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

THOMAS L. TAYLOR, III, in his capacity as Court-appointed temporary receiver for Breitling Energy Corp. et al., Plaintiff v. ROTHSTEIN KASS P.A. d/b/a ROTHSTEIN KASS & CO. P.C.; ROTHSTEIN KASS & COMPANY, PLLC and BRIAN MATLOCK, Defendants.	§ § § § § § § § § § § §	NO. 3:19-cv-01594-D

JOINT REPORT

Pursuant to the Court's April 23, 2020 Order Requiring Joint Report ("Order," Dkt. #42), Defendants Rothstein, Kass & Company, PLLC ("Rothstein Kass PLLC"), Rothstein-Kass P.A. d/b/a Rothstein Kass & Company, P.C., (collectively, "Rothstein Kass") and Brian Matlock (together, "Defendants"), and Plaintiff Thomas L. Taylor III (the "Receiver") (collectively, the "Parties"), solely in his capacity as temporary Receiver of the Breitling group of companies, file their Joint Report as follows.

I. BACKGROUND

Rothstein Kass PLLC filed a Motion to Compel Document Production (Dkt. #39) from the Receiver, requesting an order requiring the Receiver to produce documents in response to Rothstein Kass PLLC's Request for Production (RFP) No. 31 seeking "[a]ny 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." The Receiver objected to Rothstein Kass PLLC's request on the grounds that the RFP: (1) seeks information that is "entirely irrelevant" to the

parties' claims and defenses; (2) is overbroad and burdensome; and 3) seeks "confidential information pertaining to the victims of the Breitling fraud, who are not parties to [this] case." *See* Mot. 3. The Order required counsel for the parties to confer by telephone prior to May 12, 2020, and submit a report or stipulated order by May 19, 2020. Order at 2-3.

a. <u>Telephonic and E-Mail Conference of Counsel and Matters to be Resolved</u>

On April 29, 2020, Nicolas Morgan and Thomas Zaccaro, counsel for Defendants, and Edward Snyder, counsel for the Receiver, conferred by telephone for roughly half an hour. Although the parties engaged in a substantive discussion regarding the requested discovery and the Receiver's objections to it, they were unable to reach an agreement on the production of documents. On May 7, 2020, following receipt of Rothstein Kass PLLC's portion of the joint stipulation on May 6, 2020, Mr. Snyder offered to produce responsive documents, subject to the protective order in the case, that had been previously segregated by the Receiver or his assistant. Rothstein Kass PLLC's App. at 8, Ex. A. The Receiver would not, however, search through his emails to locate other responsive documents. *Id.* On May 8, 2020, Mr. Morgan requested more information on how emails had been segregated in order to assess the likely responsiveness of this search. *Id.* at 7. On May 13, 2020, following an additional request by Mr. Morgan for more information, the Receiver declined to provide the requested information and instead stated that he would oppose Rothstein Kass PLLC's motion. *Id.* at 6. Accordingly, the only issue to be resolved is whether the Receiver must produce the requested correspondence with claimants.

II. <u>PARTIES' REASONS FOR DISAGREEMENT</u>

a. <u>Rothstein Kass's Position</u>

As detailed in Rothstein Kass PLLC's Motion to Compel, the documents sought are (1) relevant to the Receiver's damages claims, (2) not privileged, and (3) described in the request to

minimize any undue burden. "[T]he party resisting discovery must show specifically how each discovery request is not relevant or otherwise objectionable" and must "show how the requested discovery is overly broad, unduly burdensome, or oppressive by submitting affidavits or offering evidence revealing the nature of the burden." Order at 2-3 (citations omitted).

i. The Requested Documents are Plainly Relevant to Receiver's Damages Claims

The Receiver has failed to specifically show how the requested documents are not relevant to the action. Relevance is to be broadly construed. *Merrill v. Waffle House, Inc.,* 227 F.R.D. 467, 470 (N.D. Tex. 2005) (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.") (quoting *Sheldon v. Vermonty*, 204 F.R.D. 679, 689 (D. Kan. 2001)). The Receiver has repeatedly indicated in pleadings, correspondence, and discovery responses that he is seeking to recover damages from increased liabilities incurred by the receivership estate as a result of claims made by purchasers of oil and gas interests, among others, because of Defendants' alleged conduct. Correspondence between the Receiver and those claimants may lead to the discovery of admissible evidence regarding the nature and amount of those claims, the factual basis for those claims, whether the receiver made any attempt to mitigate those claims, and the timing and nature of the underlying investment that led to the claim.

