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

DEFENDANTS' SUPPLEMENT TO JOINT REPORT

Pursuant to the Court's June 2, 2020 Electronic Order ("June 2 Order," Dkt. #57) and June 24, 2020 Order ("June 24 Order," Dkt. #60), Defendants file this Supplement to the Joint Report as follows.

I. INTRODUCTION

The Receiver has abandoned his prior representations to the Court. The Receiver previously represented that it would be unduly burdensome to segregate email communications with claimants:

> It would potentially take me and/or my staff literally hundreds of hours to review the fields and my office email from the date of my appointment as Receiver in 2017 to the present to identify possible communications from investors/potential claimants and segregate and produce those communications.

App. in Support of Joint Report at 46 (May 18, 2020 Decl. of Thomas Taylor, ¶ 15) (Dkt. #52). Now, in a conspicuous about-face, the Receiver claims that he has been segregating these emails all along:

> Per their usual protocol, the Receiver and his assistant are fairly certain that all investor emails were segregated and to the Receiver's knowledge they have produced all investor communications.

App. at 16, Ex. B. Based on the documents produced to date, the Receiver's second statement cannot be accurate as there are numerous communications missing from the production. Even if the Receiver has produced all responsive documents in his possession, custody, or control—which is extremely unlikely—he will need to produce future communications with claimants pursuant to his Fed. R. Civ. P. 26(e) duty to supplement.

Defendants have attempted to narrow the issues in this litigation to reduce the Receiver's obligation to produce communications with claimants. *See* App at 20, Ex. C. But the Receiver steadfastly asserts that he seeks to recover damages from Defendants for liabilities incurred as a result of claims made by purchasers of oil and gas interests. *See id.*

Plainly, the Receiver cannot have his cake and eat it too. He cannot claim that it would be too burdensome to segregate responsive emails in opposition to a motion to compel but, upon producing a small volume of responsive emails, then claim his usual practice has been to segregate these emails and therefore no more responsive documents exist. Nor can the Receiver claim that the burden of identifying the remaining responsive communications outweighs their probative value while simultaneously refusing to narrow the scope of his potential damages to exclude liabilities incurred by purchasers of oil and gas interests.

Accordingly, Defendants respectfully request that the Court enter an order requiring the Receiver (i) to produce all documents responsive to Defendants' Request No. 31 within his possession, custody, or control that have not yet been produced and (ii) to supplement his productions to date with future communications between the Receiver and any claimants in *SEC v. Faulkner* 3:16-cv-01735-D (N.D. Tex.).

II. BACKGROUND

On February 28, 2020, Rothstein Kass PLLC served Request for Production Set 1, which included Request 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" ("Claimant Communications"). The Receiver objected to Rothstein Kass PLLC's request on the grounds, among others, that the request sought "irrelevant" information and would pose an undue burden. During a meet and confer between the parties, the Receiver's counsel stated over email that he would stand on these objections and would not produce responsive documents. *See* App. at 6, Ex. A. Rothstein Kass PLLC thereafter filed a Motion to Compel Document Production (Dkt. #39) from the Receiver, requesting an order requiring the Receiver to produce documents responsive to this request. Following further conferences, both parties filed a joint report (Dkt. #51) pursuant to the Court's April 23, 2020 Order ("April 23 Order," Dkt. #42).

In this joint report, the Receiver reiterated that (i) the Claimant Communications would not contain relevant information and (ii) production of the documents would constitute an undue burden and would require the Receiver to expend "hundreds of hours" to complete this process. *See* Joint Report at 7-13 (Dkt. #51).

In an order following the hearing on the joint report, Magistrate Judge Rebecca Rutherford ordered the Receiver to produce documents responsive to Request No. 31 that had been previously segregated by the Receiver or his assistant by June 12, 2020. June 2 Order (Dkt. #57). Defendants reviewed these Documents.

Afterwards, pursuant to the Court's June 2 Order, the Parties again met and conferred, but were again unable to reach an agreement on the production of documents. During this meet and confer, the Receiver shifted from his prior objections. He no longer contested the relevance

of the documents, but instead claimed that all responsive documents had already been produced. *See* App at 15-16, Ex. B.

III. ARGUMENT

The Receiver has not satisfied his obligation to produce all documents responsive to Request No. 31 within his possession, custody, or control. Despite his representations that all responsive documents have been produced, it is clear that additional responsive documents exist based on gaps in the documents produced to date. Moreover, the nature of the Receiver's claims process ensures that additional documents responsive to Request No. 31 will come to exist in the future and, therefore, the Receiver must supplement his production pursuant to Fed. R. Civ. P. 26(e).

The only way the Receiver can avoid producing additional documents is to prove that Rothstein Kass PLLC's Request No. 31 is objectionable. *See* April 23 Order at 2-3 (Dkt. #42) ("[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.") (citations omitted)). The Receiver cannot meet the burden required to do so. The Claimant Communications are highly relevant to the claims and defenses at issue in this litigation. And, as the Receiver's most recent communications make clear, identifying and producing additional Claimant Communications will not pose an undue burden on the Receiver.

A. Additional Responsive Documents to Request No. 31 Must Exist

Numerous documents in the Claimant Communications appear to be incomplete. *See, e.g.*, App. at 28, Ex. F (investor asking for further clarification and a phone call, with no response); App. at 30, Ex. G (lower in time email mentioning attached documents, which were

not produced); App. at 33, Ex. H (email asking for update on an issue with no response). Therefore, it is clear that the Receiver has not produced all responsive documents.

