 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

SIGNED on April 27, 2021.

SUSAN HIGHTOWER
UNITED STATES MAGISTRATE JUDGE