During the telephonic conference, the Receiver did not contest that the requested documents are relevant to the action. Instead, Receiver's counsel indicated that because of the status of the receivership in the *SEC v. Faulkner* litigation, there are not yet any "claimants"

because there is not yet a requirement to make claims.[1] As such, Receiver's counsel indicated for the first time that Rothstein Kass PLLC's request is premature insofar as information about the claims will be available in the *SEC v. Faulkner* action once the claims process has progressed further. This objection is meritless for multiple reasons. First, as Defense counsel observed during the telephonic conference, the Receiver appears to have identified and corresponded with Investor Claimants as early as a year ago in the *SEC v. Faulkner* action when he served them with notice of a proposed distribution plan in that matter.[2] And second, while there is not yet a claims bar date in *SEC v. Faulkner*, the fact discovery cut-off in the instant case is November 16, 2020. It is not premature for Rothstein Kass PLLC to request the Receiver's correspondence with the same group of individuals, and it would prejudice Rothstein Kass PLLC to delay its access to this correspondence.

ii. Rothstein Kass PLLC's Request Does Not Impose an Undue Burden

The Receiver cannot meet his burden of showing that Rothstein Kass PLLC's request imposes an undue burden. Order at 2-3. During the telephonic conference, Receiver's counsel indicated that the RFP imposed an undue burden because 1) the Receiver, as a sole practitioner with limited staff who does not segregate his emails by subject matter or by sender, would need to spend many hours going through his email correspondence to identify correspondence with potential claimants, of which there may be more than 1000, and 2), in any event, Rothstein Kass PLLC's RFP failed to include any limits as to the subject matter of the correspondence, which would only increase the burden. These arguments are insufficient to meet the Receiver's burden.

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[1] However, Receiver's counsel indicated that he would not insist that Defendants serve new RFPs clarifying that "claimants" include investors who have not yet made claims.

[2] *See, e.g.*, reference to "Investor Claimants" in April 28, 2020, Memorandum Opinion and Order in *SEC v. Faulkner,* 3:16-cv-01735-D (N.D. Tex.) (Dkt. #541), Rothstein Kass PLLC's App. at 13, Attachment B.

First, Rothstein Kass PLLC's request is narrowly tailored to seek communications with a limited class—claimants—over a limited period of time. The Receiver's objection that it would take numerous hours to identify correspondence from claimants is not enough to prove undue burden. *S.E.C. v. Brady*, 238 F.R.D. 429, 437 (N.D. Tex. 2006) ("A party asserting undue burden typically must prevent an affidavit or other evidentiary proof of the time or expense involved in responding to the discovery request.") Indeed, the burden imposed on the Receiver is not disproportionate to the magnitude of the damages he is seeking, which appears to be in the millions of dollars if not tens of millions of dollars.

Second, if the Receiver is concerned with merely identifying correspondence from claimants, then limiting the subject matter of the correspondence to be produced would actually increase the burden on the Receiver: he would first have to identify correspondence with claimants and then he would have to identify which of those correspondences related to particular subject matters. By seeking *all* correspondence with claimants, Rothstein Kass PLLC has actually reduced the Receiver's burden by eliminating any need for the Receiver to determine whether certain subject matters are present in any particular email. Instead, he may simply produce all correspondence with claimants that he has identified.

