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

THOMAS L. TAYLOR, III, in his capacity as Court-appointed receiver for Breitling Energy Corp. et al., Plaintiff v. ROTHSTEIN, KASS & COMPANY, PLLC and BRIAN MATLOCK, Defendants.	§ § § § § § § § § § § §	NO. 3:19-cv-01594-D

ROTHSTEIN KASS'S MOTION TO COMPEL DOCUMENT PRODUCTION AND BRIEF IN SUPPORT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Other Authorities

Defendant Rothstein, Kass & Company, PLLC ("Rothstein Kass") through undersigned counsel, hereby moves to compel document production pursuant to Fed. R. Civ. P. 37.

I. INTRODUCTION

This litigation involves claims stemming from the alleged fraud of Christopher Faulkner and the various corporations he managed, including Breitling Oil and Gas Corporation ("BOG"), Breitling Royalties Corporation ("BRC"), and Breitling Energy Corporation ("BECC") (collectively, "Breitling"). Faulkner and Breitling, with the aid of employees and management in the companies, allegedly defrauded oil and gas investors in the Breitling companies over multiple years. The Receiver, appointed to oversee Breitling following the discovery of this fraud, has brought claims against Rothstein Kass and Brian Matlock (together, "Defendants") for alleged professional negligence during Defendants' audit of Breitling's financial statements. The Receiver claims that because of Defendants' alleged negligence, Breitling incurred liabilities from defrauded investors' claims against the companies.

Rothstein Kass served the Receiver with a narrowly tailored discovery request seeking the Receiver's communications with claimants in *SEC v. Faulkner*, 3:16-cv-01735-D (N.D. Tex.) at any time since June 24, 2016. The Receiver refuses to produce documents responsive to Rothstein Kass's request. The Receiver objects that communications between the investor claimants and the Receiver are (1) irrelevant; (2) overbroad and burdensome to produce; and (3) constitute confidential information pertaining to non-parties. None of these objections has merit:

- **The Receiver's alleged damages make the communications relevant**. The Receiver's purported damages for Rothstein Kass's alleged professional negligence and participation in breach of fiduciary duty include the claims made by investor purchasers of Breitling's oil and gas interests. Indeed, the Receiver asserts his damages, "include increased liabilities to creditors of all types –

including the fraud victim liabilities." App. at 37, Ex. C hereto (April 13-14, 2020 Email Communications between Nicolas Morgan and Edward Snyder). (emphasis added).

- **The request is not overbroad or unduly burdensome**. Requests for a litigant's own communications are plainly not burdensome. Here, the request seeks the Receiver's communications *with claimants since June 24, 2016*. In other words, the request is narrowly tailored by date restriction and scope.
- **Confidential information can be protected**. The mere fact that certain confidential information pertaining to third-parties is requested in discovery does not make it objectionable and the Receiver provides no reason to otherwise withhold confidential communications, particularly where, as here, the court has entered a protective order that the parties may use to preserve confidentiality. *Taylor v. Rothstein, Kass & Company PLLC, et al.* April 3, 2020 Stipulation and Protective Order (Dkt. No. 38). This objection lacks merit.

Put simply, Rothstein Kass's request for Receiver's communications with claimants seeks information that is relevant and not objectionable. Pursuant to the Federal Rules of Civil Procedure, the Receiver must produce responsive documents.

II. FACTUAL BACKGROUND

On August 14, 2017, this Court appointed Thomas L. Taylor, III (the "Receiver") as temporary receiver over the assets of the Breitling entities. *SEC v. Faulkner,* August 14, 2017 Order Appointing Temporary Receiver (Dkt. No. 108).[1]

[1] The Court entered another Order appointing Mr. Taylor as the Receiver on September 25, 2017 (Dkt. No. 142), which was amended on September 12, 2018 (Dkt. No. 320) and again on March 26, 2019 (Dkt. No. 418).

On July 1, 2019, the Receiver filed his Original Complaint against Rothstein Kass and Brian Matlock. The Receiver's Original Complaint alleged that the Breitling entities incurred substantial liabilities to professionals and other creditors as a result of Defendants' conduct. Receiver's Original Complaint (Dkt. No. 1) ("Complaint") ¶¶ 7, 97.