Even assuming *arguendo* that all responsive documents have been produced, the Receiver will continue to communicate with claimants throughout the claims process. These communications will be responsive to Request No. 31 and must be produced pursuant to Fed. R. Civ. P. 26(e)'s duty to supplement. *See Lopez v. Don Herring Ltd.*, 327 F.R.D. 567, 583 (N.D. Tex. 2018) (noting that if additional responsive materials to a request are found, "the proper course then is to comply with any supplementation obligations under" Fed. R. Civ. P. 26(e)); *Hancock v. Chicago Title Ins. Co.*, No. 3:07-CV-01441-D-BK, 2012 WL 12886424, at *2 (N.D. Tex. Sept. 28, 2012) (reminding party "of its continuing obligation to supplement its discovery responses should future responsive information become available."). Nevertheless, the Receiver's counsel informed Defendants that he did not believe the Receiver would agree to supplement the Claimant Communications production in the future. *See* App. at 15, Ex. B. To correct the Receiver's refusal to agree to comply with its obligations under Fed. R. Civ. P. 26(e), the Court should enter an order requiring the Receiver to comply with this Rule. *See Denton v. Suter*, No. 3:11-cv-2559-N-BN, 2017 WL 2484283, at *3 (N.D. Tex. June 8, 2017) (noting "the Court could only enter the ongoing discovery order that Plaintiffs seek if it was 'certain' that [the defendant] would not comply with a court order . . . for instance, if he openly admitted that he had no intention to ever comply with Rule 26(e).") (internal citations omitted).

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

The Receiver's damages theories, if successful, would hold Defendants liable for claims made upon the Receivership Estate. The Receiver has reaffirmed his intent to recover from

Defendants increased liabilities to the Receivership Estate measured by claims made by, among others, purchasers of oil and gas interests. *See* App. at 7, Ex. A ("[A]s stated in our Interrogatory responses, one theory of damages may be the increased liabilities to the Receivership entities. . . .").

The Claimant Communications are critical to Defendants' defenses. First, these documents allow Defendants to assess (i) the causal relationship between Defendants' alleged conduct and the claims against the Receivership Estate, (ii) the underlying merit of the claims, and (iii) the value of the claims. Defendants would be hard-pressed to perform the assessment without the details regarding claimants' purchase amounts, purchase dates, financial returns, proof of purchase, oil and gas interests purchased, and efforts to rescind purchases found in the Claimant Communications. *See* App. at 24-26, Exs. D & E (detailing investors' date and amount of investment, as well as properties invested in). Second, the Claimant Communications address key issues in the case, including the transfer of purchases between different oil and gas properties offered by Breitling Oil and Gas Corporation and/or Breitling Royalties Corporation ("Breitling"). *See id.* (investors confirming their awareness that they were transferred onto different properties); Receiver's First Am. Compl. at 18 (Dkt. #45) ("[A]fter a time it was represented that the investor interests were instead moved to other prospects as a substitution . . . .).

C. Request No. 31 Does Not Impose an Undue Burden on the Receiver

The Receiver's recent communications with Defendants undercut any claim of undue burden. *See S.E.C. v. Brady,* 238 F.R.D. 429, 437 (N.D. Tex. 2006) (A party objecting because of undue burden must prove the undue burden, usually through an affidavit or other evidentiary proof). In contrast to previous communications, pleadings, and sworn declarations that

producing Claimant Communications would cost tens of thousands of dollars and take "hundreds of hours," the Receiver now claims that he has a usual practice to segregate communications with claimants and used that practice to produce all Claimant Communications have been produced. *Compare* Joint Report at 12 (Dkt. #51) ("It would potentially take the Receiver and/or his staff literally hundreds of hours to review the files . . . to identify possible communications from investors/potential claimants and segregate and produce those communications.") *and* App. to Joint Report at 46 (Dkt. #52), Decl. of Thomas Taylor III, ¶ 15 (stating review and production of Claimant Communications would take hundreds of hours and approximately cost "tens of thousands of dollars. . . .") *with* App. at 16, Ex. B ("[The Receiver] is unaware of any other responsive documents . . . to the Receiver's knowledge they have produced all investor communications."). If all responsive documents *were* produced, which is extremely unlikely, the Receiver's ability to produce these documents within ten days pursuant to the Court's June 2 Order, demonstrates that there was never an undue burden in segregating and producing the documents. Moreover, the Receiver's "usual protocol" to segregate communications from investors as the Receiver receives them substantially reduces any burden in producing additional responsive documents to Defendants. *See* App. at 16, Ex. B.

The Receiver is the source of his own claimed burden. Defendants have sought to clarify the scope of the Receiver's damages theory, thereby narrowing the scope of discovery required in this litigation. For example, the Receiver refused to narrow his damages related to claims from Breitling sales of oil and gas interests to sales that occurred after November 22, 2013.[1] *See* App. at 20, Ex. C. Instead, the Receiver took the position that the Receiver could recover damages from increased liabilities resulting from conduct that *pre-dated Defendants'*

[1] The Receiver has used this date to narrow his other damages theories.

involvement as Breitling's auditor. Id. The Receiver has therefore not only reiterated his intent to pursue damages related to Breitling's sales of oil and gas interests, but has broadened this pursuit to include potentially hundreds of thousands of dollars of damages incurred before Defendants were even hired or otherwise involved with Breitling. The Receiver may not simultaneously pursue such a broad damages theory and claim that communications related to that theory lack sufficient relevancy to justify the meager burden required to produce them.

IV. CONCLUSION

For the aforementioned reasons Defendants respectfully request that the Court enter an order requiring the Receiver to produce any additional documents in his possession, custody, or control responsive to Request No. 31 and to supplement his production in the future.

Dated: June 25, 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 June 25, 2020 via ECF notification.

/s/ Nicolas Morgan
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