The Receiver's offer to produce emails that were previously segregated (without more information) is plainly deficient. The Receiver refused to provide any information regarding his method for segregating emails, i.e when the segregation began, how many emails were segregated, how many responsive emails may not have been segregated, etc. *See* Rothstein Kass PLLC's App. at 6-7, Ex. A. Accordingly, it is impossible to assess the likelihood of receiving even a fraction of the responsive documents in the Receiver's possession under this proposal. If the Receiver's offer were accepted without reservation, he would be free to produce a minimal

amount of responsive documents under the claim that only certain documents had been previously segregated. The Receiver did not describe or document any "undue" burden in his communications with Rothstein Kass PLLC. *Id.* Indeed, he did not articulate with any specificity *any* burden, instead asking that Rothstein Kass PLLC accept an agreement in which the Receiver would not need to undertake any effort in locating or producing responsive documents. Rothstein Kass PLLC's request does not impose an undue burden on the Receiver, and he should be required to produce responsive documents.

iii. The Receiver's Newly Raised Arguments are Unavailing

On May 19, 2020, at 3:01 PM CT, the Receiver provided his portion of the Joint Report to Rothstein Kass, nearly two weeks after Rothstein Kass provided its portion for review. The Receiver's draft portion raised brand new arguments and issues that had not been discussed during the parties' previous telephonic or electronic conferences. *See* Rothstein Kass PLLC's App. at 5-9. Regardless of their timeliness, the arguments are unavailing.

Contrary to case law construing relevance broadly, *see Merrill*, 227 F.R.D. at 470, the Receiver takes the position that relevance should be extremely limited. As a preliminary matter, the Receiver asks both Rothstein Kass PLLC and the Court to take him at his word that the requested communications will not reveal relevant information or lead to the discovery of admissible evidence, despite the fact that he has refused to engage in *any* search for responsive documents. The Receiver claims that the requested information is not relevant because (a) it does not seek communications specifically naming or "concerning" Rothstein Kass, (b) it seeks information that *could* be found in other sources, *e.g.* the financial records of Breitling and (c) the claimants were not raised in the parties' initial disclosures. These arguments are meritless. If the Receiver repeatedly represents that he will generally pursue damages to all the Breitling

entities from "increased liabilities" by claimants, he may not also reasonably assert that communications regarding these damages are irrelevant because they may not directly name Rothstein Kass, or that the issue was not raised in either parties' initial disclosures. Likewise, relevance is not limited to information from only one source. The Receiver may not refuse to produce relevant information on the basis that similar relevant information *may* be found in other sources; the test for relevance is not so narrowly construed, and the Receiver is not the arbiter of relevant sources of information.

Finally, the Receiver's newly raised objections of undue burden are unavailing. The party asserting undue burden must prove that burden through affidavits or other evidentiary information. *Brady,* 238 F.R.D. at 437. The Receiver's declaration provides no specific information on the burden imposed in searching for responsive documents; rather, it simply claims that the Receiver receives hundreds of emails each day and it would be onerous for him to sort through these emails for emails from the investor claimants he admits he has previously identified. While the Receiver claims that searching for responsive documents *may* cost him "tens of thousands of dollars" (with no support for this number), he simultaneously seeks millions of dollars in damages from Defendants and demands the production of thousands of emails and other documents from Defendants. The Receiver has not shown an undue burden. He has only shown a general burden expected of parties during discovery.

b. <u>Receiver's Position</u>

As a preliminary matter, the Receiver's counsel disagrees with Defendant Rothstein Kass ("RK")'s assertion above that during the parties' April 29, 2020 teleconference "the Receiver did not contest" the relevance of the requested documents. In fact, during the teleconference the Receiver's counsel stated the Receiver's position that the requests were not

relevant to the issue of the Receiver's damages theories because said damages theories (which are still being developed) will be based on the financial damage to the Receivership entities as measured by the entities' own financial information and documentation, which information RK already possesses. To be clear, the Receiver is not (because he cannot under established law) pursuing investor damages; rather he is pursuing damages caused to the entities by their corrupt management with Defendant's assistance.[3]

As shown below, RK's request for the communications of individual investors/potential claimants is not relevant either to the Receiver's causes of action in this case or to any defenses raised by RK in this matter.