The Receiver has taken the position that his damages resulting from Defendants' alleged conduct for professional negligence include "increased liabilities to one or more of the Receivership Entities." *See* App. at 7, Ex. A (Receiver's Response to Rothstein Kass's Interrogatories), Interrogatory No. 1. The Receiver also seeks damages for Defendants' alleged participation in a breach of fiduciary duty for "ALL of the damages caused to ALL of the Breitling entities by [Chris] Faulkner's breaches, including in terms of increased liabilities to said entities." *See* App. at 15, Ex. A, Interrogatory No. 12.

Seeking to discover information concerning the scope and nature of Receiver's alleged damages relating to increased liabilities to Breitling investors and purchasers of oil and gas interests, Rothstein Kass requested that the Receiver produce his communications with claimants. The request and Receiver's stated objection are as follows:

> **REQUEST NO. 31**: "Any and all communications between the Receiver and any claimants in *SEC v. Faulkner*, 3:16-cv-01735-D (N.D. Tex.) at any time since June 24, 2016."
>
> **RESPONSE**: Plaintiff objects to this request on the grounds that it seeks information that is entirely irrelevant to the claims and defenses of the parties to this case. Plaintiff further objects that the Interrogatory is overbroad and burdensome. Plaintiff further objects that the request seeks confidential information pertaining to the victims of the Breitling fraud, who are not parties to the instant case.

App. at 34, Ex. B (Receiver's Objections and Response to Rothstein Kass's Request for Production).

On April 13, 2020, Defendants sought clarification regarding the Receiver's objections to Rothstein Kass's Request. Defendants' counsel explained that the Receiver's communications with claimants were relevant to the Receiver's damages theory and therefore should be produced. App. at 41-42, Ex. C. Defendants' counsel noted that the Receiver's complaint and recent responses to Rothstein Kass's First Set of Interrogatories both indicated that the Receiver would continue to pursue damages stemming from liabilities incurred from claims by defrauded investors. *Id.* at 38-42. The Receiver conceded that

> "as stated in [Receiver's] Interrogatory responses, one theory of damages may be the increased liabilities to the Receivership entities . . . [and] [s]uch an increased liability theory (as recognized by the 5th Circuit in *Zacarias*) would include increased liabilities to creditors of all types – ***including the fraud victim liabilities***." *Id.* at 37. (emphasis added).

Despite his concession, the Receiver refused to produce the records and stated he would "stand on [his] objections." *Id.* at 36.

III. ARGUMENT

Fed. R. Civ. P. 37 allows for a party to move to compel discovery when the responding party fails to produce documents as requested under Fed. R. Civ. P. 34. Fed. R. Civ. P. 37(a)(3)(B). The Receiver should be compelled to produce documents responsive to Request No. 31 in Rothstein Kass's First Set of Request for Production, which seeks "Any and all communications between the Receiver and any claimants in *SEC v. Faulkner*, 3:16-cv-01735-D (N.D. Tex.) at any time since June 24, 2016."

A. Rothstein Kass's Discovery Request Seeks Relevant, Targeted Information

1. The Receiver Has Placed the Nature and Amount of Oil and Gas Investors' Claims at Issue

Relevance is to be broadly construed. *SEC v. Brady*, 238 F.R.D. 429, 437 (N.D. Tex. 2006). "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any

party's claim or defense and proportional to the needs of the case . . . ." Fed. R. Civ. P. 26(b)(1). A request for discovery "should be considered relevant if there is 'any possibility' that the information sought may be relevant to the claim or defense of any party." *Merrill v. Waffle House, Inc.*, 227 F.R.D. 467, 470 (N.D.Tex. 2005) (quoting *Sheldon v. Vermonty*, 204 F.R.D. 679, 689 (D. Kan. 2001)). The party opposing the discovery bears the burden of showing specifically how the request is not relevant. *Brady*, 238 F.R.D. at 436-7. If the discovery appears relevant, the objecting party bears the burden of establishing lack of relevance by showing the requested discovery either does not come "within the broad scope of relevance as defined under Fed. R. Civ. P. 26(b)(1)," or is of such marginal relevance that the potential harm outweighs the ordinary presumption in favor of broad disclosure. *Merrill*, 227 F.R.D. at 470-471 (quoting *Scott v. Leavenworth Unified School Dist. No. 453*, 190 F.R.D. 583, 585 (D.Kan. 1999)).