First, at this time there are no "claimants" since no mechanism for submitting claims has been formalized or communicated to investors. The claims process is still being developed in the SEC Action and no claims pursuant to the Distribution Plan Order have been submitted. As noted in the Distribution Plan Order, the Receiver previously compiled a list of 1,369 entities and individuals potentially affected by any distribution plan, and he was able to obtain addresses for 1,150 potential claimants. Thus, there are potentially over 1,300 investors/potential claimants who may have sent the Receiver communications in the four years since he was appointed Receiver.[4]

Second, the request by RK for all the Receiver's communications with each of the over 1,300 investors/potential claimants is not limited to communications concerning the activity or conduct of RK with respect to the Receivership Entities; thus the request seeks information not relevant to the claims and defenses in this case, particularly since by their very nature the

[3] *See Taylor v. Rothstein Kass & Co. PLLC*, 2020 U.S. Dist. LEXIS 17435 at *12-13 (N.D. Tex. 2020).

[4] Declaration of Thomas L. Taylor, III ("Taylor Decl.") at ¶ 5 (App. At 004 - 005).

communications being sought all post-date the alleged conduct of RK and of the corrupt former management of the Breitling entities that forms the basis of the instant lawsuit - all of which occurred in the 2013-2014 time period, years before the Receiver was appointed.[5]

Third, at this juncture the Receiver has not finalized any potential damages models in this case, but any damage models that may ultimately be based on "increased liabilities" to the Receivership Estate will be based on the actual financial records and tracing of funds of the Receivership Entities as developed by expert witnesses who have not yet been designated. Expert designations are not scheduled until August 14, 2020. Thus, the Receiver's increased liabilities damages model would *not* be based on future claims filed by the investors/potential claimants. Voluminous financial records of the Receivership Entities and the tracing of funds to and between and among those entities have already been produced to RK.[6]

Since no claims have been submitted, random communications between the Receiver and investors/potential claimants after his appointment as Receiver could not have any bearing on or relevance to either the calculations of the claims or the defenses in this case. RK argues above that investors/potential claimants' communications sent to the Receiver may be relevant to (1) the nature and amount of their claims; (2) the factual basis for their claims; (3) whether the Receiver made any attempt to mitigate their claims; and (4) the timing and nature of the underlying investment that led to the claims. With the exception of the Receiver's mitigation of claims, ***all*** of the above alleged bases for relevancy pertains to information that is already included and captured within the financial information and other records of the Breitling entities – and RK already has all of that information. As for whether the Receiver "mitigated" claims, while the Receiver is not sure what that means or how he can "mitigate" claims that

[5] Taylor Decl. at ¶ 6 (App. At 005).
[6] Taylor Decl, at ¶ 7 (App. At 005).

were caused by RK and the former Breitling management years before his appointment, nonetheless everything the Receiver has done to date to, e.g., salvage Receivership assets to "mitigate" investor claims, has been filed of public record and approved by Judge Fitzwater and RK has ready access to all of that information. The Receiver cannot "mitigate" or resolve investor claims under cover of night and by secret e-mails; every action the Receiver takes that might affect Receivership assets and claims has to be approved by the Court.

Finally, neither the Receiver nor RK have listed any of the investors/potential claimants as persons likely to have discoverable information relevant to this case in the parties' initial disclosures. Similarly, the Receiver has not listed any communications received from investors/potential claimants as evidentiary materials that support any of his claims in this case (nor will he). [7]

Even if all communications sent to the Receiver by the investors/potential claimants were potentially deemed tangentially relevant, the request is overly burdensome and not proportional to the needs of this case.

The Receiver's principal means of communication with investors/potential claims is via a website created for the Breitling Receivership. Through the website the Receiver created a means of communicating with persons that may be investors/potential claimants of the Receivership Estate. In the website, the Receiver informed the investors/potential claimants as follows:

> You may contact the Receivership using the contact information listed below. Please note that at this time the preferred method of contacting the Receiver is via e-mail. Due to the number of claimants, we may not always be able to return your email inquiry. Please consult our Quarterly Status Reports for updates on the case.

[7] Taylor Decl, at ¶ 8 (App. At 005).

Email: info@breitlingreceivership.com.[8]

As the Receiver, he posts communications to the investors/potential claimants on the Receivership website. The Receiver has posted no communication mentioning RK other than the court filings which are available to the public and to RK, and RK is fully aware of the Receivership website and has access to the Receiver's communications contained therein.[9]

The request would require the Receiver and his associates to search through all of the Receiver's means of communication to fulfill the request, including all of his e-mails for the last approximately three years.[10]

The Receiver receives hundreds of emails a day and has potentially received thousands of emails from persons that *may be* investors/potential claimants interested in the Receivership Estate. There is no way for the Receiver to distinguish (or search for) e-mails that pertain to the Receivership or that come from investors/potential claimants.[11]

In addition to the creation of the Receivership website and the separate email address noted therein, the Receiver also receives emails at: Taylor@tltaylorlaw.com. The Receiver receives hundreds of emails from investors/potential claimants and third parties/attorneys concerning the Receivership Estate to the Receiver's law firm email account. [12]

Requiring the Receiver and his office to review all of his files and all of his emails from both of the above-mentioned e-mail accounts for any communications with investors/potential claimants would be burdensome and oppressive. As noted in the Court's orders appointing Mr. Taylor as Receiver, he has been appointed to take control, possession

[8] Taylor Decl, at ¶ 10 (App. At 006).
[9] Taylor Decl, at ¶ 11 (App. At 006).
[10] Taylor Decl, at ¶ 12 (App. At 006).
[11] Taylor Decl, at ¶ 13 (App. At 006).
[12] Taylor Decl, at ¶ 14 (App. At 007).

and management of the Receivership Assets and ***to take any act necessary to prevent the commission of any act to dissipate or otherwise diminish the value of any Receivership Assets***. It would potentially take the Receiver and/or his staff literally hundreds of hours to review the files and his office email from the date of his appointment as Receiver in 2017 to the present to identify possible communications from investors/potential claimants and segregate and produce those communications. This would come at an approximate cost of potentially tens of thousands of dollars, based on the Receiver's and his limited staff's approved hourly rates. Moreover, such an endeavor would distract the Receiver and his staff from their important work and duties managing the Receivership estate.[13]

The cost and burden of conducting the search for all communications between the Receiver and investors/potential claimants outweighs the benefit of producing the communications that, by their nature, post-date the conduct and the actions of RK complained of in the instant action. The Receivership Assets are finite at this point and any unnecessary expenditure diminishes the potential distribution to any potential claimant/investor.[14]

RK's request is further burdensome because it arguably seeks to impose *a continuing obligation* on the Receiver to continuously provide RK with copies of any future communications he receives from the over 1,300 investors/potential claimants in his capacity as Receiver, including as part of the claims review and distribution process. Such communications may include confidential information including, without limitation, tax returns, in violation of the individual privacy rights of investors/potential claimants.[15]

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[13] Taylor Decl, at ¶ 15 (App. At 007).
[14] Taylor Decl, at ¶ 16 (App. At 007).
[15] Taylor Decl, at ¶ 17 (App. At 007 - 008).

In an attempt to resolve this discovery dispute and not waste the Court's time with same, and without waiving his objections to relevance, the Receiver did offer RK that he would produce communications he had received from investors via letters and some e-mails that his assistant had already segregated, but that he would not agree to be forced to expend precious Receivership resources searching through all of his e-mails and he would not agree to be forced into a continuing obligation to produce all future communications he receives from investors to RK. RK refused to agree to such compromise and the discussions ended there.

III. CONCLUSION

Following the conference between counsel, the parties were unable to resolve their dispute, and, accordingly they request a ruling on Defendants' Motion to Compel Document Production (Dkt. #39). The parties believe that oral argument or a conference with the Court would be helpful in resolving the outstanding issue detailed in this joint report.

Dated: May 19, 2020

Respectfully submitted,

/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 May 19, 2020 via ECF notification.

/s/ Nicolas Morgan
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