Communications between the Receiver and claimants in the Receivership are plainly relevant. The Receiver has repeatedly stated his intent to pursue damages related to allegedly defrauded investors' claims against Breitling.[2] *See* Complaint ¶¶ 7, 97. Indeed, the Receiver reiterated these claims in his recent responses to Rothstein Kass's Interrogatories and in correspondence to Defendants' counsel. App. at 37, Ex. C. ("Such an increased liability theory (as recognized by the 5th Circuit in *Zacarias*) would include increased liabilities to creditors of all types – including the fraud victim liabilities."); *see also* App. at 7, Ex. A, Interrogatory No. 1. Any communications to the Receivership from alleged fraud victims—the source of the

[2] We assume the Receiver concedes that he does not have standing to bring claims on behalf of investors in oil and gas well interests, but if he does not so concede, he would be hard-pressed to maintain that the requested documents are irrelevant. *See Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 190 (5th Cir. 2013) ("[A] federal equity receiver has standing to assert only the claims of the entities in receivership, and not the claims of the entities' investor-creditors").

liabilities forming a basis for the Receiver's damages—are therefore relevant to the Receiver's claims.

Communications between the Receiver and claimants are likely to reveal relevant information both on the nature and the amount of the Receiver's damages claim. The Receiver appears to be pursuing damages representing liabilities incurred by the receivership estate that correspond to the claims made by oil and gas well interest purchasers. In other words, rather than pursuing claims on behalf of purchasers, which he does not have standing to do, the Receiver seems to be seeking to recover from Defendants the amounts the receivership estate pays to the purchasers as a result of their claims. While such an approach would not be permissible, it surely puts at issue the documents sought by Rothstein Kass here. *Reneker v. Offill*, No. 3:08-CV1394-D, 2012 WL 2158733, at *6 (N.D. Tex. June 14, 2012) (Fitzwater, C.J.) ("AmeriFirst Clients' investor liability is the same as investor losses, the court holds that these liabilities are not distinct from investor losses. Accordingly, the court dismisses [the receiver's] professional negligence claim for lack of standing to the extent it is based on liabilities incurred to defrauded investors or the increase amount of such liabilities.")

The Receiver's only response that the requested communications are somehow irrelevant is that the communications were created "post-Receivership," and the liabilities would be "based on the financials of the entities pre-Receivership." App. at 38, Ex. C. This argument misses the point. The timing of the communications does not impact their relevance because claims by allegedly defrauded investors are the source of the liabilities included in the Receiver's current damages theory. Communications between the Receiver and the investors bringing those claims in the Receivership, whether before or after the Receivership, will contain relevant information about their increased liabilities resulting from the alleged tortious conduct of Breitling and Mr.

Faulkner. *See Brady*, 238 F.R.D. at 437 ("Unless it is clear that the information sought can have no possible bearing on the claim or defense of a party, the request for discovery should be allowed."); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (Relevance "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case."); *Barnett v. Magellan Health, Inc.*, No. 17-133-RLB, 2018 WL 2470727 at *3 (M.D. La. June 1, 2018) (deeming interrogatories regarding affirmative defenses relevant because Fed. R. Civ. P. 26 "specifically contemplates a party's ability to obtain discovery regarding information relevant to any party's 'claim or defense' . . . .") For instance, discussions between the Receiver and claimants as to the validity of the claimant's claims, or whether the claims were overstated, would establish the strength or weakness of the Receiver's damages theory.

The Receiver plainly cannot meet his substantial burden to show that the communications are not relevant. The Receiver should therefore be compelled to produce these documents.

2. Rothstein Kass Has Served Narrowly Tailored Discovery Requests

The Receiver's objection to Rothstein Kass's discovery request as overbroad is equally unavailing. As with relevance, a party objecting to overbreadth bears the burden of showing why the discovery should be denied. *Heller v. City of Dallas*, 303 F.R.D. 466, 490 (N.D. Tex. 2014). Moreover, if a party resisting discovery believes the request is overbroad, the responding party must (1) explain the extent to which the request is overbroad, (2) answer or respond to the extent it is not overbroad, and (3) explain the scope of what the party is answering to. *Id.* at 488. The Receiver has failed to do so.

Rothstein Kass's request is limited both in time and in scope. The request seeks information regarding a limited group of people—claimants—over a limited period of time: the three years since the Receivership was created. *Mir v. L-3 Commc'ns. Integrated Sys., L.P.*, 319

F.R.D. 220, 232 (N.D. Tex. 2016) (holding that discovery request sought relevant information and was not overbroad "in light of the claim and defense at issue.") The Receiver cannot reasonably contend that the entire request—limited as it is—is overbroad. Moreover, the Receiver has not (1) explained the extent to which the request is overbroad and (2) has not responded to the extent the request is not overbroad. *Heller*, 303 F.R.D. at 488. Because the Receiver has not met his burden of proving the request is overbroad, the documents should be produced.

B. Rothstein Kass's Discovery Request Seeks Non-Confidential Information That Is Not Burdensome to Produce

The Receiver's remaining objections are meritless. As with relevance and overbreadth, a party objecting to a request as an undue burden must (1) explain the extent to which the request presents an undue burden, (2) answer or respond to the extent it is not burdensome, and (3) explain the scope of what the party is answering to. *Heller*, 303 F.R.D. at 488. The Receiver has not met this burden. Moreover, he has not provided a privilege that would prevent production of communications with claimants.

The request is not unduly burdensome. The request seeks narrowly tailored communications ***between the Receiver and claimants in the Receivership***. The Receiver has the communications and it is not an undue burden for a party litigant to produce its own communications in a litigation, especially where, as here, the request is narrowly tailored to a subset of communications with a particular group of persons. *Nat'l. W. Life Ins. Co. v. W. Nat'l. Life Ins. Co.*, No. A.-09-CA-711 LY, 2010 WL 5174366, at *8 (W.D. Tex. Dec. 13, 2010) (finding that document request sought relevant communications, was narrowly tailored, and would not present an undue burden). The Receiver has not provided any reasons why the collection of the requested information would impose such a burden and has not responded to the

extent that the request is not burdensome. *Heller*, 303 F.R.D. at 488; *see Beneplace, Inc. v. Pitney Bowes, Inc.*, A-15-CV-065-LY-ML, 2016 WL 880204 at *8 (W.D. Tex. Mar. 7, 2016) (overruling objections of overbreadth and undue burden on grounds that the request sought narrowly tailored information related to damages calculation and resisting party did not articulate any undue burden). As such, he should be ordered to produce responsive documents.

The confidentiality objection lacks merit and is not a basis to withhold. The Receiver fails to articulate any reason to withhold communications with claimants as confidential. Rothstein Kass is aware of no privilege that attaches to these communications and the Receiver has not articulated any applicable privilege. Parties routinely produce "confidential" records in the course of discovery in civil matters. In fact, should the Receiver wish to protect certain information related to non-parties' personally identifiable information, he may do so. Rothstein Kass is amenable to (and has proposed) the parties entering into a protective order that would specifically address any sensitive information from third parties from disclosure. This objection lacks merit.

To the extent the Receiver wishes to designate any responsive materials under the protective order entered in this case, Defendants do not oppose such a designation. April 3, 2020 Stipulation and Protective Order (Dkt. No. 38).

The Receiver has no basis to withhold relevant communications with claimants in the Receivership action. Indeed, the Receiver has put those communications at issue in framing his damages claim against Defendants. The documents must be produced.

IV. CONCLUSION

Rothstein Kass's discovery request seeks relevant and non-privileged information regarding an alleged source of the Receiver's damages claim. The Receiver is unable to meet his

burden of providing evidence as to why the requested information should not be produced. As such, the Court should compel the Receiver to produce the responsive information.

Date: April 21, 2020

Respectfully submitted,

By: */s/ Nicolas Morgan*

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been served to all counsel of record in accordance with the Federal Rules of Civil Procedure on April 21, 2020 via ECF notification.

/s/ Nicolas Morgan
Nicolas Morgan

Certificate of Conference

The Receiver opposes this motion. Counsel for Defendants and Edward Snyder, counsel for the Receiver, have conferred via email dated April 13-14, 2020, during which there was a substantive discussion of every item presented to the Court in this motion and, despite best efforts, the counsel have not been able to resolve those matters presented.